ELECTRONIC FORM - CYBERSPACE AND CLASSICAL PARADIGM OF FORMALITIES

by

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The objective of the paper is to inquire the place of electronic form in legal order and present it in the light of its emergence the new paradigm of formalities. The goal is to search whether the electronic form is subtype of classical written form or is itself a sui generis category, which apart from written form, is established as independent type of form. Further, it is intended to explore whether such different perceptions of electronic form can have any practical implications. At the end paper will inquire the interrelation of electronic form and traditional written (paper based) form.

KEY WORDS:
Electronic form, paper, written form, formalities, signature.

INTRODUCTION [1]

Empirical study shows that emergence of new communication mediums have exerted the significant influence on law. This assertion is completely axiomatic towards electronic mediums, which serve as powerful substitute for to classical means of communication in the field of social interaction. The environment made by these electronic communications, referred to frequently as cyberspace, disposes with quite pretentious substance. Its essence is completely predetermined by certain technical rules, which rejects everything not substantially compatible to its. The feature of incompatibility, at the same time, compels the law to quest for the novel approach for regulation of cyberspace. Therefore, in the process such quest sometimes

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law has to deny its classical categories and use (or invent) new ones in order to achieve pertinent efficiency in cyberspace.

Inquire of general impact of cyberspace on law is not the goal of this paper. Since electronic mediums are diffused throughout the whole legal system there is the need to shift from the general inquiry to specific impact of cyberspace on concrete legal spheres, institutes or theories. Consequently, below we intend to focus on specific fragment of such influence, concretely to deal with the impact of modern electronic communications and cyberspace on paradigm of formal requirements (formalities), which sometimes is applied by law as indispensable prerequisite for validity of juridical acts. The subject matter of the inquiry is what changes have occurred in theory of formalities as the result of expansion of cyberspace and how much is the departure from classical perception of formalities. The ambit of departure will inevitably cause corresponding need for correction of traditional model of formalities or at extreme case its full redefinition.

However, our aim is not to achieve the comprehensive presentation and final picture of new model of formalities. Due to its multifold layered complexity which is characteristic to this issue, the paper will a) examine some problems emerged in the process of novel modelling of formalities and b) ascertain the aspects which are necessary to be taken into account while redefining the traditional model of formal requirements.

FORMALITIES IN COMMUNICATION [2]

The humanity has invented a great deal of means and ways of communication. The preference given to the types of communications was determined by various factors, among which two factors shall be particularly noted: 1) the need for the promptness of communication 2) requirement of constant preservation of content expressed through communication. The priority between these two interests is an issue of matter; business generally is more concerned with the requirements of promptness and swift exchange of information, while certain policy interest, on the other hand, gives preferences to the preservation of content of communication, its capture in constant mode and attesting its authenticity with additional means (for example, notarially attested document).

In order to examine the contemporary model of formalities it is important to say some words about its traditional model, existing before introduc-

tion of electronic mediums and new forms of information preservation. Theory of formalities (referred also as theory of formalism) is the ancient doctrine requiring that certain declarations of intention shall be embodied in special form (corpus), respectively should be grasped in paper and signed personally by signor.

The abstract insight to traditional paradigm of formalities leads us to very simplified distinction between written and nonwritten form. Within this classification, written form is traditionally prescribed by two requirements: documentation and identification. In the perspective of these factors the mediums of written form were varying according to practical advantage of their use (for example transition from wood or stone as writing to the use of paper as writing), however always preserving the mentioned assignments. In any case, the content of communication should be captured on paper and it should be signed by respective signer (signature). However, taking into account above mentioned character of cyberspace, neither paper nor handwritten signature is applicable in cyberspace. They are substituted by electronic document (e-document) and electronic signature (e-signature), sequence of which, as legal intuition can tell us, generates peculiar form - electronic form. The latter along with classical types of form (paper, oral and concludent) is the new corpus for legal transactions, where paper is replaced by e-document (intangible in its substance and compliant only with certain technical requirements) and handwritten signature is substituted by e-signature. If we agree with the notion "electronic form" (by which we refer to the communications carried out via electronic mediums, which enable preservation of communication in constant manner) the question which naturally arises is: where is the place of electronic form within the classical paradigm of formalities? What is the content of paradigm of formalities in the perspective of the modern technological (electronic) changes?

