E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

European Journal of Law and Public Administration

2020, Volume 7, Issue 2, pp. 212-223

<https://doi.org/10.18662/eljpa/7.2/141>

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Socionet, HeinOnline**

Published by:
Lumen Publishing House
on behalf of:
**Stefan cel Mare University from Suceava,
Faculty of Law and Administrative Sciences,
Department of Law and Administrative Sciences**

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Răzvan VIORESCU¹

Abstract

Currently, the legal framework on electronic signatures is represented by EU Regulation no. 910/2014 on electronic identification and reliable services for electronic transactions on the internal market, Law no. 455/2001 regarding the electronic signature completed by GEO no. 39/2020 and, finally, GEO no. 38/2020.

Keywords:

Electronic signature; Convention for the Protection of Human Rights and Fundamental Freedoms.

JEL Classification: H1, K3

I. INTRODUCTION

The High Court held that “if the applications are addressed to the courts in electronic format, the digital signature connects the electronic identity of the signatory with the digital document, and cannot be copied from one digital document to another, giving the document authenticity (attests that the document belongs to the signatory, and the author of the document cannot decline responsibility for the content of the document with a valid electronic signature). Basically, the valid electronic (digital) signature provides the court with a guarantee that the digital message or document is created by the person who signed it, and the content of the digital message or document has not been changed since its issuance. ” (Decision no. 520 of March 7, 2019, pronounced by the Civil Section I of the High Court of Cassation and Justice).

We remind you that the DOCUMENTS SENT IN ELECTRONIC FORMAT, BY ELECTRONIC MAIL, digitally signed by qualified electronic

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signature, according to Law no. 455/2001, are equivalent (HAVE THE SAME LEGAL VALUE) to the documents registered in court, submitted in physical format, signed in handwriting, ORIGINALLY.

We remind you that at the level of most courts before the Suceava Court of Appeal (Court of Appeal, Suceava Court, Suceava Court) the usefulness and communication of documents by the parties in electronic format was understood, and there is no doubt about the ELECTRONIC SIGNATURE used by the holders. of qualified digital signature certificates.

We remind you that even the Suceava Courts (Tribunalul Suceava, Curtea de Apel Suceava) currently has an electronic signature, applied on the procedural documents and Judgments.

II. LEGAL FRAMEWORK

According to the provisions of art. 148 para. 2 NCPC “requests addressed, personally or through a representative, to the courts may also be formulated in electronic form, if the conditions provided by law are met”, and these conditions are those stipulated by art. 7 of Law no. 455/2001 on electronic signature "in cases where, according to the law, the written form is required as a condition of proof or validity of a legal act, an electronic form meets this requirement if it has been incorporated, attached or associated logically an extended electronic signature, based on a qualified certificate and generated by a secure signature-creation device”.

Article 149 para. 4 NCPC also clarifies the element of communication to the opposing party, stipulating that “if the request was communicated, according to the law, by fax or e-mail, the court clerk is required to draw up ex officio copies of the request, at the expense of the party had this obligation. The provisions of art. 154 para. (6) remain applicable.”.

According to the Decision of the Superior Council of Magistracy no. 387/2005 regarding the internal regulation of the courts, there is also the legal framework that allows access to the case documents in electronic format, by email. Thus, according to the provisions of art. 128 para. 1 of HCSM no. 387/2005 “requests for the issuance of certificates shall be received and resolved by the first clerk or, as the case may be, by the chief clerk”, according to par. 3 “the certificate is verified and signed by the chief clerk or, as the case may be, by the chief clerk of the section and is handed to the petitioner, under signature, or sent by post”, and para. 7 notes that “the provisions of par. (1) - (6) shall apply accordingly to the release of copies of decisions or other documents in the file, the term for their preparation being at most 3 days ”. These norms refer to the provisions of art. 94 para. 2 of the HCSM no. 387/2005 which state: "the sending of correspondence will be done by post, procedural agent or courier, by

fax or e-mail or by any other means of communication that can be identified and supervised and to ensure its official character".

