



TECH LAW BRIEFING

Electronic signatures in Germany

The EU regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (“eIDAS Regulation”) is directly applicable in all EU Member States since 1 July 2016. German companies and associations¹ have responded positively to the eIDAS Regulation regarding the harmonization of electronic signatures, especially with respect to the creation of remote electronic signatures. However, the field of application of remote electronic signatures was initially rather limited due to the lack of legal recognition and restrictions in the setup process. The legal framework has been adjusted since. In the current home office environment these remote electronic signatures can assist in maintaining efficient business operations.

The difference between a remote and a “traditional” electronic signature is the location of the signature creation device: When the signatory uses the “traditional” electronic signature, the signature itself is generated in the environment of the signatory, i.e. by using a card in combination with a card reader. In contrast, when signing an agreement by using a remote electronic signature, such signature is generated externally on a hardware security module which is managed by a trusted provider that is not located in the environment of the signatory. In this case, it is not necessary for the signatory to possess a card and a card reader anymore as it is already sufficient to initiate the procedure remotely through a smart device (i.e. tablet, mobile phone). In Germany, this procedure is partly used in the banking sector for the transaction of money. For this purpose, the customer of a bank needs to download an application, install it on its mobile device and may then transfer the money remotely.

In general, contracting parties can conclude a legally binding contract under German law through a mutual agreement that expresses the intention of both parties. Because of the lack of any additional requirements, this can also be done through a remote electronic signature which is just another way of declaring the individual's will.

Apart from that, German law requires a handwritten signature for certain declarations as formal requirement for a legally binding declaration, to protect the contracting parties from imprudent decisions and to preserve evidence for court procedures.² In these cases, an electronic signature is accepted as legal equivalent to the written form, if it is a qualified electronic signature according to the eIDAS Regulation.³ The eIDAS Regulation attributes the same legally binding effect to the remote electronic signature created by a qualified trusted provider as to a qualified electronic signature that has been generated in the environment of the signatory.⁴

In addition, the courts have to deal with electronic signatures pursuant to section 371a (1) sentence 1 of the German Code of Civil Procedure (“ZPO”). According to this provision, the rules concerning the evidentiary value of private records and documents shall be applied to private electronic documents bearing a qualified electronic signature pursuant to the eIDAS Regulation. Furthermore, section 371a (1) sentence 2 ZPO provides a *prima facie* evidence in regards to the authenticity of the declaration for the benefit of the person responsible for the document. Hence, from a legal perspective, documents with a qualified electronic signature are now in principle an equally reliable alternative to documents bearing a hand-written signature.

To be able to use a remote electronic signature, the signatory must have its identity at first verified by a so-called trust service provider in order to be assigned a qualified certificate which ensures that the signature is valid and can be validated. For this verification the electronic identity function (“eID”) of identity cards

¹ *Wulff, Marianne*: Statement of the Federal Working Group of local IT services e.V. (Vitako), 01.11.2016, available (in German) under <http://www.vitako.de/Publikationen/Vitako-Stellungnahme%20eIDAS-Durchf%C3%BChrungsgesetz.pdf>.

² E.g. consumer credit agreements pursuant to Sec. 492 of the German Civil Code (“BGB”), suretyship according to Sec. 766 BGB, and termination of an employment cf. Sec. 623 BGB.

³ Sec. 126a (1) BGB.

⁴ Recital 52 eIDAS Regulation.

⁵ Some smart devices which support NFC and have a certified identity card app installed may be used as card reader.

⁶ So-called “Ad-Hoc Certificate”, cf. decree of the German Federal Network Agency (“Bundesnetzagentur”) No. 208/2018.

can be used, if this feature is already set up and the signatory has a card reader available.⁵ Alternatively, the signatory can use verification via video transmission, though this process can so far only be used to obtain a one-time access to a certificate which expires after one single use.⁶ Upon successful identity verification and acquiring the certificate, the signatory can sign the relevant documents using a certified signature solution.

Therefore, remote electronic signing may be a viable option to support remote working and to facilitate working processes.



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