ELECTRONIC FORM [3]

From the outset, we can give very tentative and incomplete answers to the questions posed above: a) either electronic form is sui generis form. Consequently, this concept perceives electronic form as something different from written form and having its own, autonomic place within the paradigms of formalities; b) electronic form as the equivalent of written form. The second concept contemplates that electronic form is one kind

(type) of written form and is subordinated under broad category of written form, consequently equating it to traditional concept of paper.

Above drawn dichotomy over the status of electronic form is not the formal or theoretical one, but in practical realm can lead to extremely divergent results. The idea of separation is with practical implications. The first practical difference and even theoretical one can be noted in legal structure (legal positivism rule) which vests legal power to use of electronic form. Mainly in case of mandatory written form, prescribed by legislation the electronic form can not be applied by parties (even using the sophisticated technology for this purpose, for example e-signature based on qualified certificate). Additionally, in inter parties relation where the written from is required by parties agreement the parties can use the electronic form only through prior agreement assigning to electronic form same legal value as to written form.[1] Another practical consequence is conspicuous in following situation: parties agree that relations between them should be carried out in electronic form (pactum de forma). Application of first concept to this situation might lead to quite odd results. For example, the use of paper instead of e-mail will probably be contrary to parties' agreement. Consequently, no relevant legal consequences will not be imputed to such paper.

Apart from the described practical differences, the theoretical dichotomy described above is not subtle and lacks certain precision. In the light of modern tendencies and practices, none of concepts can be presented as absolute. As for the first concept it should be noted that in certain situations the difference between classical written (paper) form and electronic form are blurred and can be completely eliminated. Such levelling is due to the fact, that the functions of written form,[2] traditionally assigned to it, are successfully fulfilled by the electronic form.[3] Most electronic messages constitute writing if they are understandable and can be saved. Thus, there is no need for considering electronic form as sui generis form as long as the re-

[1] The idea here lies in the opportunity of parties to promulgate some form as written form. However, such opportunity shall be restricted. For example, certain form, which at least cannot perform the documentation function, cannot be promulgated by parties as equivalent to written form.

[2] Traditionally the following functions are attributed to the written form: clarification function, identification function, authenticity function, verification function, evidence power, warning function, information (documentation) function.

[3] See Heusch, C. A. 2004, Die Elektronische Signatur – Anderung das BGB aufgrund der Signatur-Rechtlinie (1999/93/EG), Dies Koln 04, Berlin, pp. 170-185.

quirement of functional equivalence is met. At the same time, the caveat of the second concept is that not in every situation electronic form can be equated to written form. Some cases for supporting this allegation can be indicated here. Certain electronic documents have their legal value only in the frame of being exclusively in electronic form. For example, electronic document signed by electronic signature based on qualified certificate. Here the demarcation line between e-document and paper (traditional written form) is clear and conspicuous. Moreover, within the second concept additional two problems can arise in respect of equation of electronic form with written form: a) if parties agree on written form does it means that simultaneously, in any circumstances, they admit e-form; b) can, for example, person create testament by electronic means. The answer to the first question is rather difficult. Unlike paper, which is tacitly acknowledged to be effective in any case, the legal effect of use of e-mediums is not clear. The party who is not accommodated with relevant technical means in order to get acquainted with the communicated intention is "out of game".[4] Similarly, no effect can flow from electronic communication, if the recipient is unable to open it. Neither has such recipient any obligation to ensure pertinent technical means for receiving such intention. Precisely speaking any intention, made in electronic form, is not effective towards him. Consequently, in this case the application of electronic form is restricted. As to the second issue, there is the fossil conviction that to the certain transactions the use of e-form has to be a priori excluded. Testament is one example and there are other examples as well.[5]

Although the arguments, produced for each kind of exemptions, differ, almost all restrictions have the same general source. Concretely they flow from the still feeble standing of e-communications in the conciseness of society (in comparison to paper form, which is traditionally has the fossil position as the reliable instrument of communication). Such standing justifies wary approach to equation of electronic document with paper in important

[4] This is particularly relevant in states where the use of internet in population is relatively low.

