

DIGITAL SIGNATURE AND OTHER OBSOLETE, CONTEMPORARY AND MODERN MEANS OF EXPRESSING CONSENT IN NOTARIAL ACTIVITIES

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Abstract

Digital signature has not been an unknown tool for most notaries for quite some time, especially in the European area. Whether it is used solely for a more efficient communication with the public registers that are used very frequently in notarial activities or even for certain types of notarial instruments, this mechanism has become as present in the life of each notary as inkpot pens used to be in the past.

Within the same Latin law system, some States confer a greater legal value to such a mechanism, while other States limit its application to internal procedures. Although its degree of use is very different from one State to another, in some States (such as France) digital signature replaces holographic signature even in the authentication procedure, which is one of the most significant notarial activities. Of course, for the time being, this mechanism is only an alternative and does not exclude the possibility for the parties to continue to use the traditional means of expressing their consent.

Also providing a historical overview of the way consent is externalized, this study aims to examine the extent to which digital signature is currently used by public notaries and how it has become an indispensable tool in current notarial activities. At the same time, the study also provides a perspective on extending the use of digital signature in several types of notarial procedures or even the possibility to replace digital signature with systems that identify people based on artificial intelligence, such as digital fingerprint and facial recognition.

Key Words: *notary, consent, digital signature, digital fingerprint*

JEL Classification: [K15]

1. Obsolete and contemporary means of expressing consent

The activity of notaries in Romania, as in other countries, has a long tradition and over time it has adjusted to historical and legislative changes specific to each stage of development. In countries where land ownership emerged and was recorded earlier, notary documents have been recorded long before they have in Romania.

The first notarised documents in Romania date back to the 12th century in Transylvania and the 15th century in Wallachia and Moldova; estate distributions and authentication of wills appear to be part of notaries' regular activities since the 1800s. (Filitti 2015, 2016).

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In the past, the activities of notaries were organised as adjacent tasks to the royal, clerical or judicial ones; (Filitti 2017) currently, there is a self-standing organisation of notaries' activity, which is regulated separately as a legal profession.

All this long evolution of this profession has put its mark on how notarial deeds are carried out, including how consent is expressed in the authentication procedure, which is the most commonly used one in the notarial field, but also on the other types of procedures involving verification of the applicants' wish, such as estate distribution, certifications and, more recently, amicable divorce.

It can be noted that, regardless of the time in the profession's history, it is not possible to carry out a notarial procedure without the consent of the person(s) requesting such a procedure.

From the evolutionary point of view, we can see that there are various possibilities to draw up notarial documents, which are often adjusted according to the state, health or even education of individuals. Thus, we can identify two of the most important premises underlying the evolution of how consent is given, i.e.: the tools which could be used over time and the reasons relating to the health or education of individuals.

Based on these premises, we can see how in Romania, quite recently in terms of evolution, there was a need for specific regulations on citizens' health or education, more specifically both for people who know and can write and read, and for people who are cannot write because of infirmity, illness and any other objective reason or are illiterate. Although such regulations are still found today in national law, they are adjusted to the security requirements of the current society.

In this regard, Law no. 358/1944 allowed the placing of fingerprints on notarial documents by illiterate persons or people who were unable to sign and set forth very detailed regulations on the requirements and specific method of fingerprint impression.

Although the regulations that followed the said law, i.e. Decree no. 377/1960 and the Implementing Regulation for the decree, did not maintain that procedure, fingerprints have been used until recently in the notarial practice, most probably in the light of the certainty that an expert's report on such fingerprints provided and due to the defining uniqueness of fingerprints.

The fingerprint procedure is one of the most telling examples of outdated means used to express consent in a notarial procedure which, while it no longer had any legal support, it continued to be used in recent notarial practice.

The current legislation states that the main way of externalising consent in notarial documents is the holographic signature affixed to the originals of documents, as well as to the application forms based on which such documents

are prepared. Thus, Article 92 of Law no. 36/1995 makes express reference to the fact that the externalisation of consent is materialised by signature. (Popa I. F. et al. 2016).

The law states very explicitly how a valid consent must be given in special, yet frequent situations encountered in notarial practice. In this respect, when a person requesting a notarial instrument is deaf, mute, deaf-mute or blind, the procedure varies depending on whether such person is literate, in which case special mentions are made both in the content of the instrument and in the authentication text, or whether such person cannot write, in which case the presence of an interpreter is required.

In addition, the procedure is expressly regulated for persons who cannot sign regardless of the causes, and it is applied even in cases of disability, disease or illiteracy. In such cases, consent will be given only in the presence of two assisting witnesses who will sign the document, and appropriate mentions thereof will be made in the authentication text.

As we can note from the cited provisions, the presence and signatures of the two witnesses replace the objective inability of a person to sign a notarial instrument, in contrast to the previous procedure involving the use of the person in question's fingerprint.

According to the original version of the Law on notaries public and notarial activity, prior to this law's current republication, the method of expressing consent in the aforementioned special cases was only the notary's reference to such circumstance in the document, and the presence of witnesses was optional, not compulsory.

