

DIGITALISATION OF NOTARIAL ACTIVITY IN ROMANIA IN THE CONTEXT OF GLOBALISATION

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Abstract

The notaries' activity in Romania has undergone numerous and significant legislative changes in recent years; most of them have been generated by the need to cope with the imminent globalisation. A quick transition from the classic working tools to the current modern ones (i.e. from typewriter to procedures based on electronic signature) has taken place, aiming mainly at ensuring expeditious procedures and, at the same time, at securing the notary civil circuit and assuring the quality of notary deeds. One of the main factors leading to the globalisation of the notarial activity is the increasing number of cases involving international elements.

Currently, there are two major directions of globalisation in the notarial activity: the use of the digital environment and the internationalisation of legal relations; they are both opportunities and causes of the globalisation process. In this context, the national laws in the notary field and the international rules adopted and implemented over the past few years have greatly contributed to the adjustment of the notarial activity in Romania to the fast-paced globalisation in the legal field.

Keywords: *notary, electronic signature, electronic environment, electronic authentic instrument, globalisation*

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1. Digitalisation of Notarial Activity

1.1. General

Legal relations that are specific to notarial activities currently exceed national borders; this is common in all States where notarial activities take place. This phenomenon is mainly caused by the internationalisation of relations involving a notarial activity and, at the same time, by the globalisation in the legal field.

It is well-known that large amounts of information are held, processed, stored and transmitted in almost any type of activity, and this requires continuous development of the information technology field in order to keep up with the information revolution.

Oftentimes, contractual relations go beyond the content of traditional contracts, therefore a wider and more flexible legal framework, adjusted to

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new requirements, is needed. Due to the continuous changes on the international market and the fast pace at which they happen, participants often find themselves in the position of having to act quickly and make immediate decisions. This celerity requirement generates the need to simplify operations and rules relating to legal deeds, while ensuring a degree of rigor with regard to the stipulation and enforcement of clauses.

In this context, the legal and, implicitly, the notarial areas had to adjust their legislation, as well as the way they work so as to respond to the current requirements as effectively as possible. Thus, the computerisation of notarial activities has become both an inevitable and an irreversible phenomenon.

In this study, I choose to present the notarial procedures that can be carried out electronically and some of the mechanisms used in the notarial activity that operate based on modern technologies; these are only some of the notarial procedures that have been introduced or recently modified in the national legislation and which represent the Romanian notariat's response to globalisation.

1.2. Regulation and competence of a notary public in the electronic notarial activity

The widespread use of new technologies in the legal field has led to the appearance of electronic authentic instruments; this procedure is used by notaries in some of the States that apply the civil law system. The very first electronic authentic instrument in the world was signed in France, by a French notary and the French Minister of Justice on 28 October 2008. (Popa, 2010)

In Romania, Law no. 589/2004 on the legal status of electronic notarial activity¹ establishes, for the first time in the national law system, the possibility for the notarial activity to be performed in electronic form and outlines the legal status of notarial activities that can be performed in this form by a notary public. This law may be considered a starting point for the development of electronic operations both in and outside Romania. The said law is an innovative regulatory act in the essentially traditional notarial field and supplements the national competence rules set out by Law no. 36/1995 on notaries public and notarial activity², giving the Romanian notaries public the possibility to perform certain procedures exclusively in electronic form.

Electronic notarial instruments fall within the competence of notaries public, as well as of diplomatic missions and consular offices that may draw up notarial deeds in the States where they represent Romania.

¹ Published in the Official Journal of Romania, Part I, no. 1227 of 20.12.2004.

² Published in the Official Journal of Romania, Part I, no. 92 of 16.05.1995, republished in the Official Journal of Romania, Part I, no. 732 of 18.10.2011, republished in the Official Journal of Romania, Part I, no. 72 of 04.02.2013, republished in the Official Journal of Romania, Part I, no. 237 of 19.03.2018.

