

NOTARY DEED IN ELECTRONIC FORMAT AND REMOTE NOTARY DEED IN THE REPUBLIC OF MOLDOVA: DREAM OR UTOPIA?

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Abstract

In our days, the development of the state and society is seen indispensably by the integration of information's technologies. Being one of the basic pillars, which ensures the security of the civil circuit of goods, qualified notarial assistance has long been waiting for the adjustment of the legal framework and the introduction of the electronic notarial deed. By the Disposition of the Minister of Justice, a working group was formed in order to develop a draft law with the necessary amendments along. In addition to the ordinary process of drafting the legislative act, a project was recently initiated to modernize the legal framework as an emergency, targeting several areas, including the introduction of digital notary. The content of this research will reflect the history of development of the e-notary in the Republic of Moldova up to the current stage. The research will also contain an analysis of the legislation of other states, where electronic notarial deeds are already implemented, and those where the introduction of electronic notarial deed has failed. The author will differentiate between the electronic notarial deed and the remote notarial deed, as well as will try to identify the prerequisites for their implementation. Failure to adjust the project may have negative consequences, which will block the implementation of the electronic notarial deed in the Republic of Moldova, thus the research will identify some threats that may affect the appearance of the electronic notarial deed as a result of the adoption of the draft law presented to the Parliament of the Republic of Moldova and will intervene with some proposals to improve it. Additionally, will be examined the results (impact) of introducing of a new legal framework on the civil circuit security, which will deprive the notary by the necessary tools and by the clear regulation of the notarial procedure.

Keywords: *notarial deed; e-notarial deed; e-notarial document; remotely notarial deed; legal act.*

JEL Classification: K15.

1. THE STATE'S POSITION IN THE DIGITALIZATION OF NOTARY DOCUMENTS

The development of the economy depends on the state's position and capabilities. The notarial system is one of the state's resources. The shift towards

digitalization has been promoted for about 10 years now, being intensified from 2021 with the introduction of the Deputy Prime Minister for Digitalization role, under the Government Decision (GD) of the Republic of Moldova (RM) No. 118 of 12.08.2021, and in 2023 – with the Ministry of Economic Development and Digitalization, under the GD RM No. 29 of 16.02.2023.

Even though the promotion of a policy for the development of electronic notarial activity was not explicitly stipulated, this field has recently been receiving prompt and increased attention.

1.1 Policy documents

The development of the state's capabilities in the electronic field indirectly supports the emergence of the necessary conditions for the creation and promotion of electronic notarial activity. Tangentially, various aspects that are the subject of notarial procedures have found support for transformation into electronic format through policy documents related to other public and private services.

By GD RM, No. 235 of 13.10.2021, for the years 2021-2022, the creation of the necessary conditions for obtaining electronic signatures by the citizens of the Republic of Moldova abroad (para. 23.34.2) was promoted, as well as the normative framework and technical solutions for mobile electronic identity without specialized devices (para. 2.1.4, 2.1.9, 2.1.22), the normative framework for establishing the procedure for remote identification and verification of a person's identity using the eKYC (Electronic Know Your Customer) solution. Attention was also drawn to the emergence of the governmental service of electronic archive (e-Archive) (para. 2.2.7, 2.2.17, 2.2.23), and also the development of services alternative to notarial ones - drafting of the normative framework for the implementation of the unique electronic register of proxies (para. 3.10.3).

By GD RM, No. 89 of 28.02.2023, for the years 2023-2025, the policy related to the mobile electronic identity MobiSign (para. 7.2.10.) was continued, as well as the establishment of the procedure for remote identification and verification of a person's identity using the eKYC solution (para. 7.2.11.), the need for developing the existing register of real mobile guarantees (para. 8.2.14.), the creation of a new Register of wills and succession files (para. 8.2.11.), and the development of the Register of proxies SI "e-Procure" by reusing SIA (MPower) (para. 7.1.14.), which will continue to reduce the number of proxies subject to notarial authentication. To reduce the threat related to the low level of digital culture of the population, the development of citizens' digital skills is envisaged (para. 3.2.19.), and to ensure and streamline the necessary technical conditions, mandatory interconnection and interoperability, ensuring access to administrative data sources for all authorities (para. 7.2.1.). The need for a framework document for the field of digitalization is pointed out by the drafting of the National Digital Development Strategy for the period 2023-2030 (para. 1.2.41.).

