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## Electronic Documents in the Hungarian Labour Law

### *I. Introduction*

Recently, during the realisation of employment relationship information flow is often carried out by means of electronic devices and electronic documents, and therefore a more and more frequently encountered issue is the judgement of communications via such channels in law enforcement. Observing this trend, the legislator strives to codify the usability of electronic documents (nowdays both Hungarian civil law and labour law considered this condition.) In labour law enforcement the most important question about creating the basic written documents of an employment relationship (entering, modifying, terminating the relationship) in an electronic form is the demonstrability of their contents, and in the case of unilateral statements, the demonstrability of the notification of the other party.

The basic problem about electronic documents is that although it is easier to create and handle information, and it is faster to transmit it than in a paper based process, the very advantages of electronic documents – the ease of their creation and untraceable modification – are a disadvantage from the point of demonstrability.<sup>1</sup> It is very easy – exactly because of the advantages of electronic documents – to create “perfect” imitations of simple electronic documents that do not show signs of manipulation, therefore it cannot be established solely based on the examination of the document if it was manipulated or not.<sup>2</sup>

Further on, we will give an overview of these problems by analysing the Hungarian labour law legislative process and the law enforcement practice of the Supreme Court, and by outlining the questions to be solved by law enforcement.

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\* senior research fellow, MTA-PTE Comparative and European Employment Policy and Labour Law Research Group – This study was realised in the framework of MTA-PTE Comparative and European Employment Policy and Labour Law Research Group [2011TKI435]. Head of the research group is dr. György Kiss. The research was funded by OTKA grant K112961 “Basic economic and labour law elements of the employer’s power to influence the legal relationship, and the changes of interest and cessation of interest during the fulfilment of the employment relationship”.

<sup>1</sup> ISTVÁN ZSOLT BERTA: *Nagy e-szigno könyv. (The Great Book of E-signature.)* Microsec Kft., Budapest, 2011. p. 23.

<sup>2</sup> BERTA 2011. p. 24.

## *II. Principles and terminology*

Electronic communication can take place in various forms and by various means, and the technical solutions have several denominations in everyday communication, law enforcement and commentaries. As a starting point for the use of concepts, the obvious choice is to consider the concept system of the law on electronic signature (further on: LES) from Hungarian codified law.<sup>3</sup> The bottom line of the use of concepts here is the distinction between the so-called simple electronic documents and the so-called enhanced security and certified electronic documents (further on together called enhanced security electronic documents), and the consistent use of this distinction in relation to legal consequences.

### *II. 1. Simple electronic document*

The so-called simple electronic document includes among others the one most used in everyday communications, namely e-mail. According to the concept system of LES, e-mails do not qualify as enhanced security documents; as stated in the introduction, they can be simply produced, modified, and the modification is difficult to prove afterwards. LES only states about this electronic document that it cannot be rejected simply on the grounds that it exists in an electronic form.<sup>4</sup> This was formerly called “simple electronic signature” but after the 2004 amendment of LES it does not have a separate name any more.<sup>5</sup>

According to LES, if the relevant act prescribes written form, this requirement can be fulfilled by the use of an electronically signed electronic document.<sup>6</sup> Hungarian judicial practice declared that simple electronic signature includes such a signature, lacking any means of technological security, where the signatory writes his or her name or other identifier at the end of an electronic text; this signature is not suitable for proving the identity of the signatory or that the signed text has not been changed since the time of the signature. These do not qualify as enhanced security electronic signature.<sup>7</sup>

### *II. 2. Enhanced security electronic document, certified electronic document*

According to Section 4, Paragraph (1) of LES, if a legal act prescribes a written form in the legal relationship, this requirement can be fulfilled by the use of an electronically signed electronic document if the document is signed with an enhanced security electronic signature. An electronic signature is an enhanced security electronic signature if it is suitable for proving the signatory's identity, it can be uniquely associated with the signatory, the

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<sup>3</sup> Act XXXV of 2001 on Electronic Signature (further on: LES)

<sup>4</sup> The acceptance of an electronic document – including its use as a means of proof – cannot be denied, and its suitability as a means of making a legal declaration and having a legal effect cannot be questioned solely on the grounds that this document exists in electronic form [LES, Section 3, Paragraph (1)].

