



E-SIGNATURES,
ELECTRONIC CONTRACTS
AND CERTAIN
OTHER ELECTRONIC
TRANSACTIONS



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Introduction

The working committee of the Business Law Committee of the Law Society of Ireland developed this note to help corporate entities, their promoters and their legal advisors who wish to execute and exchange contracts using electronic signatures (“**electronic signatures**” or “**e-signatures**”) and/or have been asked by another party to enter contract with one or more parties that intend to execute that contract using e-signatures. This note also considers the electronic signing of deeds and certain other documents.

This note provides general guidance exclusively on contracts being entered between corporate entities and contracts entered into between corporate entities and individuals who are not regarded as consumers. This note does not cover contracts entered into between corporate entities and consumers, which give rise to separate issues in respect of consumer law. Section 15 of the Electronic Commerce Act 2000 (the “**e-Commerce Act**”) outlines the general position in respect of electronic consumer contracts: “*all electronic contracts within the State shall be subject to all existing consumer law and the role of the Director of Consumer Affairs in such legislation shall apply equally to consumer transactions, whether conducted electronically or non-electronically.*” Notwithstanding that, many of the principles set out below are as applicable to consumer contracts as they are to business contracts.

This note is limited to the position under the laws of Ireland as of March 2020 and it should be carefully reviewed where contracts have been entered into under the laws or regimes of separate jurisdictions.



1 LEGAL BASIS

The e-Commerce Act provided for the legal recognition of e-signatures in Ireland, however, the EU Electronic Identification and Trust Services for Electronic Transactions in the Internal Market Regulation 2014 (the “eIDAS”) greatly altered the landscape.

The eIDAS provides for a common EU-wide framework requiring Member States to mutually recognise and accept electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication that meet the requirements and standards set out in eIDAS. The eIDAS has had a direct effect throughout the EU since 1 July 2016 which means that in the event of conflict with national legislation, the provisions of eIDAS will prevail. However, the eIDAS does not affect national or the EU law related to the conclusion or the validity of contracts or other legal or procedural obligations relating to their form as per article 2.3 of eIDAS. In addition, Recital 49 states that *“it is for national law to define the legal effect of electronic signatures”*.

Despite the precedence given to the eIDAS in the event of a conflict with the national law, we must still have regard to the e-Commerce Act to the extent that it does not conflict with the eIDAS (or any other aspect of the EU law).

The eIDAS also sets out rules for (1) Member States to mutually recognise electronic identification schemes (such as National IDs) which have been notified to the Commission; and (2) trust services and trust service providers (being *“a natural or a legal person who provides one or more trust services either as a qualified or as a non-qualified trust service provider”*). A detailed consideration of those rules are outside the scope of this note.

2 WHAT IS AN E-SIGNATURE?

The eIDAS defines an electronic signature as “*data in electronic form which is attached to, or logically associated with other data in electronic form and which is used by the signatory to sign*”.