Pursuant to Article 3 of this law, “*electronic notarial instruments have the same legal status as notarial instruments drawn up in accordance with Law no. 36/1995 on notaries public and notarial activity*”. For this reason, the literature states that “electronic documents drawn up by civil servants receive public authority and high probative force recognised by law; the disadvantages are the impossibility to accurately identify the author, the lack of imputability and confidentiality.” (Bercea, 2005)

Such documents have the following recognised characteristics: the ability to bear and convey information; integrity (they are a durable and unalterable medium); imputability (the ability to identify the author of the message and to check the consistency of the message with the author’s will); safety of information conveyance without the risk of distortions in the communication process. However, the electronic environment dematerialises a document, and consequently its message will lack the traditional imputability due to the absence of the author's signature on the document, there will be uncertainties regarding the integrity of the document or any possible interception or amendment made by a third party, and it will be difficult to preserve the message and the proof of an electronic instrument, according to B. Reznis and the opinion published in *Professionnels du droit et contract électronique*. (Bercea, 2005).

According to Articles 12 and 13 of Law no. 36/1995, the material competence of notaries public is carried out through notarial deeds and procedures, and through legal consultations in the notarial field, other than those regarding the content of the deeds they draw up, and notaries may participate as specialists appointed by the parties in the preparation and drafting of notarial deeds.

Article 5 of Law no. 589/2004 states that notaries public may carry out the following electronic procedures, based on their electronic signature:

- e) certify electronic copies of original documents;
- f) certify the date of documents which meet the requirements set forth in Article 2(1) and the place where they were signed;
- g) receive and safe-keep in their electronic archive documents which meet the requirements set forth in Article 2(1);
- h) authenticate electronic translations;
- i) issue duplicates;
- j) other operations provided for by law.

If we compare the competencies granted to notaries public by the two laws, we see that only notarial activities of minor importance can be performed electronically; the law regulating this possibility offers only an alternative to the procedures related to certain notarial deeds. Thus, customers

may choose to request that their documents be drawn up in the classic form or in electronic form.

The notaries public authorised to draw up electronic notarial deeds have general competence and can therefore handle such documents throughout the country, due to the electronic nature of the procedure; the cases of special territorial jurisdiction of notaries public are expressly stipulated by law.

Electronic notarial instruments must comply with the substantive rules on the notarial instruments' procedure regulated by Law no. 36/1995 on notaries public and notarial activity. Consequently, the common rules on notarial deeds and procedures adjusted to the specifics of the electronic environment will be applicable, in accordance with the laws in the field.

We can see that notarial instruments which can be drawn up electronically under the law are not part of those instruments that require checking whether the parties understand the content of the instrument and whether all requirements regarding the valid manifestation of the parties' will are met. The verification carried out by a notary public in the case of electronic documents consists in certifying the identity of the party requesting the drawing up of an electronic document based on electronic signature, which justifies the mentioning of the requesting party's and the notary public's electronic identification elements in the notary's certification/authentication text.

On the other hand, the legal force of the documents prepared by a notary is considered to be based on the certainty that the notary filters the elements ensuring the identification of the parties, the imputability and integrity of the document's content, which is why the law excludes from the category of documents that can be processed electronically those that necessarily involve the verification of the parties' identity, address and capacity by the notary public, according to the same Reznis, cited above. (Bercea, 2005)

1.3. *Requirements of electronic notarial instruments*

Pursuant to Article 2(1) of Law no. 589/2004, "*electronic notarial instruments must meet the following requirements, otherwise they will become null and void:*

- a) *to be processed electronically;*
- b) *to bear the notary public's extensive electronic signature, based on a qualified certificate issued by an accredited certification service provider. Certificates issued to notaries public shall include information about the notary's office, as required by the regulations of the specialised regulatory and supervisory authority in the field;*
- c) *to meet the substantive requirements stipulated by law with regard to the recorded legal transaction."*

The same article requires notaries public, diplomatic missions and consular offices to check whether all these requirements are met, while Article 9 of Law no. 36/1995 requires notaries public to check the legality of the notarial instrument before it is signed.