<sup>5</sup> BERTA 2011, p. 30.

<sup>6</sup> LES Section 3, Paragraph (5).

<sup>7</sup> Gf. 13.40.403/2009/7.

devices used for its creation are solely controlled by the signatory, and it is attached to the contents of the document in such a way that all changes – after the act of signing the document – can be perceived.<sup>8</sup>

This approach is based on the concept that an authentic document can be created not only on paper but also electronically. Since with paper based documents the authenticity is proven by the signature produced on them by hand, electronic documents can be verified by an electronic signature. Electronic signature does not mean a hand made and scanned signature but it is a special encoding; the authenticity of the resulting encoded document is ensured by its structure.<sup>9</sup>

According to LES, a document fulfils the requirement of being written if at least an enhanced security signature is attached to it, and a document with a certified electronic signature – according to the act on the rules of civil procedure – is a private document providing full evidence.<sup>10</sup>

In the case of electronic documents a complex encoding process is carried out, and the resulting signed and encoded document has a special structure that proves the identity of the encoding person, and exactly what document he or she encoded.<sup>11</sup>

It must be emphasised that the rules of LES (with the exception in Section 3, Paragraph (1)) are about more solid solutions using cryptography, and the term electronic signature and electronic document means at least an enhanced security electronic signature.<sup>12</sup>

It is important to note that when the Labour Code, declaring in Section 22 the criteria that need to be met for an electronic document to match the legal status of a paper based document, does not state unambiguously the requirements about writing down, signing and communication of electronic documents, and their signatory.<sup>13</sup> These questions can only be answered on the basis of the properties (identifiability of its signatory, demonstrability of its communication) of the individual electronic documents (see the above system of LES). At the same time, it can also be stated that the Labour Code does not define the concept of one concrete electronic document but it regulates what criteria an electronic document must fulfil so that it could create legal consequences of “being in writing”.

### III. Legislative framework

Legislation strived for prescribing the consideration of electronic documents both in the codification of the Labour Code and the Civil Code, and there are also provisions about electronic documents in the Act on Civil Servants and the Act on the Rules of Civil Procedure.

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<sup>8</sup> LES Section 2, Paragraph (15).

<sup>9</sup> BERTA 2011, p. 187.

<sup>10</sup> BERTA 2011, p. 188.

<sup>11</sup> BERTA 2011, p. 188.

<sup>12</sup> BERTA 2011, p. 191.

<sup>13</sup> JÓZSEF CSEFFÁN: *A Munka törvénykönyve és kommentárja. (The Labour Code and its Commentary.)* Szegedi Rendezvényszervező Ltd., Szeged, 2014. p. 88.

### *III. 1. Concepts in the Labour Code and the Civil Code*

According to Section 22, Paragraph (2) of the Labour Code, a legal declaration shall be considered written if its communication is realised by an electronic document suitable for the unchanged recollection of the information contained in the legal declaration, and the identification of the declarant and the time of the declaration (further on: electronic document).

According to Section 6:7, Paragraph (3) of the Civil Code, a legal declaration shall also be considered written if its communication is suitable for the unchanged recollection of the information contained in the legal declaration, and the identification of the declarant and the time of the declaration.

The substantially uniform regulation of the issue in the Labour Code and Civil Code positively promotes uniform law enforcement. The wording of the Labour Code, namely that the phrase “further on: electronic document” is included in parentheses, may provide a basis for the conclusion that the act provides the definition of the electronic document, although the Labour Code (and the Civil Code) does not define a type of electronic document, but only codifies (general) criteria about electronic documents. (The electronic documents meeting these criteria shall be considered as written.)

### *III. 2. The solution in the Act on Civil Servants – legal declarations of crucial importance only on paper*

According to Section 20, Paragraph (3) of the Act on Civil Servants, a legal declaration shall be considered written if its communication is realised by an electronic document suitable for the unchanged recollection of the information contained in the legal declaration, and the identification of the declarant and the time of the declaration (further on: electronic document), except in the case of appointment and its acceptance, the modification of the appointment, legal declaration related to the termination of public service, administrative decision in disciplinary and indemnity related cases, administrative decision on the payment of penalty, order to eliminate incompatibility and demand note.

