

SIGNING AGREEMENTS WITH A QUALIFIED ELECTRONIC SIGNATURE

In the face of the epidemic, paper form has become to some extent unavailable almost overnight, yet agreements and other documents still need to be signed. This is how the electronic form that has existed in the Polish Civil Code for nearly 20 years became a kind of remedy for problems related to the logistics of signing agreements. But how should it be used to conclude agreements effectively?

Documentary form versus electronic form

Documents in electronic form may be an effective way of concluding agreements – many of them need, for instance, only e-mail correspondence containing the arrangements in the e-mail or an attachment to be valid. However, regulations attach different power of evidence to electronic documents, and occasionally also their validity or effectiveness, depending on how they are drawn up and signed. An ordinary e-mail may meet the requirements of so-called documentary form, provided it is possible to identify the person making the statement, and is sufficient for agreements that need not be concluded in more stringent forms (e.g. written form). However, to meet the requirements of electronic form in the meaning of the Civil Code, an e-mail or other electronic communication (e.g. a pdf file) must still be signed with a qualified electronic signature¹.

In this briefing, we have dealt only with the qualified electronic form, which ensures greater security for the parties and (unlike documentary form) gives the benefit of the presumption that the person who made the electronic signature made the statement it accompanies.

Requirements for electronic form

Signing a document in electronic form means that the declaration of will is expressed in electronic form and accompanied by a qualified e-signature. The Polish legislator promotes such qualified electronic, making it equivalent to written form.

¹ The only exception is banking activities, which may be documented in "ordinary" (non-qualified) electronic form with the equivalent effect to written form, provided the detailed technical requirements are satisfied and the bank concluded an appropriate agreement with the customer.

The European legislator in Regulation (EU) No. 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS") directly points out that a qualified e-signature should have the equivalent legal effect of a handwritten signature.

The declaration of will of a party to an agreement accompanied by a qualified electronic signature is valid if the signature was made during the validity of the qualified certificate issued for the signature and the certificate has not been suspended.

Any agreement may be concluded in electronic form unless a special form is required (e.g. a notarial deed).

To conclude an agreement in electronic form all the parties to the agreement must hold a valid qualified e-signature. An agreement may also be concluded effectively in a mixed form in which case one or more of the parties accedes to the agreement in electronic form and the other parties – in written form (these two forms have the equivalent legal effect). However, it is necessary to bear in mind the practical aspects by reason of which it is not advisable to use a mixed form in the case of, for example, a registered pledge agreement.

Qualified e-signatures must relate to the entire substance of the agreement. It is not sufficient to sign the file containing only the signature pages separate from the body of the document – a validly signed agreement is a complete document (usually in pdf format) accompanied by the qualified e-signatures of the relevant parties.

What does this mean in practice?

In practice, an agreement saved in a pdf file may be signed by each of the parties with a qualified e-signature. The signatures on one pdf document (file) may be made many times, which means that after one of the parties has signed, the agreement should be sent to the other party to be signed with a qualified e-signature and then returned.

Importantly, the pdf file containing the substance of the agreement on which even one qualified e-signature has been made is blocked to prevent any alterations being made to it, and any attempts to make alterations will be noted. This is a huge advantage of electronic form because as an integral part of the file, the signature gives the document credibility and dispels doubt as to whether any alteration have been made to the document between its signing by one party and the other.

Who signed?

Documents should be signed with the qualified e-signature embedded in the document (internal signature). The pdf file is then expanded to include, for example, the designation ".sig". This allows so-called validation of the qualified e-signature and verification of the following each time:

- whether the certificate has the status of a qualified certificate (as lower-ranking certificates also exist) and whether it is still valid (and hence, whether the signature to which the certificate relates is valid);
- the identity of the person who signed the document (the certificate states the name and surname of the signatory and the feature "subject", which contains the personal electronic identity number (PESEL) or other identity number; if it is PESEL, it is possible to check whether that person is

authorised to represent the party to the agreement, provided the signatory is mentioned in the National Court Register as a member of the management board or commercial proxy and the same PESEL is in the National Court Register);

- whether any attempts have been made to alter the document;
- when exactly (date and time) the signature was made.