GD RM, No. 90 of 28.02.2023, dedicated to the action plan for the year 2023, puts in the foreground and supports the approval of the National Digital Development Strategy for the period 2023-2030 (para. 2.1.), which was supposed to have been drafted, the implementation of the technical solution for mobile electronic identity without specialized devices on the signer's side (para. 2.8.), the promotion of the normative framework to stimulate the development and use of electronic services (para. 2.13.), and, additionally, the drafting of the Concept of the Governmental Service of Electronic Archive (e-Archive) (para. 1.21.), which was not achieved in the previous period.

Although not directly visible, the development of electronic notarial activity is reflected in the state's policy aimed at stimulating the development and use of the above-mentioned electronic services.

At the same time, Law No. 211 of 06.12.2021, which strategically provides for several areas of digitization in the justice sector for the years 2022-2025, does not stipulate anything about electronic notarial assistance.

1.2 Implementation of policy documents

Currently, out of all the nominated fields, the most advanced service being developed is the alternative to notarial assistance – the Register of representation powers based on electronic signature (MPower), which is expanding its scope. Parallel to this, solutions are being implemented for mobile electronic identity (MobiSign).

At the same time, Law No. 126 was adopted on 26.05.2023. Although it is meant to support the development of remote businesses, the content of this law goes beyond this objective, with new regulations being introduced for electronic and remote notarial assistance as well.

By the Order of the Minister of Justice (MJ) RM No. 141 of 06.06.2022, a working group was established for the adjustment of the normative framework for the elaboration of the Concept of the electronic notarial act and electronic notarial activity. However, the aforementioned law project was developed by the Ministry of Economy with the support of the Economic Council under the Prime Minister and USAID Moldova. It should be noted that so far, no concept of electronic notarial act and electronic notarial activity has been developed.

2. HISTORY OF INTEGRATING NOTARIAL DEEDS INTO ELECTRONIC FORMAT IN THE REPUBLIC OF MOLDOVA

Notaries in the Republic of Moldova do not draft notarial deeds in electronic format, in the sense of electronic documents, although certain activities in electronic format are carried out. According to art. 2 of Law No. 124 of 19.05.2022, an electronic document is defined as *content in electronic form, particularly in the form of text or sound, visual or audiovisual recording, to which an electronic signature or electronic seal has been applied.*

Some premises for electronic notarial activity have been forming for a long time, even some actions in this activity can be performed in electronic format, however, the notarial act as a result of these actions does not obtain electronic support.

2.1 Electronic notarial registers

Currently, notaries are registrars/operators only in two registers kept in electronic format: the register of movable real guarantees and the register of succession files and wills.

By GD no. 849 of 27.06.2002, the register of pledged movable goods was created, which was kept in electronic format. Currently, instead of the register of pledged movable goods, the register of movable real guarantees operates, created by GD no. 210 of 26.02.2016. The register of movable real guarantees is kept in electronic format, but the notary's electronic signature is only used for his identification in the system, without being applied to documents generated in the system. In other words, the system does not generate electronic documents.

By the MJ Order no. 38 of 03.02.2006, the register of succession files and wills was created, which is kept in electronic format. At present, this register contains information on succession files and wills prepared since 14.09.1998. This register is kept in electronic format but does not generate electronic documents, as no electronic signature is applied.

In accordance with art. 25 para. (1) of Law no. 71 of 22.03.2007, starting with 10.11.2021, in the RM all state registers are to be kept in electronic form. Art. 25 of Law no. 246 of 15.11.2018 does not stipulate a specific form of notarial registers, this being approved by the MJ. And para. 2 of the MJ Order no. 329 of 10.12.2019 obliges all notaries to keep all notarial registers approved by this order on paper.