As regards the validity of electronic notarial instruments abroad, the Law on the legal status of the electronic notarial activity stipulates that the electronic notarial activity is regulated by international conventions to which Romania is a party, and electronic documents issued by authorities or notaries from another State may be taken into consideration by notaries public when issuing an electronic notarial instrument only if the foreign electronic signatures are based on a qualified certificate issued by an accredited certification service provider. This requires Romanian notaries public to thoroughly check whether the said requirements are met and to possess knowledge or get informed on how qualified certificates for electronic signatures are issued in the States where such documents come from.

According to the regulations on these types of procedures, Romanian notaries public are required to hold certificates for electronic signature issued by qualified certification service providers.

1.4. *Electronic signature - an indispensable mechanism for notarial activities in the context of globalisation*

Currently, the electronic notarial activity in Romania is not possible without the use of electronic signatures, which are not scanned handwritten signatures, but a sophisticated mechanism that must enable the signatory to sign in and ensure the authenticity of the signed document, for it is a means of identification and confirmation between the parties. (Vasiu, 2009).

Electronic signatures are regulated by Law no. 455 of 18 July 2001³, according to which an electronic signature is “*made up of electronic data that is attached to or logically associated with other electronic data, and used as an identification method.*”

Article 6 of this law is particularly important, for it lays down the legal status of electronic documents and recognises the authenticity of electronically signed documents; thus, *an electronic document bearing an incorporated, attached or logically associated electronic signature and recognised by the person who signed it has the same effect as an authentic instrument between its signatories and between those representing their rights.*

All electronic signatures are represented digitally, i.e. through series of 1s and 0s, but they can also have other forms created by various other

³ Published in the Official Journal of Romania, Part I, no. 429 of 31.07.2001, republished in the Official Journal of Romania, Part I, no. 757 of 12.11.2012, republished in the Official Journal of Romania, Part I, no. 316 of 30.04.2014.

technologies, such as: a name added at the end of an electronic message, a digitised image of a handwritten signature, a secret code for credit cards, a biometric identification tool, a digital fingerprint, or a retinal scan, and even a digital signature created through cryptography. (Bocșa, 2008).

An electronic signature has a dual role: it identifies the signatory and expresses his/her will to approve the content of a document; therefore, it is a security element.

In order for an electronic signature to have legal effects, it must meet certain requirements laid down by law, more precisely: the use of signature creation and verification devices and the existence of a valid certificate from a certification service provider, the lack of which renders impossible the assimilation of an electronic document with a private document. (Bocșa, 2008).

In the notarial activity in Romania, electronic signatures are not used for remote signing of documents; however, they are very commonly used for signing documents that require certain registration formalities for enforceability purposes. For example, declarations of inheritance option, which must be signed electronically by the notaries public who draw them up and registered in the National Notarial Register of Inheritance Options; or powers of attorney, which must be signed and registered the same way in the National Notarial Register of Powers of Attorney and their Revocations.

Although currently the electronic notarial activity in Romania does not include a procedure for remote signing of contracts based on electronic signature, such procedure is of major importance if such possibility will be regulated in the future, as well as for relations that go beyond the borders of our country. Currently, the possibility to sign contracts remotely in Romania exists mainly in the e-commerce field.

1.5. Applications of electronic procedures in notarial activities

One of the most important innovations for notarial activities in recent years is the setting up of National Unique Registers by the Union of Romanian Notaries Public in 2007; these registers are kept in both paper and electronic format. I mention this notarial activity because it has significant applicability from the perspective of procedures performed electronically, given that access to, along with each registration and query of these registers, are based only on the notary's electronic signature.

The National Registers have been established mainly to facilitate and secure notarial procedures, and to align the notarial activity in Romania with the notarial activity carried out in the EU Member States. Their purpose is to develop the activity of notaries public, to create centralised records of certain types of documents, and to ensure celerity in the handling of notarial instruments and procedures.

Thus, the National Union of Romanian Notaries Public has set up registers that contribute greatly to securing the civil notarial circuit. This enables notaries public to check whether a power of attorney has been revoked, whether there is a notarised last will and testament, the parties' matrimonial property regime, whether another divorce application has been filed with another notary, and even to obtain a unique national number for a divorce certificate.