Of course, the provisions of art. 148 para. 2 NCPC, the requests addressed to the court in electronic form, regardless of their object, must comply with the provisions of Law no. 455/2001 and to have incorporated the extended electronic signature of the applicant, an obligation that also falls on the court - namely the application of the electronic signature.

Both the Code of Civil Procedure and the Code of Criminal Procedure refer to documents that can be sent to the courts in electronic format.

In the case of both codes, the idea is that the conditions imposed by law for electronic documents must be met, ie including the use of an electronic signature.

This is given that the electronic signature is, in the digital environment, the equivalent of the holographic signature.

In addition, even HIGH COURT OF CASSATION AND JUSTICE judges recently pointed out in a civil decision that if a lawyer wants to send documents electronically to a court, he must use an electronic signature. Otherwise, the court cannot verify whether the person who sent an electronic document is who he claims to be.

"In such cases as in the case before the court, in which the requests are addressed to the courts in electronic format, the digital signature connects the electronic identity of the signatory with the digital document, not being copied from one digital document to another, which gives the document authenticity. the fact that the document belongs to the signatory, and the author of the document cannot decline responsibility for the content of the document with a valid electronic signature). Basically, the valid electronic (digital) signature provides the court with a guarantee that the digital message or document is created by the person who signed it, and the content of the digital message or document has not been changed since its issuance", is explained in the motivation of the Decision. HIGH COURT OF CASSATION AND JUSTICE no. 520/2019, pronounced by the Civil Section I.

III.WHAT KIND OF DOCUMENTS CAN BE SENT TO A COURT BY E-MAIL?

According to certSIGN specialists, any communication with the courts, within the pending files, can be made by e-mail.

This means that the electronic signature can be used, among other things, in lawsuits, enforcement appeals, counterclaims, counterclaims, written submissions, interrogations, appeals, appeals or extraordinary appeals, complaints and appeals. Whether it is a civil or a criminal case.

"No legal provision prevents the submission of documents signed with a qualified electronic signature in court proceedings, regardless of the nature of litigation (civil or criminal). As long as the qualified electronic signature is the equivalent of the handwritten signature,

documents submitted in electronic format - signed with the qualified electronic signature by the lawyer, as a representative of a party - cannot be considered by the court as not being sent. In no case will a court be able to consider requests not submitted, not formulated in time by a lawyer on the grounds that they were sent electronically and with a qualified electronic signature", according to certSIGN opinions.

If they choose to send documents electronically to the courts, lawyers save the time they would waste on their records. At the same time, lawyers save when it comes to the costs of sending documents (by postal or courier services), plus they do not consume so much paper.

The High Court of Cassation and Justice-Civil Section I noted the equivalence between the qualified electronic signature and the handwritten one on the documents sent to a court and also recognized the electronic way of communicating documents in civil proceedings, as long as they bear a qualified electronic signature.

Both aspects are found in the HIGH COURT OF CASSATION AND JUSTICE Decision no. 520/2019 pronounced in the public hearing of March 7, 2019, which can be consulted in full here. In it, the supreme court examined the exception of the nullity of the appeal sent by email to the court whose decision is being appealed in the conditions in which neither the appeal request nor the email bore a qualified electronic signature.

Following the debates, the Supreme Court ruled that if a party agrees to send requests to the court in electronic format "the existence of the scanned signature of the signatory is not sufficient", the qualified electronic signature connects the electronic identity of the signatory with the digital document. from one digital document to another, which gives the document authenticity "and" provides the court with a guarantee that the digital message or document is created by the person who signed it, and the content of the digital message or document has not changed since the date of issue".

We welcome the decision of the Supreme Court, which we believe will encourage legal practitioners to move to the use of digital means of signing and communicating documents in the act of justice. Thus, the courts will also have to adapt to the electronic management of the act of justice, to the fast and efficient communication with its actors.

The High Court of Cassation and Justice has ruled that in the case of sending the appeal by e-mail, it is not enough to scan it, but (based on Law no. 455/2001) the digital signature is required.

The High Court held that "if the applications are addressed to the courts in electronic format, the digital signature connects the electronic identity of the signatory with the digital document, and cannot be copied from one digital document to another, giving the document authenticity (attests that the document belongs to the signatory, and the author of the document cannot

decline responsibility for the content of the document with a valid electronic signature).