Other electronic notarial registers are not currently used, although legislation contains obligations of the notary to register in the electronic register of powers of attorney.

2.2 Electronic signature

Some time ago, in the opinion of Cara-Rusnac (2012, pp. 86-93) the use of electronic signature in notarial activity seemed to be a myth, now every notary holds at least one qualified electronic signature, which is used in notarial activity. Mostly notaries use it in related activities - for reporting, correspondence, etc., it is not applied to notarial deeds. At the same time, according to art. 5 para. (6) of Law no. 246 of 15.11.2018, starting with 01.03.2019 there is no prohibition on the use of electronic signature on notarial deeds.

According to art. 187 para. (2¹) of the Tax Code (Law RM no.1163 of 24.04.1997), starting with 01.01.2017 notaries submit tax reports using automated methods of electronic reporting. All tax reports are electronic documents.

According to para. 4 of the Order of the Main State Tax Inspectorate no. 16 of 14.01.2013, starting with the fiscal period year 2012, notaries submit information regarding certain contracts in electronic form with the application of the electronic signature. The notary is not able to download electronic documents from the system, which violates Law no. 124 of 19.05.2022.

According to para. 30 of the Rules for completing the Report on the professional activity of the notary, approved by the Decision of the Notary Chamber Council no. 2 of 12.11.2019, starting with the year 2019, notaries apply electronic signature on the report and send it by electronic mail to the Notary Chamber.

Other reports/statements are submitted on paper.

2.3 Related competences

In accordance with art. 50 of Law no. 246 of 15.11.2018, the notary is obliged, by applying the electronic signature, to perform the provisional registration of certain notarial acts in the real estate register. For technical reasons, this obligation cannot be fulfilled to this day.

Under art. 56 of Law no. 246 of 15.11.2018, the notary has the competence to certify the content of web pages. In this case, a certificate is issued on paper. Art. 57 of Law no. 246 of 15.11.2018, assigns to the notary the competence to confirm the time of data collection from the advertising register, kept in electronic form, to which he has access. In this case, a certificate is issued on paper.

2.4 Interoperability

In exercising their service competencies, notaries are provided with access to public registers under the legislation regarding data exchange and interoperability. According to art. 3 of Law no. 142 of 19.07.2018, the notary is recognized as a private participant in the data exchange. Art. 10 of Law no. 69 of 14.04.2016 guarantees the notary access to any necessary information, including online, but in reality notaries are forced to justify access to specific data by special provisions. It should be noted that, in most cases, the notary's access is guaranteed for a fee, and the information held in several public registers and accessed by notaries is not up-to-date and is not complete.

3. MAIN DIRECTIONS OF IMPLEMENTING NOTARIAL ACTS IN ELECTRONIC FORMAT

Electronic notarial activity includes a diversified complex of procedures, which the notary will be able to carry out, depending on the received request.

Obviously, if the applicant is not physically in the presence of the notary, and the notarial act requires more actions from the notary, the risk of errors is increasing. It should be noted that each state should assess its own capabilities to determine the forms of realization of electronic notarial activity, taking into

account both the needs of society and the costs of creating and maintaining the informational system that is expected to technically ensure these competencies.

3.1 Act in electronic format

Most often, for simplicity, the notarial act in electronic format is called an electronic notarial act. This mistaken simplification is also admitted in Law no. 126 of 26.05.2023. De jure, the format does not change the legal effects of the notarial act. The adjective "electronic" in the notarial procedure only signifies the tool used by the notary in this procedure: an electronic device instead of a pen and paper. Assuming that the notarial act itself becomes an electronic one, we can conclude that the procedure for fulfilling the notarial act has become an electronic (automated) one, which does not require the presence of a professional in the field (notary), with functions of directing and strictly following the legal procedure. For this reason, the term "electronic notarial act" is not correct, but rather "notarial act in electronic format".