Currently, the National Union of Romanian Notaries Public operates the following registers:

- The National Notarial Register of Inheritances (R.N.N.E.S.), which keeps records of inheritance cases involving Romanian, foreign or stateless citizens, whose last home address was abroad or unknown and who owned assets in Romania,
- The National Notarial Register of Inheritance Options (R.N.N.E.O.S.), for the recording and verification of notarial instruments relating to acceptance of inheritance, waiver of inheritance and revocation of waiver, and documents whereby the appointment as will executor is accepted or denied,
- The National Notarial Register of Gifts (R.N.N.E.L.), which keeps records of wills and codicils, declarations of waiver thereof, retractions of will and codicil revocations, will instructions regarding amounts of money, valuables or securities deposited at credit institutions and revocations thereof, donation contracts, acceptance of donation offers, revocation of donations, and declarations removing the effects of debarment,
- The National Notarial Register of Powers of Attorney and their Revocations (R.N.N.E.P.R.), which keeps records of powers of attorney, representation agreements and their revocations, signed before a notary public; management agreements and their revocations, authenticated by notaries in Romania and Romanian diplomatic missions abroad,
- The National Notarial Register of Matrimonial Property Regimes (R.N.N.R.M.), for the recording and checking of matrimonial property regimes adopted by spouses, and of marriage contracts,
- The National Notarial Register of Creditors - Natural Persons and Oppositions to Estate Partition (R.N.N.E.C.), which keeps records of creditors' claims regarding the debts owed to them by natural persons,
- The National Notarial Register of Divorce Applications (R.N.N.E.C.D.), which keeps records of divorce applications filed

with notaries public, in order to avoid double registration, and of notaries' resolutions in divorce procedures.⁴

All these registers may be consulted not only by notaries public, but also by state institutions and natural or legal persons, if they provide proof that they have a right or interest.

Notaries public must provide as soon as possible any information related to such procedures and notarise documents only after consulting these registers; the consulting of such registers is exclusively computer-assisted.

Another important step in electronic notarial activities is the Cooperation Protocol signed on 26.05.2009 by the Ministry of Administration and the Interior⁵, the Special Telecommunications Service, and the National Union of Romanian Notaries Public. The purpose of this cooperation is to develop, implement and use a computerised system that enables notaries public to confront the information appearing in Romanian identity documents of the persons requesting notarial documents and procedures with the data in the National Register of Persons, provided by the specialised structures of the Ministry of Internal Affairs, under the law.

This system is functional and undeniably useful, for it enables notaries public to verify whether an identity document presented to him/her is valid and registered in the official records of the Ministry of Internal Affairs. In this case, notaries public sign in based solely on qualified digital certificates held by each of them.

Although there are several applications of electronic systems in the notarial field in Romania, I have chosen to mention only the two most important notarial electronic applications in order to emphasise their importance in the evolution of the notarial activity.

2. Internationalisation of notarial activities

We can notice the increasing tendency of the European Union to computerise the procedures carried out in notary offices. Thus, the European Union has set up the Council of the Notariats of the European Union (CNUE), of which Romania is part as of 1 January 2007; it is an official body representing the notary profession in the relations with European institutions. One of the Council's working groups is e-justice, whose objective is to develop electronic services in the field of justice at the level of the European Union and make them available to all Member States.

In the same direction, as of 1 November 2007, the Council of the Notariats of the European Union has launched the European Notarial Network

⁴ <http://www.uniuneanotarilor.ro/?p=4.2>, accessed on 07.03.2019.

⁵ Currently named Minister of Internal Affairs.

which deals with cross-border cases; it is intended for notaries in all Member States of the Council.

This body does not provide legal advice; instead it provides technical support to facilitate certain procedures involving foreign elements, aiming at improving cross-border cooperation among notaries. Thus, each notary may send a written request to his/her national interlocutor, who will process it or contact a foreign interlocutor who is part of the European Notarial Network's partner organisations; the entire procedure is carried out electronically.