Basically, the valid electronic (digital) signature provides the court with a guarantee that the digital message or document is created by the person who signed it, and the content of the digital message or document has not been changed since its issuance. " (Civil Section I of the High Court of Cassation and Justice, 2019; Juridice, 2019).

Law no. 455/2001 regarding the electronic signature, republished, hereinafter referred to as Law no. 455/2001 (Law no. 455/2001, 2001):

Article 5: The electronic document, to which an extended electronic signature has been incorporated, attached or logically associated, based on a qualified certificate not suspended or not revoked at that time and generated by means of a secure electronic signature creation device, is assimilated , as to its conditions and effects, with the document under private signature. More details about the legal effects of the electronic signature are stipulated in art. 25 of the eIDAS Regulation on electronic identification and trust services, but also in the law of electronic signature (Law no. 455/2001).

On 07.04.2020 was published in the Official Gazette Part I no. 289 Emergency Ordinance no. 38/2020 on the use of documents in electronic form at the level of public authorities and institutions (Emergency Ordinance no. 38/2020, 2020).

The adoption of a regulation on electronic documents and the use of electronic signatures appears in the context of declaring a state of emergency in Romania and in the context in which public administration authorities must take the necessary measures to organize the activity so as to avoid, as far as possible, direct contact.

The need to adopt measures to ensure the continuity of the state apparatus within it, as well as in relation to third parties (individuals or legal entities) is expressly provided in the content of Decree no. 195/2020.

A way of implementing the provisions of Decree no. 195/2020 represents the creation of the legal framework regarding the use of electronic documents and, implicitly, of the electronic signature.

Currently, the legal framework on electronic signatures is represented by EU Regulation no. 910/2014 on electronic identification and reliable services for electronic transactions on the internal market (European Parliament and of the Council, 2014), Law no. 455/2001 regarding the electronic signature completed by GEO no. 39/2020 and, finally, GEO no. 38/2020.

The electronic signature is of three types: simple, advanced and qualified. The classification is relevant in relation to the effects that the legal act in which it is included may have (electronic document).

The simple electronic signature is a set of data in electronic format, attached to or logically associated with other data in electronic format and which are used by the signatory to sign.

The advanced electronic signature is an electronic signature that meets the following requirements:

- refers exclusively to the signatory;
- allows the identification of the signatory;
- it is created using electronic signature creation data that the signatory can use, with a high level of trust, exclusively under his control; and
- is related to the data used for signing, so that any subsequent changes to the data can be detected.

A qualified electronic signature is an advanced electronic signature that is created by a qualified electronic signature-creation device and is based on a qualified electronic signature certificate.

The difference between an advanced electronic signature and a qualified electronic signature is precisely the possession of a qualified signature-creation device (usually in the form of a token device) and the possession of a qualified certificate.

The essential aspects regulated by GEO no. 38/2020

- documents issued in electronic format by public authorities and institutions will be signed with a qualified electronic signature, and as an exception, the type of electronic signature applicable to internal documents is established by them. Interpreting these provisions in conjunction, it follows that, in external relations, the institution or public authority will use a qualified electronic signature and, for acts transmitted internally, this obligation may be derogated from;

- from the date of entry into force of the ordinance, public authorities and institutions have the obligation to receive documents signed with electronic signature;

- public authorities and institutions establish the type of electronic signature applicable (advanced or certified) for the use by natural or legal persons of a service available online provided by those authorities;

- within 15 days from the date of entry into force of the ordinance, public authorities and institutions must issue administrative documents to establish the type of electronic signature required for a particular service provided;

- in order to receive electronic documents, public authorities and institutions will make their own portals available or will use such tools provided by third parties. We mention that the possibility of using e-mail is not excluded and must be considered by public institutions or authorities.

The legal effects of the electronic signature according to GEO no. 38/2020.

According to the ordinance, documents issued in electronic format by public institutions or authorities and signed with a qualified electronic signature will be assimilated to authentic documents.

