# EVIDENCE ADMISIBILITY, ADMINISTRATION AND ASSESSMENT THROUGH THE ELECTRONIC RECORDINGS

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## Abstract

*The main objective of the paper focuses on a current topic of a real interest, given the necessity of solving the civil and criminal actions filed in courts or the arbitrage courts through the evidentiary means, including the electronic ones, for the impartiality and observance of the procedural rights of the parties.*

*Using the context analysis, which leads to a descriptive documentary research, the current article succeeds in identifying the size and the generic principles of a good administration and assessment of the electronic.*

*As a result, we shall perform an analysis of the main objectives concerning: the concept of evidence in general and especially of the electronic writs, the origin sources, the method of administration and assessment, as well as using them.*

*We consider that by applying these principles, there will take place essential changes regarding the admissibility, administration and assessment of the electronic writs, which will lead to a better application of the national legal provisions and of the European Directives, to the compliance of the national legislation with the European Union legislation.*

**Keywords: Electronic writs, admissibility, administration, evidentiary assessment through the electronic writ, judiciary evidence.**

## Contents

The civil and criminal actions, being, as a rule, of a contentious nature, cannot be solved on the basis of the parties 'allegations, the judge being able to state his decision on the basis of the evidence administered[3].

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[3] For a detailed examination regarding the civil suitcase evidence, see: I. Stoenescu, S. Zilberstein, *Law of Civil procedure. Generic Theory,* EDP, Bucharest, 1983, p. 335 and the next; Gh. Beleiu, *Civil Law. Insight into the Civil Law. Civil Law Subjects,* Şansa Publishing House, Bucharest, 1992, p. 99 and the next; D. Radu, D.C. Tudorache, *The Evidentiary System in the Civil Suitcase*, Ankarom Publishing House, Iaşi, 1996; Fl. Măgureanu, *Law of Civil Procedure,* the 12th edition, Universul Juridic Publishing House, Bucharest, 2010, p. 243 and the next; FL. Măgureanu, *Writs – Evidentiary Means in the Civil Suicase,* Lumina Lex Publishing House, Bucharest, 1997, p. 10 and the next.

Consequently, the evidence plays a very important role in solving the cause the court was summoned for, as the lack of evidence actually rends the judgment delivery impossible, without the allegations being proved, there runs the risk of being mistaken in assessing the factual and legal circumstances. Only by correct and total administration of the evidence, the judge may be aware of the real relations between the parties, the facts which determined the conflict between them, and then, on the basis of the evidence administered, to correctly apply the law in the case under research.

The court, in order to find out the truth in the cases under research, at first has to examine the admissibility of the evidence, to administer the evidence already registered, and then, on pronouncing the decision, to assess the evidence which were administered.

In the field literature, the procedural incident in the evidentiary administration, including the administration of the electronic evidence, represent, generically, those events which intervene to interrupt the regular normal approach of an action or, specifically, the various petitions filed during a pending suitcase and which aim at calling off the action or postponing the judgment.

Under the classical evidentiary regime, the legal document gets the shape of a pre-established writ, on paper support, which represents the evidentiary instrument to which the legislator grants the highest credibility, as compared with the technical means, which the courts, unfortunately, are not accustomed to.

The computers perform operations without appealing to or producing written documents, automatically, replacing the paper support, with the magnetic support (CD-ROM, floppy-disk or diskette), microfilms[4], without excluding the possibility of producing a written document through some extensions, peripheral means (printers), having the possibility of reproducing any document stored into the computer's archive or stored on a magnetic support under the shape of a recording, in a short time.

Regarding the electronic writs, the procedural incidents may refer to the verification of the writs or the forgery procedure[5].

The electronic business may not be performed as long as the Romanian electronic environment does not provide a real time transaction; the access to technology implies a suitable legal framework and prohibitive costs for most of the Romanians, potential clients[6].

For the success of the field under analysis, they have to perform a unitary approach of all the aspects regarding the implementation of an informational society in Romania and create a national strategy for this revolutionary digital reform, a reform which may include all the aspects of the social life, respectively the legislative and institutional reform for the field of the information technology – especially the so-called secondary legislation, which may comprise regulations regarding the electronic signature, the electronic business environment and the private data protection.

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[5] Also see Fl. Măgureanu, G. Măgureanu, *Procedural Incidents regarding the Evidence Administration through Writs*, Commercial Law Magazine, no. 5 and 6/2010, p. 42-50 and respectively 7-15.
[6] Also see O. Căpăţînă, *The Evidence through the Electronic Recordings*, Treaty, II, no. 141

The legislative projects regarding the electronic signature and the private data protection were approved and enacted, becoming applicable[7].

Regarding the development of the electronic business environment, the priority is the acceleration of introducing electronic identification systems and of the electronic payment systems, however, the legislative matter has to reconsidered and the possibility of introducing new working instruments has to be analyzed, instruments which may be legally supported and, better to say, legally covered, such as the functional framework, based on standards, for a larger variety of components, applications, policies and practices whose purpose is fulfilling the main functionalities of an electronic transaction.