According to Section 20, Paragraph (4) of the Act on Civil Servants, the electronic signature or certified electronic signature of the declarant conforming to the act on electronic signature is not necessary for his or her identification.

According to Section 21, Paragraph (1) of the Act on Civil Servants, the written legal declaration shall be considered being communicated if it is handed over to the addressee or any other person entitled to receive it, or if the electronic document becomes accessible to them. According to Section 21, Paragraph (2) of the Act on Civil Servants, the electronic document becomes accessible when the addressee or any other person entitled to receive it has the opportunity to become fully aware of its contents in relation to their obligations as public servants.

The Act on Civil Servants – in contrast to the Labour Code – does not allow the basic legal declarations related to the public employment relationship to be stated in electronic

documents (Act on Civil Servants, Section 20, Paragraph (3)). This is somewhat in contrast to the principle of LES quoted earlier, according to which a legal declaration cannot be rejected simply on the grounds that it exists in an electronic form.<sup>14</sup> The other important difference is that it allows any other legal declaration (not listed in Section 20, Paragraph (3) of the Act on Civil Servants) to be stated in a simple electronic document, stating *expressis verbis* that an electronic signature is not necessary in such cases (Section 20, Paragraph (4) of the Act on Civil Servants).

#### IV. The assessment of the criteria of electronic documents in hungarian commentaries

##### IV. 1. Exposure of the question in the commentaries on the new Labour Code

When exposing this topic, the commentaries on the new Labour Code usually declare the usability of electronic documents in employment relationships, often referring to e-mail in general: a sign of the Labour Code being adapted to modern requirements is that it recognises e-mail as a means of legal declaration;<sup>15</sup> among others, text message and e-mail qualify as electronic documents.<sup>16</sup> A legal declaration shall also be considered written if its communication is realised by an electronic document suitable for the unchanged recollection of the information contained in the legal declaration, and the identification of the declarant and the time of the declaration (for example in e-mail, fax).<sup>17</sup> Simply including the name, even in electronic form, makes the given electronic document written.<sup>18</sup>

Sometimes the use of electronic documents is declared specifically in relation to the termination of employment relationship: employment relationship can be terminated in an electronic document (for example in e-mail or even text message), provided that it is suitable for the unchanged recollection of the information contained in it, and the identification of the declarant and the time of the legal declaration. Thus, the employee can terminate his or her employment relationship in a simple electronic e-mail. It is sufficient if he or she writes the following during the probation period: "Hereby I terminate my employment relationship during the probation period with immediate effect." Nevertheless, in the event of a dispute, he or she has to prove that the legislative requirements on electronic documents apply.<sup>19</sup> The provisions of Labour Code declare these widely spread – and also being considered in public

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<sup>14</sup> The acceptance of an electronic document – including its use as a means of proof – cannot be denied, and its suitability as a means of making a legal declaration and having a legal effect cannot be questioned solely on the grounds that this document exists in electronic form [LES, Section 3, Paragraph (1)].

<sup>15</sup> ISTVÁN HORVÁTH – ZSOLT SZABÓ: *Munkajogi navigátor. Az új Munka törvénykönyve a gyakorlatban.* (Labour Law Navigator. The New Labour Code in Practice.) AdóNet, Budapest, 2012. p. 67.

<sup>16</sup> KOLOS KARDKOVÁCS (ed.): *Az új Munka törvénykönyvének magyarázata.* (Explanation of the New Labour Code.) HVG Orac, Budapest, 2014. p. 83.

<sup>17</sup> CSÉFFÁN 2014. p. 88.

<sup>18</sup> KARDKOVÁCS 2014. p. 84.