Belgium and France had the initiative to set up the European Network of Registers of Wills, under the Basel Convention in 1972, intended to facilitate access to information contained in European registers of wills. In addition to the classic ways of sending information by fax or post, another way to send information to the central register of wills is by using an electronic form. (Tocoian, 2006).

In this respect, the ARERT (The European Network of Registers of Wills Association) project has been developed to interconnect the national registers of wills at the continental level, so that every European notary may interrogate this network via the Internet.

In Italy, NotarelSpA, a joint-stock company operating in the Italian notarial field, was set up in 1997 to meet the needs of computerising the notarial activities. This company operates as an "interface between Italian notaries and various public administration institutions, which manages the procedural interdependencies involving the use of computer systems." (Popa & Mihăescu, 2006).

In Belgium, the 10th anniversary of the "e-notariat" was celebrated in 2011, with all IT projects aimed at providing the most efficient service to notary offices and citizens. At the beginning, notary offices were connected with all the notarial and regional institutions via a communication and information exchange platform; later, this exchange of information has taken place electronically with state institutions and public registers as well.

Moreover, tools have been introduced to facilitate the work of notaries, such as software to calculate fees and various pecuniary rights and obligations of the parties. The Bank of Notarial Deeds (NABAN) has been created as a result of the use of electronic authentic instruments; this project is not yet completed, but it will be of significant practical utility.

I have presented a few examples to show the growing interest of the European institutions in developing the activities performed electronically and in improving the existing procedures, which are particularly useful tools in the context of globalisation.

Instead of conclusions - advantages and disadvantages of electronic procedures in notarial activities

The increasing use of electronic procedures in notarial activities has remarkable advantages, especially due to the growing number of legal deeds that the representatives of this profession must handle: electronic procedures facilitate the drawing up and notarisation of documents, the communication between institutions, and the quality and promptness of the offered services.

Over the last 20 years, we went from writing documents using typewriters to writing documents using computers, which are now indispensable to any notary office; now, we even have institutional intercommunication by e-mail, and this was only a desideratum a few years ago.

The development of such procedures is foreseeable in this direction, especially the multiplication of the notaries' competences to cover other electronic documents than those currently regulated, as a result of the computerisation of all activities in any field.

Although currently the notarial activity in Romania is based mainly on hard copies, the involvement of notaries in the field of new technologies is a topical issue and a continuous concern in the EU States, with consequences on the notarial activity in Romania, which constantly adjusts its rules and procedures to the international ones.

The prevailing field where electronic signatures are used in Romania remains e-commerce and the remote signing of certain contracts, but current trends and practice show an increasing use of electronic signatures in notarial activities. A major advantage of electronic activity in the notarial field is that there is a real opportunity to cut red tape and considerably reduce the time needed to carry out notarial procedures.

However, the inconveniences of informational and electronic development in notarial activities should not be neglected. The role of a notary in understanding the true will of the parties in the absence of a real dialogue may be diminished, and this may result in inadequate procedures. On the other hand, the electronic environment is not better protected against its own threats, since the variety of crimes and the rate of specific crimes continue to increase. Therefore, while the electronic environment has undeniable advantages, it has to deal with the vulnerabilities to which computer systems are exposed.

All branches of law will have to respond to the explosion and development of information technology and the Internet; in order for the electronic activity in the notary field and in other similar areas to keep up with this fast-paced development, all the actors involved in such procedures must be kept informed and national systems must be adjusted.

Since it is not a mere exchange of information, but significant legal effects are generated as well, a legal framework must be created and

continuously updated to adjust to the accelerated globalisation and implicitly to the electronic activity, including through amendments or even legislative innovations, so that the Romanian notarial activity may keep up with the globalisation phenomenon.

Are current national and international rules sufficiently developed to cover the current legal effects of the globalisation process? I think the answer is no, if we consider the accelerated pace of globalisation, but there are visible major amendments to the traditional rules in this respect.

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