We can therefore see the rapid development of the rules applicable to the same situation in a relatively short period of time over the entire existence of the notary profession. In the special situations described above, the expression of consent went from fingerprinting to the mandatory presence of two witnesses who replaced the signature of the parties. Although it does not seem to simplify the procedure, the reason behind such amendments is to give greater certainty to the legal relationships arising from execution of notarial instruments.

2. Modern means of expressing consent

While the Romanian legislation does not currently regulate other means of expressing the parties' approval as to the content of a notarial instrument other than those referred to in the previous chapter, with some exceptions to be detailed later, we have chosen to present some of the means that are starting to be used in the legislation of other countries having a Latin-type legal system, similar to Romania's system.

Such a means is digital signature, which is defined in Romania by Article 4(3) of Law no. 455 of 18 July 2001 on digital signature as "*made up*

*of electronic data attached to or logically associated with other electronic data and serving as an identification method”.*¹

The definition of this mechanism reveals that digital signature is not a graphic representation of a holographic signature to be incorporated in a document, but a digital representation of unique data. (Racolța 2019)

Of reference for the applicability of digital signature in the notarial field are the provisions of Law no. 589/2004 on the legal regime of the electronic notarial activity², which in Article 5 lays down certain procedures of lesser importance that notaries public may carry out in electronic form based on digital signature, i.e.:

- a) authentication of electronic copies of original documents;*
- b) date certification by marking the time of documents that meet the requirements laid down in Article 2(1) and attesting the place where they were signed;*
- c) receipt and storage of documents meeting the requirements laid down in Article 2(1) in the electronic archive;*
- d) notarisation of translations in electronic form;*
- e) issuance of duplicates;*
- f) other operations provided for by law.*

Although not used for remote signing of documents prescribed by law as falling under the material competence of notaries public, with the exceptions mentioned above, digital signature is indispensable for the activity of notaries due to the fact that digital signature has replaced classic holographic signature in many procedures involving interaction with other institutions. (Racolța 2019) For instance, the communication of notary offices with some city/town halls, more recently also with the Cadastre and Land Registration Offices, and the national notarial registries keeping records of certain documents, such as wills, donations, powers of attorney, statements of option in estate distribution. Thus, notaries public can check, based on digital signature, the matrimonial regime of the parties to a document, the revocation of powers of attorney, the existence of wills or statements of option in estate distribution; moreover, they can register such documents electronically.

The use of digital signature is notable in France, where the first electronic authentic instrument was signed for the first time worldwide on 28 October 2008. (Racolța 2019) Since then, digital signature has become a regular means for signing authentic instruments in France, involving however the presence of each party in front of a notary in different cities/towns.

¹ Published in the Official Gazette of Romania, Part I, no. 429 of 31.07.2001, republished in the Official Gazette of Romania, Part I, no. 757 of 12.11.2012, republished in the Official Gazette of Romania, Part I, no. 316 of 30.04.2014.

² Published in the Official Gazette of Romania, Part I, no. 1227 of 20.12.2004.

A very recent and relevant regulation for the electronic notarial activity in France, which has been adopted in the current context of social isolation due to the pandemic caused by the SARS-COV2 virus, is Decree no. 2020-395 of 3 April 2020³. This decree authorises the signing of notarial instruments electronically and remotely, without the parties being required to be present in a notary's office. The applicability of this decree is currently set for a limited period of time, i.e. for the duration of the health emergency state. The urgent adoption of this decree was also motivated by the fact that it was impossible for the parties to be physically present on the premises of notary's offices due to the social distancing requirements.

Italy has also adopted a procedure that is similar to the one in France by implementing the iStrumentum software since 2013. The procedure that this software involves consists in the digital signing of a document by the parties thereto, followed by the digital signing of that document by the notary; then the document will be archived in electronic format.⁴

In recent years, other mechanisms have been developed and they can perform the same role of digital signature, ensuring the identity of the persons who use them and, at the same time, the expression of their consent to a given procedure. Such mechanisms are electronic fingerprinting and facial recognition, which are already used in various economic or professional activities, for example in the commercial or banking field. Currently, none of these electronic tools are used in the notarial field; however, they could be an alternative to digital signature, especially if they turn out to be less vulnerable to security breaches.

Conclusions

We can see the major usefulness of digital signature in the regular activities of notaries but, for the time being, digital signature is not likely to be used for authentic instruments in Romania; however, digital signature has started to be used successfully in other countries, thus ensuring the continuity of the notaries' activity irrespective of the social context.

This is why we have chosen to elaborate on the current situation of one of the most important digitisation mechanisms in the notarial field, which can be a premise for the development of notarial activity in this direction, as is the case of many other activity areas.

If we analyse how consent expression has evolved in a relatively short period of time, we can see the dynamics of their regulation and how the notary's institution has tried to meet both the social and the digitisation requirements.

³ Decree no. 2020-395 of 3 April 2020 authorizing the remote signing of notarial documents during the health emergency period, published in JORF no. 0082 of 4 April 2020.

⁴ <https://www.notartel.it/notartel/contenuti/servizi/identita-digitale/istrumentum.html>, accessed on 10.04.2020.

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