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Regulating electronic identity in the European Union: An analysis of the Lisbon Treaty's competences and legal basis for eID

Norberto Nuno Gomes de Andrade¹

European Commission, Joint Research Center (JRC), Institute for Prospective Technological Studies (IPTS), Spain

ABSTRACT

Keywords:

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This paper discusses the feasibility of EU legal action in the field of electronic identity (eID) within the new distribution of legal competences and the provision of novel legal basis engendered by the Treaty of Lisbon. The article attempts to find a 'legal anchor' to the idea of a pan-European electronic identity within EU law, looking at the issues of competences and legal basis. After examining various different areas of competence and the most feasible (and probable) candidates for a legal basis supporting an EU legal framework for eID, the paper argues that the latter should be found in the combination of Article 16 TFEU (concerning the right to the protection of personal data) with Article 3 TUE, and Articles 26 and 114 TFEU (concerning the establishment and functioning of the Internal Market), which also constitute the area of competence where an eID legal initiative can be pursued.

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1. Introduction

The socio-economic relevance and importance of electronic identities have grown exponentially for more than a decade. The development of ubiquitous networks of electronic communications has raised the need to ascertain "who is who" on the internet, namely for accessing services and performing commercial transactions.

As a result, electronic identity has become a key driver for the growth of the EU economy and the completion of the Single Digital Market. eID constitutes not only a fundamental enabler for the deployment of cross-border services within the EU27, but also an indispensable element for the increase of

entrepreneurial activities in Europe. As observed in the Digital Agenda, "[e]lectronic identity (eID) technologies and authentication services are essential for transactions on the internet in both the private and public sectors."²

Electronic identity (eID) is used in this paper to indicate a set of information and data relevant to an individual person when stored and transmitted via electronic systems, including but not limited to computer networks (that is, digitized). Taking into account that, in the offline world, an identity is established from an extensive set of attributes associated with an individual (e.g., name, height, birth date, employer, home address, passport number), it is relevant to note that, in the online world, an individual identity can be

E-mail address: norberto.andrade@ec.europa.eu.

¹ Winner, CLSR 'Best student paper' Award at the 2011 IAITS 6th International Conference on Legal, Security and Privacy Issues in IT Law (LSPIL), Nicosia, Cyprus, 19–22 September 2011.

² European Commission, "Communication from the Commission – a Digital Agenda for Europe," (Brussels: European Commission 2010), 11. This strategic document envisages, moreover, specific and concrete actions in the field of eID. This is the case of Key Action 16, according to which the Commission will "[p]ropose by 2012 a Council and Parliament Decision to ensure mutual recognition of e-identification and e-authentication across the EU based on online 'authentication services' to be offered in all Member States (which may use the most appropriate official citizen documents – issued by the public or the private sector)".

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established by combining both real world and digital attributes³ (such as passwords or biometrics).⁴ Electronic identities are thus identities that are constructed out of the various identity-attributes related to a given person (which together compile his/her identity information), processed electronically by technically supported identity management systems, and that are then recognized by public and private entities (such as national governments and private companies).⁵

This paper discusses the feasibility of EU legal action in the field of electronic identity (eID) within the new distribution of legal competences and the provision of novel legal basis engendered by the Treaty of Lisbon. The article attempts to find a 'legal anchor' to the idea of a pan-European electronic identity within EU law, looking at the issues of competences and legal basis. In brief, it ascertains whether the Treaty of Lisbon – unlike the previous ones – can act as a legitimating departure point for a European common regulation in the area of electronic identity.

