EXPLANATORY MEMORANDUM TO

THE ELECTRONIC IDENTIFICATION AND TRUST SERVICES FOR ELECTRONIC TRANSACTIONS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Act.

1.2 This memorandum contains information for the Sifting Committees.

2. Purpose of the instrument

2.1 This instrument amends provisions deriving from European Union Regulation "(EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC" ("eIDAS Regulation"). This is retained in domestic law under the European Union (Withdrawal) Act 2018 ("the Act"). This instrument repeals the electronic identification aspects and retains the trust services.

Explanations

What did any relevant EU law do before exit day?

2.2 The eIDAS Regulation sets out the legal framework and specifications for eIDAS products and services. It covers two related but essentially separate subject areas.

2.3 The electronic identification aspects of the eIDAS Regulation require EU Member States and participating European Economic Area (EEA) countries to recognise certain electronic identification schemes from other Member States to enable citizens to carry out transactions electronically for access to public sector digital services. Electronic identification schemes are a means of proving who you are online.

2.4 For the obligation to recognise these schemes to apply, the electronic identification scheme and related technical solutions are first subject to a peer review process by other Member States (this is referred to as 'pre-notification' throughout the eIDAS Regulation). This process aims to ensure that there is sufficient trust in the electronic identification scheme and that other Member States agree it complies with the technical standards set by the eIDAS Regulation. The electronic identification schemes must be interoperable with other schemes.

2.5 The trust services aspects of the eIDAS Regulation are services relating to electronic signatures, electronic seals, timestamps, electronic delivery services, and website authentication. The Regulation requires that trust services meet certain criteria to allow for interoperability across the EU.

Why is it being changed?

2.6 In respect of electronic identification, the UK will not have access to the interoperability framework for electronic identification provided by the eIDAS Regulation when the UK is no longer an EU Member State. The electronic identification sections of the eIDAS Regulation are being repealed, as they will not be relevant as a result of the UK's exit from the EU.

2.7 In respect of trust services, the instrument amends provisions that are inappropriate or redundant as a result of the withdrawal of the UK from the EU. These amendments include changes to terminology and removing requirements which will no longer be appropriate post-EU exit: for example, references to "Member States" or the requirement for a Member State to notify the European Commission of the trusted list provider. More examples are available in 7.5.

What will it now do?

2.8 Retained EU law will no longer include the electronic identification sections of the eIDAS Regulation. The amended eIDAS Regulation will ensure that trust services continue to have the same domestic regulatory framework as they had before Exit day and to allow for EU trust services to continue be used in the UK. The intention for trust services is to ensure continued mutual recognition and interoperability are possible. The instrument achieves this by allowing the technical standards and specifications in domestic law to mirror those in the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Sifting Committees

3.1 This instrument is being laid for procedural sifting by the ESIC and SLSC.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Act provides for regulations to make provision to remedy any deficiency in retained EU law arising from the withdrawal of the UK from the EU. In respect of the electronic identification sections, the instrument makes amendments in order to

remove deficient provisions from the UK statute book. The electronic identification provisions will no longer be relevant once the UK has withdrawn from the EU.

6.2 With regard to the trust services provisions, the instrument makes amendments to the eIDAS Regulation to correct deficiencies in the UK statute book and to allow for the continued use in UK markets of EU-based trust services. For example, this includes amendments to particular terms that would be out-dated or ineffective when the UK leaves the EU.

7. Policy background

What is being done and why?

7.1 The eIDAS Regulation provides a framework for electronic identification which seeks to enable European citizens to access certain online public services. Secondly it provides a framework for trust services, which are mainly to do with validating electronic transactions. Trust services encompass electronic signatures and seals (the digital versions of handwritten signatures and company seals), electronic time stamps and an electronic equivalent of recorded delivery. Another example of a trust service is the secure certificate for a website, providing evidence that the website is genuine and giving a degree of certainty that it does not contain malicious code.

7.2 The electronic identification aspects of the eIDAS Regulation places obligations on certain public services to accept electronic identification schemes from other EU Member States and participating EEA countries. As set out in paragraph 2.6 the UK will no longer have access to the interoperability framework for electronic identification provided by the eIDAS Regulation when the UK is no longer an EU Member State. The electronic identification sections of the eIDAS Regulation are therefore being repealed, as they will be redundant as a result of the UK's exit from the EU. A UK standards-based electronic identification scheme will continue to operate in the UK, providing a secure way to prove online identity to access public services. Repealing the electronic identification provisions of the eIDAS Regulation will not impact on the UK's electronic identification scheme continuing to provide this service to users registered with this UK scheme.