<sup>19</sup> SZILVIA HALMOS – ZOLTÁN PETROVICS: *Munkajog.* (Labour law.) NKE, Budapest, 2014.

opinion as written – means of communication as written without any further requirements.<sup>20</sup> There are also statements according to which notification by means of an electronic document can also be realised by e-mailing a signed and scanned document.<sup>21</sup>

#### *IV. 2. The handling of the problem in the commentaries on Labour Code on the basis of LES*

Significant authors – aware of the several layers of the issue – after general remarks usually state that there are several types of electronic documents, and these should be considered in Hungarian codified law on the basis of LES: the question can be answered by interpreting the relevant provisions of Act XXXV of 2001 on Electronic Signature.<sup>22</sup>

According to Section 1, Paragraph (3) of LES, the act – apart from two exceptions – cannot be applied to electronic signature not qualifiable as enhanced security electronic signature. Nevertheless, Section 2, Paragraph (6) of the act also uses a concept relevant for electronic signatures not qualifiable as enhanced security electronic signatures. According to this, electronic data logically assigned to or inseparably attached to the electronically signed electronic document for the purpose of identification qualifies as electronic signature.

Comparing this provision to other provisions of the act, three types of electronic signature can be distinguished. “Simple” electronic signature, which is not a technological or technical solution but the attachment of another piece of electronic data to the existing electronic data, even in such a way that a name is written to the end of an electronic document. As we already stated, provisions of the act on electronic signature do not consider such “simple” signatures; they basically contain special directions about the other two forms of electronic signature, the enhanced security electronic signature and the certified electronic signature.<sup>23</sup>

Section 6:7, Paragraph (3) of the Civil Code basically defines the concept of electronic document – literally – identically as Section 22, Paragraph (2) of the Labour Code. Thus, concerning the previously outlined problem of signature, the case-law of administrative and labour courts can also be relevant.<sup>24</sup>

#### *IV. 3. Doubts and questions raised in the commentaries on the Labour Code*

If we look at all the details of the reasonings accentuating the legal declaration character of simple electronic documents in labour law, it is obvious that the authors also have doubts. These “uncertainty” issues and warnings<sup>25</sup> are all about the demonstrability of the contents and delivery of simple electronic documents. Case-law is uncertain to what extent electronically transmitted documents (especially e-mail and text message) qualify as legal declarations.<sup>26</sup>

<sup>20</sup> KARDKOVÁCS 2014, p. 83.

<sup>21</sup> TAMÁS GYULAVÁRI (ed.): *Munkajog. (Labour law.)* ELTE Eötvös Kiadó, Budapest 2012. p. 103.

<sup>22</sup> KARDKOVÁCS 2014, p. 84.

<sup>23</sup> KARDKOVÁCS 2014, p. 84.

<sup>24</sup> KARDKOVÁCS 2014, p. 84.

<sup>25</sup> KARDKOVÁCS 2014, p. 86.

<sup>26</sup> KARDKOVÁCS 2014, p. 83.

The Labour Code does not provide clues on the requirements about writing, signing, the signatory and the communication of electronic documents.<sup>27</sup> It is risky to communicate legal declarations having a substantial legal effect (for example termination of the employment relationship, termination of employment contracts with immediate effect) as an electronic document.<sup>28</sup> According to the current state of technology, it is difficult, sometimes almost impossible for the party making the legal declaration to prove the communication of electronic documents. Thus, it is risky to communicate legal declarations of a substantial legal effect (for example termination, withdrawal) in such a way, since according to Section 24, Paragraph (4) in case of dispute the party making the legal declaration has to prove that it has been duly communicated.<sup>29</sup>

#### *IV. 4. The issue in the commentary on the Civil Code*

The Civil Code declares that a legal declaration shall also be considered written if its communication is suitable for the unchanged recollection of the information contained in the legal declaration, and the identification of the declarant and the time of the declaration.<sup>30</sup> According to the commentary on the Civil Code, this rule was purposefully phrased in a technology-neutral way; juridical practice will have to establish what forms of legal declarations meet this requirement. Since the requirements of the Civil Code are in accordance with the conceptual framework of Act XXXV of 2001 on Electronic Signature, this means that an electronic document with a certified electronic signature without doubt meets the requirement of being written in the Civil Code.<sup>31</sup>

Nevertheless, other solutions can also fulfil the requirement set of the Civil Code consisting of three cumulative criteria. Such a case can be for example a technical solution providing online banking services.<sup>32</sup>

There is a reference in the commentary on the Civil Code for the above commentary on the Labour Code: the commentaries on Labour Code falsely state that this condition can be met by a simple e-mail or even text message.<sup>33</sup> (See the next point.)