The article begins by succinctly describing the principal amendments brought by the Treaty of Lisbon, focussing on the suppression of the EU pillar structure and on the architectural division of competences between the EU and the Member States. It surveys the various different categories and areas of competence, looking for the most feasible (and probable) candidates for a legal basis for an EU legal framework for eID. At a more concrete level, the paper looks into the Lisbon Treaty, analyzing three legal dispositions (or clusters of them) that could be invoked to sustain an EU proposed legal action in the field of eID:

- Art. 77(3) of the Treaty on the Functioning of the European Union (TFEU) which, with reference to Policies on Border Checks, Asylum and Immigration, now allows for the adoption of measures or provisions concerning passports, identity cards or any other such document;
- the Treaty dispositions concerning EU citizenship (Article 9 of the Treaty on European Union – TEU – and Articles 20–25 TFEU), based on which one could argue that the enshrined rights of citizenship require the identification of each

individual citizen, presupposing the construction of a European identification system;

- and Art. 16 TFEU: the right to the protection of personal data. Regarding the latter, the paper asserts that it is in the context of electronic communications and personal data protection, which is – in turn – intimately connected to a rationale of internal market construction, that eID should be legally framed.

As a result of this analysis, the paper argues that the legal basis for the regulation of eID should be found in the combination of Article 16 TFEU (concerning the right to the protection of personal data) with Article 3 TEU, and Articles 26 and 114 TFEU (concerning the establishment and functioning of the Internal Market), which also constitute the area of competence where an eID legal initiative can be pursued.

2. Competences and legal basis

In order to discuss an eventual proposal for an EU legal action in the field of eID, two important elements should be analyzed: competence and legal basis. These two elements, in fact, constitute the basic legal conditions (further to the fulfilment of the correspondent legislative procedural requirements) which must be satisfied in order to deploy an EU legal action in the area of eID. Firstly, the EU Institution adopting an act in the field of eID must have the competence or the legal power to do so. Secondly, the legal act (a Directive, for instance) must be based upon a legal basis,⁶ and reference must normally be made in the recitals to the concrete enabling power, generally to be found in the Treaty itself.⁷ In other words, the objectives of the proposed legal act must follow the Treaty article(s) on which it was based.⁸

In our context, the main task we are confronted with is to find a way to anchor an eID legal initiative to EU Law (both through Treaties and EU secondary legislation), that is, to assert a specific area of EU competence and to specify a legal basis for the implementation of a European eID legislative act. In this way, and in order to propose a legislative act on eID, we need to search for an appropriate competence and legal basis in the Treaty.

In this article, I will first look at the most relevant amendments made to the Lisbon Treaty in relation to the theme of electronic identity (Section 2). In this particular, I will focus on the suppression of the pillar architecture of the EU, as well as on the new distribution of competences enshrined in the new Treaty. Secondly, I will look at specific

³ OECD, "The Role of Digital Identity Management in the Internet Economy: A Primer for Policymakers," (Paris: OECD, 2009), 6.

⁴ "Biometrics are measurable biological and behavioural characteristics and can be used for strong online authentication. A number of types of biometrics can be digitised and used for automated recognition. Subject to technical, legal and other considerations, biometrics that might be suitable for IdM use include fingerprinting, facial recognition, voice recognition, finger and palm veins" —, "The Role of Digital Identity Management in the Internet Economy: A Primer for Policy Makers," (2009), 7.

⁵ From a more technological perspective, the technical solution most commonly used in electronic communications to identify a given person, holder of eID, is PKI (public key infrastructure). The latter uses a pair of "keys": a public key used for signing an electronic document, and a private key linked to a certificate and used by the receiver to validate the signature. In this way, PKI can be used to detect if a document has been changed without authorization after it was sent. In addition, eIDs "may be stored on smart cards or other devices but may also be received from a central authority during an authentication process" Ronald Leenes et al., "D2.2 – Report on Legal Interoperability," (Den Haag: STORK-eID Consortium, 2009), 16.

⁶ The basic principle underpinning legal base was expressed in Case 45/86, *Commission v. Council* (Generalised Tariff Preferences) where the ECJ expressed the opinion that: *the choice of a legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.*

⁷ In the case of delegated legislation, those references are located in an enabling legislative act.

⁸ This means that an eventual legislative act regulating eID should clearly state its principal objectives.

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