According to the criterion of how the content of the notarial act is stored, we can highlight:

- notarial acts on paper,
- notarial acts in electronic format.

In turn, a notarial act can become electronic:

- being drafted entirely on paper, then scanned and electronically signed by the notary in order to be preserved in electronic format and for this document to circulate electronically;
- being drafted on paper and later scanned and electronically signed by the notary;
- being signed with a special pen on a touchscreen by the applicant and electronically signed by the notary;
- being signed with the applicant's electronic signature and the application of the notary's electronic signature;
- a combination of the above variants.

In this case, all obligations are carried out by the notary personally, and the result is recorded directly, without the use of additional technical tools. As a consequence, to implement notarial acts in electronic format, it is necessary to clearly regulate the legislation in the field of electronic archives and create the necessary conditions for preserving these electronic documents.

In addition to the archive, a special regulation is required to describe the notary's competencies to convert a document from paper to electronic and vice versa, which will form the basis of notarial acts in electronic format. However, this competence is missing in Law no. 126 of 26.05.2023.

3.2 Remote notarial deed

Based on the communication criteria between the applicant and the notary, we can identify:

- the applicant is in the presence of the notary who drafts the notarial act;
- the applicant is remote from the notary drafting the notarial act, but in the presence of another notary;
- the applicant is remote;
- a combination of the above-mentioned cases. For example, the seller is in front of one notary, and the buyer is in front of another notary, and a single sales contract is authenticated; or the seller is in front of the notary, and the buyer is remote;
- the presence of the applicant is not necessary for drafting the notarial act, communication being only in writing (the applicant only sends the notary a digitally signed request and pays for the notary assistance). For example, securing evidence by certifying the content of a web page.

The notary is bound to respect the rules for drafting general notarial acts, so that the result of notarial activity is identical, regardless of whether the applicant is remote or in the presence of the notary. It's clear that without physical contact, the risk of fraud in the notarial assistance procedure increases, and the notary needs both the necessary technical support to combat fraud and specific technical knowledge to detect such fraud. The speed of IT development versus the professional capabilities of an individual notary results in increased fraud risk. Only the professional notarial body or the state can effectively compete in the fight against fraud.

Fraud is a risk not just for the notary, but for anyone who accepts the drafting of the notarial act at a distance and risks being harmed. Most often this fraud is seen when using different payment systems through electronic devices (smartphone app, webpage, etc.).

In the case of remote notarial deeds, the technologies offered to the notary must solve several tasks to ease the notary's tasks (e.g., establishing the identity of the applicant), even though other tasks become more complicated (e.g., verifying the applicant's consent).

3.3 The main difference between a notarial act in electronic format and a remote notarial deed

It is incorrect to view the remote notarial act as a variety of the notarial act in electronic format. Even a notarial act performed remotely can be confirmed by the notary by issuing a document on paper. At the same time, neither does an notarial act in electronic format necessarily mean that it was prepared remotely from the notary. Both these forms must be considered separately. However, this mistake is most often observed in practice. Studying the provisions of Law No. 126 of 26.05.2023 concerning the notarial procedure, we find that there is no clarity

regarding the tools to be used by the notary for drafting electronic notarial acts and, separately, for the notarial act performed at a distance. Some specific provisions (e.g., the prohibition of drafting remote notarial acts mentioned in art. 5¹ para. (5), or the prohibition of enforcing notarial acts drafted on paper in electronic format in art. 43 para. (11) of art. IX), which limit the realization of some competences, do not go beyond this problem, which should have been solved by the concept.

4. FUNDAMENTAL PREMISES FOR THE DIGITIZATION OF NOTARIAL ACTS

This paper does not aim to identify all the premises necessary for the digitization of notarial acts, but only to discuss some aspects which, in the author's opinion, require special attention.

