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Digitalization: Electronic signature or handwritten signature?

1. Summary

Digital signatures are becoming increasingly popular. They enable legally valid digital signing of contracts without media disruptions. However, not every digital signature is suitable for every contract. Whenever the law requires a written form, the signature can only be replaced by a **qualified electronic signature**. Not all signature solutions available on the market meet these requirements.

2. Legal Framework in Austria

The relevant legal basis for digital or "electronic" signatures in Austria is the Signature and Trust Services Act.ⁱ This law established additional national provisions to supplement the EU-wide eIDAS Regulation.ⁱⁱ The types of electronic signatures are defined in the eIDAS Regulation. However, member states are free to determine the legal effects of electronic signatures.ⁱⁱⁱ The only exception is the principle that a **qualified electronic signature** is equivalent to a handwritten signature throughout the EU.

3. Types of Electronic Signatures

An "electronic signature" refers to data in electronic form that is attached to or logically associated with other electronic data and used by the signatory for signing.^{iv} An electronic signature may not be immediately visible to a user. Therefore, an electronic signature should not be confused with the graphical representation of a signature in a PDF document. Similarly, statements such as "This document was electronically signed" do not provide sufficient information on their own. Whether a document has been electronically signed needs to be verified separately (see section 4.2 below).

There are three types of electronic signatures: simple electronic signature, advanced electronic signature, and qualified electronic signature (more details in section 5 below). These signature types have different areas of application. In Austria, only a **qualified electronic signature** is a comprehensive substitute for a handwritten signature.

4. Replacement for the Handwritten Signature: Qualified Electronic Signature

In many cases, the law requires that legal transactions be concluded **in writing** or that declarations be made in writing. These “in writing” requirements are generally met when a contract or a unilateral declaration is signed by hand at the end of the text (i.e., mere text form is not sufficient). In case the law stipulates an “in writing” requirement, the handwritten signature can only be replaced by a **qualified electronic signature** in case of digital contract conclusion.^v

4.1. Examples

In the following exemplary (but not exhaustive) cases, the law requires written form. In these cases, handwritten signatures can only be replaced by a qualified electronic signature, not by a simple or advanced electronic signature:

- **Termination of a lease agreement by the tenant:** According to section 33 para 1 of the Austrian Tenancy Act (MRG), tenants can terminate a lease agreement in writing. Sending an email without a qualified electronic signature does not suffice for a valid termination.^{vi}
- **Fixed-term lease agreement:** According to section 29 para 1 item 3 of the MRG, lease agreements can be limited in writing. To comply with this formal requirement, it is necessary for both parties to sign the agreement or use a qualified electronic signature. Failure to do so would result in an invalid fixed-term agreement.^{vii}
- **Agreement on a ground for termination:** According to section 30 para 2 item 13 of the MRG, the parties to a lease agreement can agree on important circumstances that justify termination of the lease. Such termination grounds must also be agreed upon “in writing”, i.e., by wet-ink signature or a qualified electronic signature.^{viii}
- **Default of payment under a reorganization plan:** According to section 156a para 1 of the Insolvency Act, a debtor loses the debt relief and other benefits granted by a reorganization plan if they are in qualified default vis-à-vis a creditor. According to section 156a para 2 of the Insolvency Act, a written reminder from the creditor is required for this purpose. An email without a qualified electronic signature does not meet this requirement.^{ix}

Note: Testamentary dispositions cannot be validly made in electronic form. Declarations under family and inheritance law that require a written form, or a stricter formal requirement and private surety declarations can only be electronically signed if the document contains confirmation from a notary or a lawyer that the signatory has been informed about the legal consequences of their signature.^x

4.2. Recognizing/Verifying a Qualified Electronic Signature

As mentioned above, a graphical representation of a signature in a PDF document or similar does not indicate whether a document has been electronically signed. However, the presence of corresponding signature information can be determined using standard applications. For example, the widely used Adobe Acrobat Reader can verify electronic signatures in PDF documents. If a qualified electronic signature is present, the application displays it as follows:



Dies ist eine qualifizierte elektronische Signatur gemäß EU-Verordnung 910/2014.

Screenshot (German language version): This is a qualified electronic signature according to EU Regulation 910/2014



RTR GmbH (the Austrian Regulatory Authority for Broadcasting and Telecommunications) also offers an online service to verify signatures in documents (via upload).^{xi}

5. Overview of Signature Types

The eIDAS Regulation defines the following types of electronic signatures:

5.1. (Simple) Electronic Signature

The simple electronic signature consists of data in electronic form that is attached to or logically associated with other electronic data. Such a simple electronic signature can be used as evidence in court.^{xii} However, it does not replace the need for qualified electronic signatures where required (see examples in section 4.1 above).

5.2. Advanced Electronic Signature

An advanced electronic signature must meet additional requirements that a simple electronic signature does not:^{xiii}

- a) it is uniquely linked to the signatory
- b) it allows for the identification of the signatory
- c) it is created using electronic signature creation data that the signatory can use with a high level of confidence under their sole control
- d) it is connected to the data signed in such a way that subsequent changes to the data can be detected.

The absence of the above-mentioned characteristics in a simple electronic signature indicates that the simple signature may not be suitable for business transactions, and the use of a "higher-level" signature is generally advisable. Once again, the advanced electronic signature does not replace a qualified electronic signature.

5.3. Qualified Electronic Signature

A qualified electronic signature, as the highest level of electronic signatures, must fulfil all the requirements of an advanced electronic signature. It must be created by a qualified electronic signature creation device and based on a qualified certificate for electronic signatures.

6. Practical Tip

To avoid difficulties with the enforceability of contracts or individual contract clauses, it is advisable to use qualified electronic signatures. Even in cases where a simple electronic signature would be sufficient, the use of a higher-level signature does not harm.

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ⁱ Bundesgesetz über elektronische Signaturen und Vertrauensdienste für elektronische Transaktionen (Signatur- und Vertrauensdienstegesetz – SVG), BGBl. I Nr. 50/2016 idF BGBl. I Nr. 104/2018.

ⁱⁱ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

ⁱⁱⁱ Article 2 (3) eIDAS.

^{iv} Article 3 No 10 eIDAS.

^v Section 4 para 1 Signature and Trust Services Act.

^{vi} Austrian Supreme Court OGH, 28.03.2017, 8 Ob 102/16g.

^{vii} RIS-RS0101797.

^{viii} RIS-RS0068994.

^{ix} Austrian Supreme Court OGH, 21.08.2014, 3 Ob 104/14m.

^x Section 4 para 2 Signature and Trust Services Act.

^{xi} Link to RTR's signature verification page (partially available in English):

https://www.rtr.at/TKP/was_wir_tun/vertrauensdienste/Signatur/signaturpruefung/Pruefung.en.html

[retrieved: 28 May 2023].

^{xii} Article 25 (1) eIDAS

^{xiii} Article 26 eIDAS.