3 LEGAL EFFECT OF E-SIGNATURES AND ELECTRONIC CONTRACTS

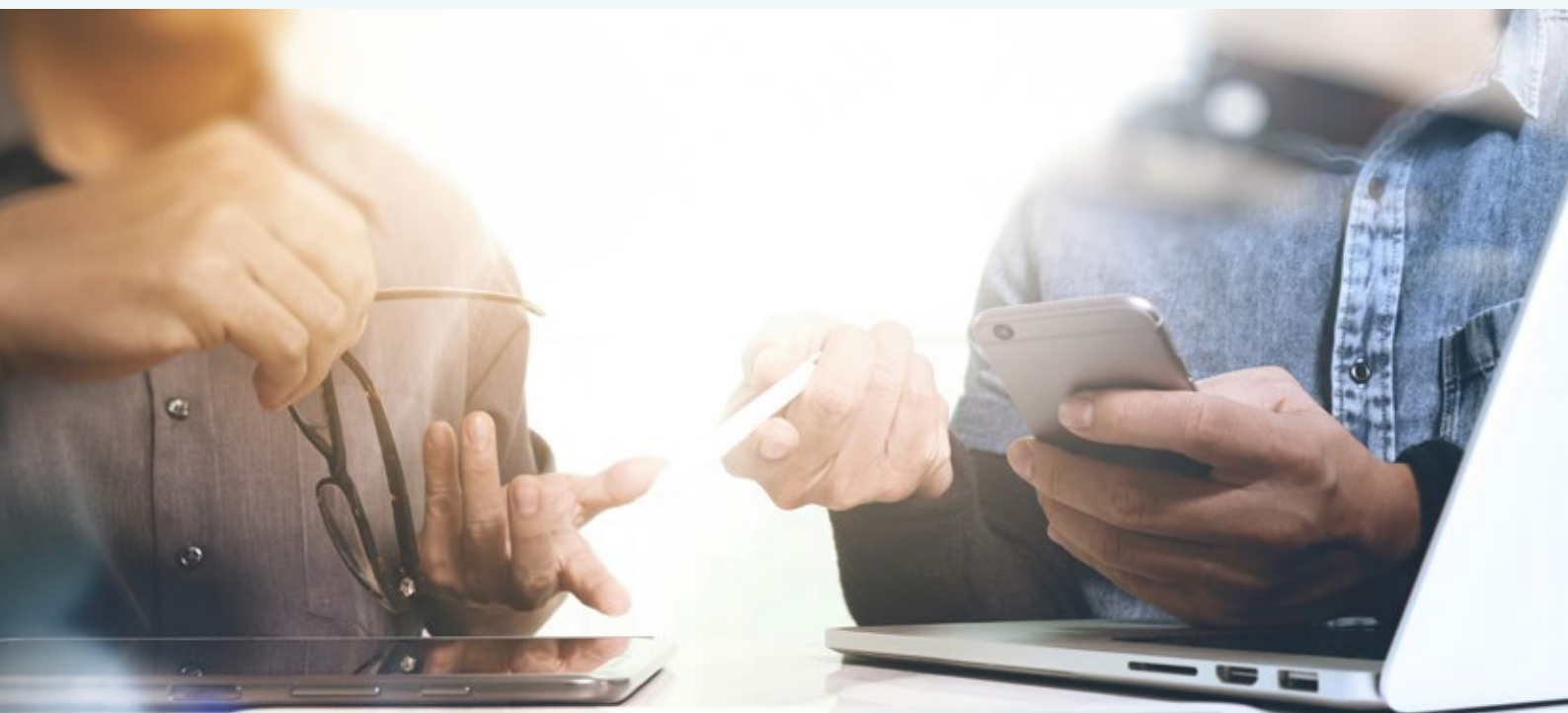
Article 25 of eIDAS provides that an “*electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet requirement for qualified electronic signatures*”.

Furthermore, section 19 of the e-Commerce Act provides that an “*electronic contract should not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partially in electronic form, or has been concluded wholly or partly by way or an electronic communication.*”

Section 22 of the e-Commerce Act also provides that, among other matters, “*in any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility in evidence of...an electronic signature... (i) on the sole ground that the signature is in electronic form, or is not an advanced electronic signature, or is not based on a qualified certificate, or is not based on a qualified certificate issued by an accredited certification service provider, or is not created by a secure signature creation device, or (ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form...*”

The contract taken as a whole, or any core element of the contract such as offer, acceptance of an offer or any related communication (including any subsequent amendment, cancellation or revocation of the offer or acceptance of the offer) may, unless otherwise agreed by the parties, be communicated by means of an electronic communication which is effected electronically and shall not be denied legal effect, validity or enforceability purely on that basis.

In addition, where an electronic signature platform is used then such platform should, of itself, provide evidence that an electronic signature was applied to the relevant document by the purported signatory at a particular time. It is unlikely that an Irish Court will seek any additional evidence where an electronic signature has been applied using a recognised platform.



4 TYPES OF E-SIGNATURES

The eIDAS defines three key types of e-signatures:

1. Electronic signature (the “simple electronic signature”): *“data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign”.*

2. Advanced electronic signature should be:

- (i) uniquely linked to the signatory;
- (ii) capable of identifying the signatory;
- (iii) created using electronic signature creation data that the signatory can use under his/her sole control; and
- (iv) linked to the data signed in such a way that any later change in the data is detectable.

In practical terms, the use of advanced electronic signatures involves the encryption of an electronic document using an electronic code (similar to a PIN number) which is unique to the signatory. The fact that the document can only be encrypted, and then decrypted by the recipient, provides reassurance in respect of the identity and unaltered nature of the document. Please also see section headed **Advanced e-signature based on a qualified certificate** below in relation to advanced electronic signature based on a qualified certificate under the e-Commerce Act.

3. Qualified electronic signature is *“an advanced electronic signature that is created by a qualified electronic signature creation device and which is based on a qualified certificate for electronic signatures.”*

Qualified electronic signatures are similar to advanced electronic signatures, however they include additional security requirements - they are created by a qualified electronic creation device and they are based on a qualified certificate for electronic signatures.