#### *IV. 5. Conclusions that can be drawn from the standpoints*

It is uniformly accepted that (future) juridical practice will define how electronic documents are considered in legal disputes. On the other hand, if we add warnings and uncertainties about demonstrability to the statement of labour law commentaries – according to which simple electronic documents can be suitable to have legal effect –,

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<sup>27</sup> CSÉFFÁN 2014, p. 88.

<sup>28</sup> KARDKOVÁCS 2014, pp. 83–84.

<sup>29</sup> KARDKOVÁCS 2014, p. 86.

<sup>30</sup> Civil Code, Section 6:7, Paragraph 13.

<sup>31</sup> LAJOS VÉKÁS: Commentary on the Civil Code. Wolters Kluwer, Budapest, 2013. 1037. p.

<sup>32</sup> VÉKÁS 2013, p. 1037.

<sup>33</sup> VÉKÁS 2013, p. 1037.

then there is no substantial difference from the statements of the commentary on Civil Code, and the two markedly different standpoints seem to be not so far apart.

#### *IV. 6. Communication of the electronic document*

The demonstrability of the communication of electronic documents is also problematic. The electronic document becomes accessible when the addressee or any other person entitled to receive it has the opportunity to become fully aware of its contents.<sup>34</sup> Thus, an electronic document can only be regarded as having been communicated when its addressee has factual possibility to become aware of its contents. This viewpoint is supported by Section 21, Paragraph (2) of the Act on Civil Servants, according to which the electronic document becomes accessible when the addressee or any other person entitled to receive it has the opportunity to become fully aware of its contents in relation to their obligations as public servants.<sup>35</sup>

We must not forget that in case of dispute the party making the legal declaration has to prove that it has been duly communicated. In relation to this the commentaries state that according to the current state of technology, it is difficult, sometimes almost impossible for the party making the legal declaration to prove the communication of electronic documents. Thus, it is risky to communicate legal declarations of a substantial legal effect (for example termination, withdrawal) in such a way.<sup>36</sup>

#### *V. The case-law of the supreme court up to the present day*

The similar approach of Civil Code and Labour Code currently in force about electronic documents makes it possible that uniform civil and labour law practice be formed on the issue. Examining the case-law of the Supreme Court it can be concluded that the grounds of judgement are based on the rules of the LES when qualifying electronic documents. Because of this, judgements do not accept simple e-mail in such cases when a provision necessitates a written declaration.

##### *V. 1. Bidding in e-mail*

Bidding in e-mail in itself does not meet the requirement of being written (Pfv. VII. 22.271/2011/6). According to the grounds of the judgement, as per Section 4, Paragraph (1) of Act XXXV of 2001, if a legal act prescribes a written form of the legal relationship, this requirement can be fulfilled by the use of an electronically signed electronic document if the document is signed with an enhanced security electronic signature. Also, according

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<sup>34</sup> Labour Code, Section 21.

<sup>35</sup> KARDKOVÁCS 2014. pp. 86–87.

<sup>36</sup> KARDKOVÁCS 2014. p. 86.



to Section 2, Paragraph 15 of the act, an electronic signature can be considered an enhanced security electronic signature if it is suitable for proving the signatory's identity, it can be uniquely associated with the signatory, the devices used for its creation are solely controlled by the signatory, and it is attached to the contents of the document in such a way that all changes – after the act of signing the document – can be perceived.<sup>37</sup>

Bidding by e-mail in itself does not meet the requirement of being written, only a declaration exchange by electronic documents signed by enhanced security electronic signature (Gf. IV. 20.110/2007/4).

#### V. 2. Request for rectification in e-mail

In a case about a request for rectification<sup>38</sup> the Supreme Court stated that the request for rectification sent in e-mail did not fulfil the legal criteria of electronically signed electronic document, that is the requirement to be written (Pkf. 2. 26.701/2008/2).