Also, the acts and documents of public authorities and institutions with qualified electronic signature and issued in the procedures of elaboration, endorsement and presentation of draft public policy documents, draft normative acts, as well as other documents, initiated for adoption or approval by the Government, have the legal force of authentic documents.

As mentioned above, in order to use a qualified electronic signature it is necessary to have a qualified certificate and a qualified device. Typically, cryptographic keys are stored on a token device or even in the Cloud.

The only way to obtain the qualified electronic signature and, implicitly, the qualified certificate and the qualified device, is by calling a specialized service provider for this purpose. The person concerned must pay close attention to the choice of service provider. They must meet the conditions provided in art. 20 of Law no. 455/2001, respectively must be qualified reliable service providers, whose activity is authorized and verified by the authorities specialized in this field.

IV.CONSTITUTIONAL COURT JURISPRUDENCE

Regarding fax and e-mail, the Constitutional Court (**CCR decision no. 605/2016**) notes that these methods of communication are accepted by law, but are not found in the hypothesis of the criticized legal norm. For example, the Court notes that art.94 of the Rules of Procedure of the courts, approved by the Decision of the Plenum of the Superior Council of Magistracy no.1.375 / 2015, published in the Official Gazette of Romania, Part I, no.970 of 28 December 2015, provides that court documents filed in person or by representative, received by mail, courier or fax or in any other manner provided by law, shall be filed at the registry, where, on the same day, after establishing the subject matter, receive, except in cases provided by law, certain date and number from the ECRIS application. Also, the Code of Civil Procedure provides these ways of communicating procedural documents, for example, according to art.148 paragraph (2), requests addressed, personally or through a representative, to the courts may be formulated and in electronic form, if the conditions provided by law are met. Article 139 paragraph (4) of the Code provides that if the request was communicated, according to law, by fax or e-mail, the court clerk is required to prepare ex officio copies of the request, at the expense of the party who had this obligation. According to art. 199 paragraph (1) of the Code of Civil Procedure, the request for summons, filed in person or through a representative, received by mail, courier, fax or scanned and sent by e-mail or in electronic form, is registered and receives a certain date by applying the entry stamp. As it results

from the provisions of art. 471 paragraph (3), the appeal request can also be sent by mail, fax, e-mail or courier.

The Court therefore notes that interested parties have at their disposal, in addition to the submission of procedural documents in person or by representative, by post, express courier or a specialized communication service, and the possibility of transmitting these documents by e-mail or fax. thus facilitating the rapid communication of procedural documents.

The Court considers that the sending of procedural documents by fax or e-mail was assimilated to personal filing in court and not to sending by post office, courier service or other specialized communication service. The procedural document sent by fax or e-mail is considered to have been made on time on the date it was registered in court.

According to the Code of Civil Procedure, civil courts, at least, must have their own electronic signature, for summonses and procedural documents!

When communicating citations electronically, courts must each use an extended electronic signature instead of the court stamp and the clerk's signature, and the communication is considered complete when the system used confirms the referral to the addressee, according to a law amending the Code of Civil Procedure. entered into force today.

The Code of Civil Procedure has officially received a series of amendments contained in Law no. 310/2018, among which are aspects related to the communication of documents to the court.

First, the parliamentarians replaced, in electronic communication, the stamp of the court and the signature of the clerk on the citations with the extended electronic signature, an instrument not mentioned so far in the Code of Civil Procedure.

Each court must therefore have its own extended electronic signature for summonses and pleadings.

"The communication of summonses and other procedural documents may be made by the court registry by fax, e-mail or other means that ensure the transmission of the text of the document and confirmation of its receipt, if the party has indicated to the court the appropriate data for this purpose. will be accompanied by the extended electronic signature of the court that will replace the court stamp and the signature of the court clerk from the mandatory citations of the summons. Each court will have a single extended electronic signature for summonses and procedural documents", stipulates, today, the Code of Procedure civil.

However, the idea of communication for confirming a form containing the name of the court, the date of communication, the name of the clerk, etc. has disappeared from electronic communication. and which the addressee completes, for return to court.

Then, Law no. 310/2018 (2018) brought in the Code a norm according to which summonses and other procedural documents sent by fax or electronically are considered communicated at the time they received a message from the system used that they reached the recipient according to the data provided.