According to the eIDAS, a qualified certificate for electronic signature *“is issued by a qualified trust service provider and meets the requirements laid down in Annex I to the eIDAS.”*

Article 24 of eIDAS sets out requirements for qualified trust service providers (“**QTSPs**”) when issuing a qualified certificate: the QTSPs must verify the identity of the person signing electronically and *“the information shall be verified by the qualified trust provider either directly or by relying on a third party in accordance with national law:*

- (a) *by the physical presence of the natural person or of an authorised representative of the legal person;*
- (b) *remotely, using electronic identification means, for which prior to the issuance of the qualified certificate, a physical presence of the natural person or of an authorised representative of the legal person was ensured and which meets the requirements set out in Article 8 (...);*
- (c) *by means of a certificate of a qualified electronic signature or of a qualified electronic seal in compliance with point (a) and (b);*
- (d) *or by using other identification methods recognised at national level which provide equivalent assurance in terms of reliability to physical presence. The equivalent assurance shall be confirmed by a conformity assessment body.”*

The EU Commission website lists QTSPs of qualified electronic signatures and qualified certificates which should be recognised and used across the EU¹. Practitioners in Ireland may use a QTSP that has been listed by any EU Member State and not necessarily by Ireland.

As at the date of this practice note, qualified electronic signatures are not commonly used in Ireland and/or in the UK.

Advanced Electronic Signature based on a qualified certificate (e-Commerce Act)

The advanced electronic signature based on a qualified certificate provided for in section 14 of the e-Commerce Act goes beyond the definition of an advanced electronic signature contained in the e-Commerce Act but not quite as far as the definition of a qualified electronic signature under eIDAS. The advanced electronic signature based on qualified certificate aims to achieve a higher level of security.

5 ELECTRONIC SEALS

Electronic seals (the “**e-seals**”) are available only to legal persons, such as corporate entities, to ensure origin and integrity of data/documents. However, an e-seal is not an e-signature of the legal person.

6 ELECTRONIC TIME STAMP

An electronic time stamp is defined in the eIDAS as “*data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time*”. The eIDAS again provides that an electronic time stamp shall not be denied legal effect and admissibility as evidence in legal proceedings, solely on the grounds that it is in an electronic form. It is worth noting that Adobe Systems Software Ireland Limited have been granted qualified status in relation to electronic time stamp services in Ireland.

7 CONTRACTS IN “WRITING” OR “SIGNED”

In the absence of any regulatory or statutory requirements, there is no need for a simple contract to be in any particular form. Once exchanged, the contractual nexus is complete. Therefore, unless the particular contracts provide otherwise (see section 12.3 below), simple contracts can be completed using an electronic signature (including a simple electronic signature) given that there is no need for them to be in any particular form. Legislation may however require that a contract be executed in “writing”, “signed” or “executed under hand” and so it is necessary to consider the statutory definition of those terms.

The broad definition of “*writing*” under the the Interpretation Act 2005 includes electronic signatures as it: “*includes printing, typewriting, lithography, photography, and other modes of representing or reproducing words in visible form and any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form*”.

Furthermore, Section 13(1) of the e-Commerce Act 2000 provides that if “*by law or otherwise the signature of a person or public body is required (whether the requirement is in the form of an obligation or consequences flow from there being no signature) or permitted, then, subject to subsection (2), an electronic signature may be used.*”

In light of the broad definition assigned to “writing” and “signed” in Irish legislation, unless the contract provides otherwise a contract executed using electronic signatures and which may exist solely in electronic form in our view satisfies a statutory requirement for the contract to be in writing and/or signed.

1 <https://webgate.ec.europa.eu/tl-browser/>

8 ORIGINAL DOCUMENTS

Original documents may exist solely in electronic form and there is no requirement for an additional wet-ink version of the document to be executed or for the document to be printed in hard copy. In addition, any post execution amendments to that document may be made in the same way as with a wet-ink document, however, please see section 12 below on the barriers to the use of e-signatures as well as section 13 which considers the specific requirements of certain categories of documents and the preference of certain registries for use of wet-ink signatures.

Where the electronic version is to be retained as the sole or “original” copy of document, there is a requirement under sections 17 and 18 of the e-Commerce Act 2000 that the electronic copy be retained in a permanent format which, in practice, would mean saving in pdf form in an online depository of which practitioners will be aware of various providers, whether bespoke platforms or open-source.

9 COMBINATION OF EXECUTION METHODS

It is possible that a combination of execution methods may be used whereby one party to the contract may use an electronic signature and another party to the contract may execute it using a wet-ink signature.