An ideal solution is to place the signature in a pdf file in the place designated for this on the signature page. This is important when a specific entity is acting in various capacities in the agreement (e.g. as both borrower and guarantor, or as agent, lender and security agent), and the signature page provides for separate places where the same entity acting in different capacities is to place its signature. Not everyone, however, can overcome the technical challenges posed in this regard by the program for signing documents with a qualified e-signature.

With that in mind, it is vital to write on the signature page the names and surnames of the persons signing the agreement and state their functions (attorney-in-fact, commercial proxy, member of the management board) and the name of the entity they are representing. If a relevant entity is acting in the agreement in various capacities, it is possible to write in the agreement that the e-signatures made on behalf of that entity relate to a declaration of will with regard to each of those capacities. In this way, there is no doubt to whom an e-signature made in the document in a place other than the signature page belongs and in what capacity it was made.

Certified date

Certain agreements entered into in a written form must have a certified date to be valid or produce certain legal effects. This includes security assignment agreements and an agreement to appoint a mortgage administrator. This is not an obstacle to such agreements' being concluded in electronic form, provided the qualified e-signature is accompanied by a qualified electronic timestamp.

It should be noted that a qualified e-timestamp is a service separate from the qualified e-signature and must be acquired from a provider of trust services recorded in the register kept by the National Bank of Poland or other institution keeping such register in another member state of the European Union.

Access to such a service allows the signatory to stamp documents using a qualified e-timestamp from which the document obtains a certified date in accordance with the provisions of the Civil Code.

Legal pitfalls

Signature pages without the remainder of the agreement: If the qualified e-signature was made on signature pages separated from the remainder of the agreement, it does not satisfy the electronic form requirement because on the signature pages no declaration of will was made, and under the Civil Code a declaration of will must be made in electronic form and signed with the qualified e-signature in order to comply with the requirements for electronic form. Joining those pages to the remainder of the document in the form of a subsequently drawn up aggregate PDF file raises doubts because the agreement itself was not covered by the qualified e-signature. In such a case, the document would be in documentary form, rather than electronic form.

Mixed form: Often it is necessary for various parties to sign the document in various forms, e.g. the borrower signs an agreement in written form, and the bank in electronic form. In such a case, the parties must exchange an electronic file and paper version so that the declaration of will made by a party reaches the other party (which is essential for effective conclusion of the agreement). It should also be remembered that the entirety of the agreement is documented by an electronic file (usually pdf) with a qualified e-signature and a paper copy signed by the other party.

When gathering counterparts signed in mixed form, the parties should exchange the media where their declarations of will are contained as follows:

- counterparts signed electronically – sending by e-mail or on a physical medium (disk, pen drive);
- counterparts signed in writing – sending by e-mail or courier or (when the epidemic ends) in person.

Registered pledge: Although a registered pledge agreement may be signed in electronic form and submitted with the application in electronic form to the court keeping the pledge register, for practical reasons it cannot be signed in mixed form because it would not be possible to effectively file the application with the pledge register. Maybe in the future the courts will develop the technical capacity and enable "mixed" applications to be filed.

Failure to state in the body of the agreement the full names of the persons signing it: This could lead to a number of difficulties, primarily in identifying and verifying the authority of the entities signing the agreement, but also determining in what capacity (function) a relevant person signed the agreement, if he/she signed it for more than one party (as a member of the management board, commercial proxy or attorney-in-fact).

Verification of signatures

If an agreement has already been signed by one of the parties, before making its qualified e-signature the other party should check the validity of the signature (qualified certificate) of the counterparty. It is possible to verify each electronic signature in an application provided by the e-signature provider or by another trust services provider entered on the list kept by the National Bank of Poland or an institution keeping such a register in another member state of the European Union.

Online verification facilitates checking the genuineness of a document, whether the document has been altered after signing and whether the certificate used for signing was correct and had not been invalidated (certification path), and also the nature of the certificate (qualified or unqualified).

In the case of e-signatures embedded in a pdf document, there is a convenient verification method in the form of an appropriate Adobe Acrobat tool. However, it should be remembered that with regard to qualified e-signatures Adobe does not have the status of a "qualified trust services provider" and verification with the aid of that tool is of only a preliminary nature (because it does not enjoy the presumption of evidence enjoyed by certificates originating from qualified entities).

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