The electronic transactions imply: privacy, which means the information secrecy; the message integrity against any vicious manipulation of the information; the authentication regarding the verification for a person or application identification; and the security of the paternity communication.

a. Admissibility of the electronic evidence – for the electronic evidence to be admissible, we have to certify its authenticity, the electronic recording has to be identified and connected to its source; to state that the evidence kept its integrity and there are no differences as compared with the initial variant and also that the digital recording the action is based on can prove the truth on its contents meets the requirements of necessity and truthfulness.

These recordings may offer sufficient guarantees for sincerity and objectivity, being pre-established, the date of the last document modification being automatically registered by the computer and, as a result, you can use this temporal reference point in establishing the creation of the respective document, easy to be kept and unalterable, offering multiple possibilities of physical presentation, on a magnetic support of different sizes and on the classical support of the writs.

The electronic recordings would have to follow the same obligations regarding the filing to the court, the time and the number of copies, subsequently implying their verification through expertise in case their authenticity is contested.
Unlike the traditional writs, the electronic writs do not have a strictly visual representation except when the recipient verifies, using specific methods, the signature conformity, respectively its authenticity, integrity and privacy of the document contents as well as the signee's identity.

Its special advantage also represents the fact that the digital support (diskette, CD, etc.) is more long-lasting than the paper, the accountancy and the archiving possibilities being clearly superior and the electronic language has become universal, eliminating the speech difficulties, translation, interpretation, different legal regulation.

[7] See in this respect: The European Commission's Proposal regarding a communitarian framework for the electronic signatures, published in the European Communities' Official Journal, series C, no. 325 of 23rd October 1998, p. 5-12; Law no. 455/2001 regarding the electronic signature, published in the Romania's Official Journal, Part I, no. 429 of 31st July 2001. The technical and methodological norms for the application of the Law no. 455/2001, published in the Romania's Official Journal, Part I, no. 847 din 28 December 2001; Law no. 451/2004 regarding the temporal trademark, published in the Official Journal, Part I, no. 1021 of 05 November 2004.

According to the provisions of art. 4 point 3 of the Law no. 455/2001 "the electronic signature represents electronic data, which are attached or logically associated with other electronic data and which serve as an identifying method".
The Law quoted also regulated „the extended electronic signature" which represents that electronic signature which cumulatively meets the following requirements:

**a)** it is uniquely associated with the signee;
**b)** it insures the signee's identification;
**c)** it is created through means exclusively controlled by the signee;
**d)** it is connected with the electronic data, to which they refer to so that any subsequent modification of these data is identifiable.

The authentication is a requirement for the evidence identity and not for its integrity.

The authentication of any electronic recording should imply the presence of an witness under oath who may be available to answer a series of questions, which may prove the identity of the digital recordings and the existence of a security policy at the institutional level.

The information security policies have to define, at the organizational level, the generic tendencies regarding the information security, the processes and principles for using the cryptography and which contain the directives on the way to manipulate under secure circumstances of the keys and important information.

It is imperative that there should be made proposals on the electronic evidence authentication, such as: practices for using authentication certificates, certification authorities at the national level, recording authorities who may verify the identity of the user and send an application for authorized to the certification authority using a multi-security communication channel, modalities of accepting and annulling the digital certificates, etc., solutions which may insure the integrity of the system for preserving the recordings used as a means of evidence.

On the evidence certification through electronic means, you have to consider the fact that the writs recordings are not applicable as such, that is why they may appeal to the possibility to create a new category of ,,duplicates" which may include the photocopies and the authenticated copies, except for the electronic pictures and which should be considered equivalent to the original if they meet the requirements regarding their certification. The regular data of the recording do not have the significance of ,,original", the users who will transform the writs into electronic pictures, want to ruin original writ, in order to avoid the costs for their storage, such a modality of document storage being much more comfortable. They also may fear that a deliberate destruction of the original might be made for altering its contents.

b. considering the special importance of the evidence in establishing the actual facts the law regulates in detail the procedure for their administration, representing a guarantee of the right for the parties' defense.

The proposal for the electronic evidence has to follow the same procedures as the writs, that is, they will be fulfilled by the plaintiff through the summons petition, and then by the defendant through the statement of defense, to which there have to be annexed copies

certified by the National Authority for Communication Regulation (ANRC). Subsequently the parties no longer have the obligation to present the original document during the session.

If the electronic recording is contested, as a result of a preferential selection of the communications has doubts on its authenticity, then it will proceed to: the digital certificate verification at the national authority; the forgery procedure, in case the party to which the electronic document opposes considers it a forgery, a circumstance under which the court shall forward the evidence to a competent prosecutor for him to perform research on the forgery crime, the judgment being suspended until the receipt of the results of the prosecutor's research and conclusions.

In the developed countries, from the technological point of view, the electronic recordings have become usual not only in accountancy or other activities of the institutions but also even in the banking system where a series of operations such as transfers, compensations, payments, etc. are performed without making use of writs.

An electronic support does not fall in the category of the writs under private signature, even when the information stored are transposed, through a peripheral, on paper, may however represent an evidentiary departure according the regulations of the Civil Law.