10 SECURITY AND REPUDIATION

Some forms of electronic signature will be more secure and resilient to fraud, and therefore may carry greater evidential weight. There may be an increased risk of repudiation when using a simple electronic signature over an advanced electronic signature or qualified electronic signature. However it is worth noting that wet-ink signatures carry many of the same risks in relation to repudiation. As noted above, an advanced electronic signature or qualified electronic signature is capable of providing a digital audit trail in relation to the signatory.

Electronic signatures are only as secure as the business processes, systems and technology used to create them. As mentioned above, the eIDAS provides for additional trust services for electronic transactions such as e-seals and electronic time stamping.



11 SECTIONS 13, 14 AND 16 OF E-COMMERCE ACT

Different types of information technology and procedural requirements may be used depending on whether the document is executed under the terms of sections 13, 14 or 16 of the e-Commerce Act:

SECTION OF THE E-COMMERCE ACT AND TYPE OF DOCUMENT	TYPE OF E-SIGNATURE REQUIRED
Section 13 - simple agreements	simple electronic signature
Section 14 - documents where the signature is required to be witnessed	an advanced electronic signature based on a qualified certificate can be used to execute such documents.
Section 16 - documents required to be executed under seal	an advanced electronic signature based on a qualified certificate can be used to execute such documents

The Business Law Committee is of the view that the processes set out in each of sections 13, 14 and 16 are enabling provisions, and do not preclude the signatory and/or witness from using other forms of electronic signature.

12 POSSIBLE BARRIERS TO THE USE OF E-SIGNATURES

12.1 Requirement for Consent

Section 13 of the e-Commerce Act highlights the key requirement of consent with regard to the use of e-signatures. The counterparty to a contract must agree prior to the entry of the contract to an e-signature being used for the purposes of the execution of documents. There is no requirement in the e-Commerce Act that the counterparty's consent be explicit and, therefore, such consent may be implied or inferred (e.g. by conduct such as the utilisation of an e-signature platform), however, best practice remains to obtain express consent where possible. When dealing with public bodies, electronic signatures can only be used if the public body consents to their use and if the particular IT requirements of that public body have been met provided those requirements have been made public and are objective, transparent, proportionate and non-discriminatory.

12.2 Documents that must be executed by wet-ink signatures

It is not permissible to execute all types of documents using e-signatures in Ireland. Section 10 of the e-Commerce Act lists documents that must be signed using wet-ink signature:

- wills, codicils or any other testamentary instruments to which the Succession Act 1965 applies;
- trusts*;
- enduring powers of attorney;
- documents by which interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisition or disposal of such interests;
- affidavits or a statutory or sworn declaration; and
- documents required by the rules, practices or procedures of a court or tribunal.

*Where a prescribed manner of execution of a trust is not provided by the Statute of Frauds or otherwise then trusts in such a scenario (for example where a trust in respect of personalty is being created) are considered as being capable of e-signature.

12.3 Restriction on the use of an e-signature in a contract

When executing documents, it should be considered whether there is a contractual definition of “writing” in an agreement which may exclude e-signatures as means of execution of the documents pursuant to the agreement, or whether there is any other restriction on the use of e-signatures in the agreement.

13 REQUIREMENTS REGARDING E-SIGNATURES FOR CERTAIN CATEGORIES OF DOCUMENTS

DESCRIPTION OF DOCUMENT	STATUS OF ELECTRONIC SIGNATURE
Deeds executed by Irish companies	<p>Deeds executed by Irish Companies can be executed in one of two ways: (a) under company seal and subject to the company’s constitution, the document to which the seal is applied must be signed by a director or other person duly authorised by the directors and countersigned by the secretary or by a second director (if any) or other person duly authorised by the directors, or (b) by the company granting a power of attorney to one or more named individuals to execute that deed on the company’s behalf (the power of attorney does not need to be a deed, and the company’s seal does not need to be affixed to it).</p> <p>If the company seal approach is to be used by the company, it should be noted that there is currently no electronic means for the affixing of corporate seals in Ireland so the seals need to be physically affixed to the deeds.</p> <p>We do not recommend that the wet-ink sealing of a deed be countersigned by electronic means as this could theoretically give rise to an assertion that the countersigning party has signed a counterpart rather than the same copy as the wet-ink corporate seal is affixed to.</p> <p>Section 16 of the e-Commerce Act provides a mechanism for the execution of documents “<i>under seal</i>”, using an advance electronic signature based on qualified certificate, however we are not aware of this provision being relied on in practice as of the date of this practice note.</p> <p>If the power of attorney approach is to be used by the company, see further below.</p>
Powers of Attorney	<p>A power of attorney is not a deed and is not required to be executed under seal as a matter of Irish law.</p> <p>Until there is some clarity relating to execution under seal electronically, the execution of deeds by an individual (a natural person) appointed under a power of attorney provides a workable solution for companies wishing to execute deeds using an e-signature.</p>
Deeds executed by an individual acting under a power of attorney, which requires them to sign in the presence of a witness who attests the signature.	<p>The witnessing requirement in respect of deeds executed by an individual, (including any individual acting under a power of attorney) is met where either:</p> <ol style="list-style-type: none">the witness is physically present when the signatory applies his/her e-signature, and the witness then applies his/her signature underneath as witness by his/her e-signature; orthe witness is physically present when the signatory applies his/her e-signature, but does not have his/her own e-signature, and therefore prints the e-signed documents and witnesses using a wet-ink signature. <p>It is currently best practice that a witness be physically present at the signing, and not rely on means of telecommunication (videocam, etc.) for the purposes of the witnessing.</p> <p>Under section 14 of the e-Commerce Act, a signatory may sign the deed using advanced electronic signature based on qualified certificate and the individual who witnesses the signature of the document may also sign the document by an advanced electronic signature based on qualified certificate. However, this method of execution is not used in practice as of the date of this practice note. Given the view expressed above that the prescribed manner of execution in section 14 is not mandatory, then this means section 14 does not preclude documents being executed in the presence of a witness by other means, including by both signatory and witness using other forms of electronic signature.</p>