"(...) the communication message to the addressee received from the system is the proof of communication. It will be listed and attached to the case file", according to another new provision. The procedure shall also be deemed to have been completed on the date shown on the hard copy of the consignment, certified by the clerk who made the transmission.

Documents submitted by fax or e-mail

"The procedural document, submitted within the term provided by law by registered letter to the post office or submitted to a express courier service or to a specialized communication service or sent by fax or e-mail, is considered to be made on time", writes, today, in the Code of Civil Procedure.

When sending documents by fax or e-mail, the indication of the date and time of receipt of the fax or e-mail, as attested by the computer / fax of receipt of the court, will serve as proof of the date of submission of the document by the interested party.

V.HIGH COURT OF CASSATION AND JUSTICE JURISPRUDENCE

HCCJ decision no. 45/2020 (2020) (in a preliminary ruling procedure) guarantees, in essence, to litigants involved in a civil process that, as long as they send a procedural document within a time limit (calculated per day), it does not matter whether the time of referral falls within the schedule of the court where the pleading is sent or not.

"[The] procedural documents sent by fax or e-mail, on the last day of the procedural term which is counted on days, after the hour when the activity ceases in court, is considered to be submitted in time", the supreme court noted.

The Code of Civil Procedure stipulates, as a rule, that a term that is counted per day is fulfilled at 24:00 of the last day in which the procedural act can be performed. At the same time, an exception is provided for documents to be filed in court. In their case, they must be submitted by the end of the working day on the last day of the deadline.

The decision of the HIGH COURT OF CASSATION AND JUSTICE is relatively similar to another decision of the same court, which resolved a similar issue, but regarding the Code of Criminal Procedure. It is, more precisely, about the HIGH COURT OF CASSATION AND JUSTICE Decision no. 12/2020, a document recently issued by the Panel for resolving legal issues in

criminal matters and which applies from today (June 26, 2020), following its publication in the Official Gazette (2020).

Thus, as it appears in the HIGH COURT OF CASSATION AND JUSTICE document, the transmission "on the last hundred meters", by electronic means, of a procedural act is considered to be done in time, although the effective registration at the judicial body is made after its expiration.

"The HIGH COURT OF CASSATION AND JUSTICE states that in interpreting the provisions of Articles 269 and 270 of the Code of Criminal Procedure, if the procedural document to be made within a certain time limit is sent by e-mail or fax, on the last day of the time limit which is calculated in days, is considered to be done in time, even if the procedural act is registered at the judicial body after the expiration of the term ", it is specified in the document.

The HIGH COURT OF CASSATION AND JUSTICE went further and mentioned that the actual submission of the procedural document "is made at the time of receipt of the communication of computer equipment of the judicial body, which is proven by the computer report provided, regardless of the time of registration in court records, administrative operation subsequent".

VI.CONCLUSIONS

The legal effects of the electronic signature are stipulated in art. 25 of the eIDAS Regulation on electronic identification and trust services, but also in the law of electronic signature.

According to art. 25 of Regulation (EU) no. Regulation (EC) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC (EU Regulation no. 910/2014, 2014; Decision no. 520, 2019).

Electronic signature

Article 25

Legal effects of electronic signatures

(1) An electronic signature shall not be denied legal effect and the possibility of being accepted as evidence in court proceedings solely because it is in electronic format or does not meet the requirements for qualified electronic signatures.

(2) A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

(3) A qualified electronic signature based on a qualified certificate issued by a Member State shall be recognized as a qualified electronic signature in all other Member States.

Qualified electronic signature

A qualified signature appears in Adobe Acrobat Reader as valid (green check mark) and contains information about checking it against the European Trusted List. Easy-to-verify graphics are displayed that give users a level of confidence such as:

- Tick green and the text “Signed and all signatures are valid”;

Electronically signed documents have the same legal value as signed and stamped paper documents. Moreover, being an electronically signed document with a digital certificate, they are much more difficult to falsify than a stamp or a handwritten signature.

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APPLICATIONS ADDRESSED TO THE SUCEAVA COUNTY COURTS ...

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