7.3 Trust services can have different levels of security - the three common levels are Simple, Advanced and Qualified. Some examples of the levels and their uses are:

- Simple - On an email, a scan or image of a person's signature is attached. This shows a loose association but there is no way of proving that the signature belongs to a person or that they were the one to attach it.
- Advanced - A doctor signs a prescription electronically. The Advanced electronic signature is associated with one individual, who has proved their identity and validity to the issuer through a secure and approved method. It is likely to be secured against misuse with strong encryption, and only the individual has the private part of the encryption key. The Advanced signature can be used as evidence in court, although it could be repudiated under certain circumstances, just as a claim could be made that a signature was forged.
- Qualified - A key contributor of evidence in a case of serious fraud deposits evidence with the authorities electronically. They use their digital signature to confirm it was them who deposited the information, and that the information is

correct to the best of their knowledge. The Qualified signature has high levels of security associated with it, and primary authentication of the individual may include multiple channels including biometric data. It may well have a physical token as part of a multi-factor authentication before each use. It is considered to be sufficiently secure to withstand repudiation in a court of law.

7.4 The UK has been heavily involved in the development of the eIDAS Regulation and it is considered to be a world-class scheme with supporting standards and approvals. There is no current need to change the standards on trust services, and informal consultation shows that private, public and third sector groups would prefer to have them continue in their present state.

Amendment examples

7.5 Examples of amendments to be made include:

- Article 15 - Accessibility for persons with disabilities. This article will be removed, as it is a duplication of the protection provided in the Equality Act 2010. This amendment is intended to avoid confusion and does not reduce the rights of those protected by the Equality Act 2010.
- Article 18.1 - Mutual Assistance. The original text requires the supervisory bodies of Member States to exchange good practice with each other. The new text refers to the Information Commissioner's Office (ICO) specifically, retaining a power for it to disclose information to a public authority in the EU where it would be in the interests of effective regulation or supervision of trust services.
- In the Commission Implementing Decision (EU) 2015/1506, Article 4, paragraph 2 "other Member States" is replaced with "the public sector body" to maintain functionality of the legislation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 As this instrument is addressing deficiencies in retained EU law and there is no significant impact as a result of this instrument, a full consultation was not viewed as necessary.

10.2 In relation to trust services, a group including representatives from the Audit, Banking and Public sectors was convened, along with the current regulator and trusted list provider, to ascertain if continuation of the current regime was needed and wanted, as

far as it is possible. Many representatives, including from banking and HM Treasury, identified that open banking rely on certificates defined in and protected by the eIDAS Regulation, and asked for the domestic regulations to mirror those in the EU as closely as possible to reduce friction in trade.

11. Guidance

11.1 Formal guidance will not be required. However, ahead of the date of the UK's exit from the EU, there will be communication with those online public services that are currently obliged by the eIDAS Regulation to accept electronic identification schemes from EU Member States. These online services will remove the access route for EU electronic identification schemes.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the impact will not be above £5m. The electronic identification aspects of the eIDAS Regulation place obligations on certain public services to accept electronic identification schemes from other EU Member States and participating EEA countries. There is currently only one electronic identification scheme, which can be used by individuals and not businesses, that has been through the 'pre-notification' process referred to above. There is therefore no significant impact as on the date of the withdrawal of the UK from the EU there will be only one electronic identification scheme that other Member States, including the UK, had been obliged to accept to access certain online public services.

12.4 A de minimis assessment has been completed for the trust services aspects of this instrument, and confirms that the technical changes made by this instrument will have an impact of less than £5m on UK businesses. A copy of the assessment is available on request.

13. Regulating small business

13.1 The trust services aspect of the eIDAS Regulation applies to activities that are undertaken by small businesses, but will not change the burden or expectations upon them. The de minimis assessment confirms that the total effect on all businesses in the UK will be less than £5m.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Felicity Bennée at the Department of Digital, Culture, Media and Sport, telephone: 07815293809 or email: fliss.bennee@culture.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sue Bateman, Deputy Director for Data Policy and Governance at the Department of Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Margot James, the Minister for Digital and the Creative Industries at the Department of Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. **Sifting statement(s)**

1.1 The Minister for Digital and the Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Electronic Identity and Trust Services (Amendment etc.) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)".

1.2 This is the case because the instrument is addressing the deficiencies in retained EU law.

2. **Appropriateness statement**

2.1 The Minister for Digital and the Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Electronic Identity and Trust Services (Amendment etc.) (EU Exit) Regulations 2018 does no more than is appropriate".

2.2 This is the case because: it does no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU, examples of which are mentioned in section 7 of the main body of this Explanatory Memorandum.

3. **Good reasons**

3.1 The Minister for Digital and the Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action."

3.2 These are set out by way of example in section 7 of the main body of this Explanatory Memorandum.

4. **Equalities**

4.1 The Minister for Digital and the Creative Industries, Margot James has made the following statement(s):

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

4.2 The Minister for Digital and the Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Margot James have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

5. **Explanations**

5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.