Corporate resolutions	Subject to the company's constitution, resolutions may be signed using electronic signatures.
Minutes of a general meeting	Subject to the company's constitution, minutes of a general meeting can be signed by the chairperson of the meeting using an electronic signature.
Declarations of Solvency under a Summary Approval Procedure ("SAP")	There is no legislation nor regulations in place which prohibit electronic signatures being used for declarations under a SAP under section 202 of the Companies Act 2014. However, such declarations must be delivered to the Companies Registration Office ("CRO") which currently are most likely refuse to accept declarations signed using electronic signatures on the basis of their preferred practice. Until a definitive position is adopted by the CRO, and given the risks of non-filing, it would be recommended that wet-ink signature continue to be adopted as the preferred option.
Irish tax returns and other tax reporting filings	<p>Returns submitted to the Irish Revenue Commissioners (the "Revenue Commissioners") via its online platform, the Revenue Online Service ("ROS"), are deemed to be signed electronically. While paper returns require a wet-ink signature, the delivery of returns in this format is relatively rare due to mandatory e-filing requirements through ROS.</p> <p>Revenue Commissioners' stated position is that an electronic signature is acceptable once it conforms to the e-Commerce Act.</p>
CRO Forms	The CRO allows for all forms that are available online to be executed electronically. This includes Forms B1, B10, B2 and C1/C1A. The signatories wishing to execute such forms using e-signature must register for digital signing certificate via the Revenue Commissioners <i>ROS</i> website.
PRA Filings	On the basis that almost all filings with the Property Registration Authority (the " PRA ") are in respect of an excluded category of documents, the Business Law Committee would expect the PRA to continue with its current requirement for wet-ink signatures for the time being.

14 REFERENCE TO E-SIGNATURES IN AN AGREEMENT

It is not necessary to specifically include a reference to electronic signatures in an agreement itself for it to be validly executed using electronic signatures. However, the Business Law Committee recommends the inclusion of a clause, on a "for the avoidance of doubt" basis, stating that the parties consent to the execution of the agreement by electronic signatures.

As a corollary to that, the Business Law Committee also recommends that practitioners ensure that there is no restriction on the use of e-signatures in an agreement where it is proposed to use an e-signature to sign that agreement.

15 REFERENCE TO E-SIGNATURES IN A COMPANY'S CONSTITUTION

It is not necessary to include a specific reference to electronic signatures in a company's constitution in order to authorise the company to enter into contracts and/or deeds electronically and to sign documents such as resolutions and notices etc.

16 ELECTRONIC SIGNATURES IN CROSS-BORDER TRANSACTIONS

This practice note relates to Irish law. Where a document is governed by the law of another jurisdiction confirmation from local counsel that an electronic signature is a valid method of execution should be sought.

SUMMARY

The valid execution of documents in Ireland is dependent on a number of issues, which include the type of execution required, any legislative requirements, the governing documentation of the company and the powers of the individuals concerned. It is important that company officers are fully aware of the relevant requirements when executing documents on behalf of a company. A particular document may require specific execution formalities or may specify restrictions and so every transaction must be approached on its own facts. Where documents can be executed electronically, it is also necessary to bear in mind whether the document will need to be filed with any authority or registry, which may insist on a wet-ink signature.

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