[5] According to the EU Directive on E-commerce these exceptions are: a) contracts that create or transfer rights in real estate, except the rental rights; b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; c) contracts of suretyship granted and on collateral securities furnished by persons acting outside their trade, business or profession; d) contracts governed by family law or by law of successions.

cases. However, in some situations, arguments in favour of exclusion of electronic form are superfluous and too artificial and mainly in respect of warning function of written form,[6] which sometimes is overemphasized. The warning function, set as the main argument for introducing exemptions, can also be fulfilled in electronic environment; for example double click requirement or relatively long procedures in case of application of e-signature (particularly e-signature based on qualified certificate), which theoretically hinders the user from the precipitation (Übereilung). It can be expected that the exemptions set in EU Directive on E-commerce and subsequently adopted by many national legislations soon will be revised and changed.

TRADITIONAL SIGNATURE AND E-SIGNATURE [4]

The issue of paradigm of formalities gets more complicated in the light of variety of signatures contemporary used in legal transactions. The importance of signature in the paradigm of formalities is determined by two factors: a) the writing itself does not have any legal relevance. Such relevance is constituted only where legal consequences flowing from the writing can be imputed to certain person. b) as long as both, paper and electronic document can preserve the content of intention, the different stance to their legal consequences exactly lies in the charter of signature adduced (requirement of authenticity and identification). Here I would like only to stress the widely accepted practice of equation of e-signature with handwritten signature (consequently deleting the legal difference between electronic form and written form), which is inspired by EU directive on E-signature. According to art. 5.1 Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data.

The introduction of such equation (handwritten signature=e-signature based on qualified certificate) is tricky and can have some adverse effects. The statutory requirement for written form is scattered within the legislation in different statutes. For example in consumer legislation there is the

[6] Warning function is the main argument for setting of restriction on use of electronic form.

reference to word of 'writing' enabling the consumer in written form to implement his rights against professional supplier. In terms when the state blindly copies art. 5.1 of EU Directive on E-signature, the consumer, willing to implement his rights in electronic form, would be compelled to use the e-signature based on qualified certificate, if the use of handwritten signature is impossible or due to time prescription such use is unfavourable. Consequently, such situation would lead to the increase of transactional costs on the part of customer (weak party) thus depriving him effective legal measures. This also is in contrast with idea of simplification (erleichterung), which is prominent postulate of international legislation on internet and electronic communications.

In order to avoid above described situation, some changes shall be made to the concept of written form, specifically relaxing the requirements of the writing and modifying the concept of written form. Such modification shall aim to envisage the situations where there is no need for the stringent authentication requirements, and what counts foremost is the need for preservation and conservation of content of intention, notwithstanding what kind of signature will be adduced to it (above mentioned case concerning the consumer can be the example). Thus, it would be inappropriate to adopt the notion of writing and its overall functions in stringent form (mainly function of authentication or identification). Where necessary and appropriate, the notion of writing shall be reduced only to satisfaction of documentary function no matter of the distinct level of reliability, traceability and integrity with respect to paper document. Of course the evidential weight of such writing is another issue, which shall not a priory prejudice its legal value.

CONCLUSION [5]

At the conclusion, we can repeat that difference between paper and e-document is not fully overcame. Although the worldwide preference is given to the second concept, still the latter is applied with certain reservations. The subsisting dichotomy between e-document and paper makes the paradigm of formalities as multilayed concept, since it still has to preserve within the written form the dichotomy such as original and nonoriginal. In result, the notion of written form is required to carry out further internal substructuring.