In the field legal literature, the IT document was considered, as a written evidentiary departure, as an allegation or the out-of-record copies, deprived of evidentiary force.

We consider that the IT documents may be used as independent evidence, together with other means of evidence, there is the obligation of the one who calls forth the electronic document to provide sufficient security elements on the certification of the information provided and which is connected with the judiciary action it refers to.

The electronic document may be considered a departure for written evidence when the presentation of the original document is not possible, as such a writ was not considered as a pre-established document as it did not bear the original signature of the one who was bound to perform it, however, after the emergence and enactment of the electronic signature, we consider that there should be revised this quality of the electronic writs, that is to say, they should be considered pre-established.

Certain provisions of the French Civil Law were modified through a law of 12$^{th}$ July 1980 regarding the evidence of the legal documents, acknowledging the evidentiary value of the copy, in case it represents a reproduction which implies an irreversible modification of the IT support.

In the French field literature, certain authors[8] consider that "the current development of the informatics and computer communication engender new issues in the relations between the professionals and between these and their clients[9].

[9] Ripert, Roblot, Droit de l'informatique, Editura LGDJ, Paris, 1996, p. 58

Regarding the electronic signature, taking into consideration the amplitude of using the magnetic credit or debit card, based on simultaneous private code composition. The Montpellier Court decided that the regular functioning of the system should represent sufficient evidence in a circumstance where the evidence may be made through all the evidentiary means. The institutions issuing the cards quickly inserted into the contracts-model which provide their clients clauses which stipulate that this identification technique makes the object of the evidence for the underwritten engagements[10].

On 13th March 2000, in France, they adopted the law regarding the validity of the electronic signature, law which contains two new elements: the electronic recording shall be admitted as an evidence in courts with an evidentiary value equal to the one of the confessions or the writs, provided that this may determine the sender's identity and the contents integrity; the electronic signature shall be legally considered as belonging to a certain person, provided that the respective person may certainly identify the signature and prove the connection with the document he refers to.

Under such circumstances, we consider that the admissibility of the electronic evidence as evidentiary means with the evidentiary force of the other evidentiary means shall be necessary to identify a third party who may provide the proof of the signatures identity. The certification should be provided by private experts, professionals in the field, authorized to perform these operations.

The Federal Law of the United States of America grants the same evidentiary force to both the electronic recordings, and, with a few exceptions, the writs, such as testamentary dispositions and in the field of the family law[11].

The discovery of these means of electronic communication may be conducted and turned into account with the maximum benefits, which may insure the proper achievement of the main target of the justice, that is to say, defending the rights, freedoms and legitimate interests of any person.

Regulations similar to those in the USA are also stipulated in other countries, such as Sweden, where ever since 1994 it was set up a committee authorized to update the legislation in the field of the IT documents, with a view to having an electronic signature or an equivalent, as a substitute for the verifications characteristic to a writ. An essential requirement represents the obligation for the digital document to have the same evidentiary force of that of a writ and at the same time to be able to connect to a computer and used as such, the password method not being accepted. The committee established that the traditional rule regarding the evidentiary value of the electronic document may be applied when the contents of the magnetic support (floppy disk or C.D.ROM) is sent via the postal service (e-mail) to the recipient. Under these circumstances, when the messages are sent via the electronic network, the applicable principle is that the document is considered to be received when the data and the information contained in the electronic document reached the "mail box" of the e-mail service within the interested institution.

[10] Federal Civil Law Rules Computer-based discovery in Federal Civil Litigation, Federal Judicial Center,November 15, 2000.
[11] Idem

In Canada, they proposed a law on the harmonization of the electronic evidence, through which they could clarify the issues related to the use of the electronic recordings as evidence in civil and administrative courts and to offer certain legal solutions, taking into account the fact that some provinces enacted the electronic evidence[12]. The Law has to clarify certain aspects and has to be harmonized so that they should take the best possible technical decisions, as to the reproduction and preservation of the electronic recordings, with the minimal risk and uncertainty and clarify aspects related to: the nature of the limits which will be applied in the admissibility of the electronic evidence; the person who is responsible for providing the evidence; the procedural requirements for insuring a correct examination of the electronic evidence provided in courts.

Concluding, we can appreciate the necessity and the special value of the electronic documents for solving with celeritate and objectivity the civil and criminal cases, which have lately been ever more numerous and complex.

Experts in the legal field who represent parties with large amounts of electronic data have to grasp the phenomenon, if their clients will make the object of such an investigation and advice them when needed, to impose defensive strategies which they are to apply mainly in the litigation, including the storage program for the suitable documents, the permanent erase of the magnetic means used for the electronic communication and the implementation of an optimal system for the documents management.

The judiciary evidentiary system has to be adapted to the use of the ever developing technology, has to be neutral, which, however, has to insure the objectivity necessary for the judgments delivery where these means of evidence are administered.

It is necessary that the recordings integrity should be demonstrated, as an admissibility requirement, that the confidence in the computerized system which produced the recording, especially, the data safety and the management of the electronic recordings.

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