The court similarly stated in another case about a request for rectification<sup>39</sup> that the request for rectification sent in e-mail did not fulfil the legal criteria of electronically signed electronic document, neither the legal criteria of being written, therefore it is not suitable to have a legal effect (Pf. 2. 21.381/2008/2).

The returning element is the reasoning that according to the current state of technology electronic signature is generally realised by a certificate assigned to the electronic document (ministerial motivation of the LES). In accordance with this a name written at the end of an e-mail as an electronic document does not fulfil the requirement in Section 2, Paragraph 15 of the LES and is only a simple electronic signature. Because of this an e-mail signed like this, according to Section 4, Paragraph 1 of the LES, does not fulfil the form criteria of being written (Pf. 2. 20.326/2005/1).

In the Supreme Court's view, the condition on late performance penalty in a contract based on the exchange of e-mails signed with simple electronic signatures is void, based on Section 217, Paragraph (1) of the Civil Code, since a contract signed by simple electronic signature does not meet the requirements of being written in Section 246, Paragraph (1) of the Civil Code, Section 38, Paragraph (2) of Transitional and Authorizing Provisions for the Civil Code, and Section 4, Paragraph (1) of the act on electronic signature. In the lack of a valid late performance penalty condition there was no need to canvass to what reasons the late performance penalty condition would apply, and whether the respondent performed their contractual obligations late (Gf. 13. 40.403/2009/7).

A deed with enhanced security electronic signature can be considered as a written legal declaration (Fpkf. 15. 44.076/2012.).

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<sup>37</sup> Pfv. VII. 22.271/2011/6.

<sup>38</sup> Pkf. 2. 26.701/2008/2.

<sup>39</sup> Pf. 2. 21.381/2008/2.

### *V. 3. Communicating of a paper based termination by e-mail*

In case by case labour decisions of the Supreme Court<sup>40</sup> about termination by an electronic document there were examples of communicating paper based termination declarations by electronic documents: the employee opened the electronic document that was prepared on paper, scanned and sent to him or her by e-mail, thus this legal declaration qualified as being communicated to him or her.<sup>41</sup> The termination also existed on paper, its digitised communication was realised by e-mail, and the fact that the electronic document was delivered and opened was not disputed by the parties.

### *VI. Conclusions*

In judicial practice two basic aspects need to be taken into consideration: legislation states that electronic documents should be considered, and they should be evaluated by law enforcement; on the other hand, ascertaining the reality (communication) of electronic documents is a basic aspect of their use as evidence.

Because of these two circumstances during the probative proceedings the principle of free proving makes courts able to form their own conviction about the probative value of the electronic documents present in the case. Nevertheless, it can generally be stated that to identify a simple e-mail with the concept of electronic document of the law and its acceptance as an automatic written document is only practical when the contents of the legal declaration are not disputed by the parties. The same can be said about the communication of the electronic legal declaration: in case of dispute the burden of evidence of the communication is with the declaring party, even in the case of simple e-mails.

The Labour Code, the Act on Civil Servants, and the Civil Code all use the conceptual framework of the LES, and they relate any digressions to this act. Based on what is stated in the LES, the probative value of the given electronic document can be established. The practice of the Supreme Court formed until recently has also taken the criteria stated in the LES, and it is practical to take it into consideration also in the future in case of disputes.

Because the Civil Code and the Labour Code are on the same theoretical basis regarding electronic documents, it is fully possible that economic, civil and labour law judicial practice uniformly judge electronic documents.

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<sup>40</sup> Referenced by JÓZSEF RADNAY (ed.): *A magyar munkajog. Kommentár a gyakorlat számára. (Hungarian Labour Law. Commentary for the Practice.)* HVG Orac, Budapest, 2014. pp. 66–67.

<sup>41</sup> Mfv. I. 10.547/2012/5.

**BANKÓ ZOLTÁN****ELEKTORNIKUS DOKUMENTUMOK A MAGYAR MUNKAJOGBAN****(Összefoglaló)**

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