4.1 Premises for drafting notarial acts in electronic format

The isolated development of only electronic notarial activity separate from the state's IT technologies is impossible. Under these circumstances, we can highlight the following premises:

- *State information systems must be created, the data of which will be processed during the drafting of notarial acts*

Of course, if the state is behind in the development of its own technologies, the promotion of electronic notarial assistance will require more resources, which will have to cover the lack of these information systems. For example, in Brazil, the provision of electronic notarial assistance uses a unique register of notary clients, a unique register of final beneficiaries, a national center for digital authentication. In the Republic of Moldova, there are already certain state information systems, such as the state register of the population, the state register of legal entities, the state register of individual entrepreneurs, etc., the data of which can be processed in the exercise of notarial activity, to avoid duplicating information systems. At the same time with the development of electronic notarial activity, the state promotes the policy of developing the state register of legal entities, which is expected to provide more operational and qualitative information about legal entities and certain individuals.

At the same time, there is also the real estate register, which keeps a record of real estate and the holders of rights over these properties. Notaries do not have direct access to this register, and the development of the information system that will ensure the smooth operation of this register has been underway for several years.

Parallel with information systems, related public services must also be developed, such as: electronic authentication/identification services, electronic signature application services, electronic archive storage services, etc.

Naturally, the lack of these and other data/information systems, as well as the related electronic public services in the notarial procedure does not lead to the impossibility of providing electronic notarial assistance, but requires more resources to promote them, as these resources and services must be developed. For example, in France and the Russian Federation, notaries have created public key certification centers (qualified trust service providers), through which electronic signatures used by notaries and applicants for notarial deeds are created.

- The information in the state information systems must be truthful, complete, and current

For good functioning, the information used in notarial activity must be truthful, complete, and current. At the same time, the state must institute this presumption. In the Republic of Moldova, this presumption is instituted in relation to public registers, although the information from many information systems does not meet these criteria.

There is no perfect information system, as any system is an organism of continuous development. A simple historical look shows us that the same state population register appeared about 30 years ago, the real estate register about 25 years ago, and the notary office about 18 centuries ago. Thus, notaries have drawn up notarial acts beyond the appearance of information technologies and information systems. As a result, these information systems are just a toolkit that can facilitate the work of the notary. Indeed, the use of truthful, complete, and current information will increase efficiency and operationality in the drafting of notarial acts, but it does not lead to the impossibility of drafting electronic notarial acts, in general.

- free and unrestricted access of notaries to state information systems and public services provided

If notaries do not have access to these information systems (it should be noted that notaries have obtained this access through a system-consumer interoperability system only about 5 years ago), the preparation of notarial deeds on electronic support will be possible, but notaries will have to duplicate the state functions in the evidence of processed data, which leads to an increase in the self-cost of notarial assistance. It should be noted that notaries are state-authorized representatives with public functions, for which reason it would be illogical to grant powers from the state and limit access to resources necessary for the effective realization of these powers.

The notary benefits from financial autonomy. Thus, payment for the notarial assistance provided must cover the notary's expenses, and incompatibility does not allow the simultaneous conduct of other paid activities, with a few small exceptions. As a result, this funding ultimately falls on the applicants for notarial deeds, who pay this fee. In this context, paid access to information systems and/or public services increases the self-cost of notarial assistance which, ultimately, must be borne by the applicants. From these considerations, the Soviet approach

of providing free notarial assistance (exempt from payment), regardless of the beneficiary, is fundamentally incorrect, especially when the applicant is the state or public authorities, as in this case notaries find themselves in a situation where their work will not be remunerated by force, which violates the provisions of the Supreme Law.

I reiterate, paid access to information systems and public services does not make it impossible to prepare notarial acts on electronic support, it only increases their cost, so the accessibility of this assistance becomes less attractive to applicants.

In countries where all or most of these services and systems are developed by notarial professional bodies, the self-cost of notarial assistance has not increased, because the costs of manual and paper data processing have been directed towards electronic processing without any added value being applied to this self-cost (e.g., France, Russian Federation). In countries where these systems and services are offered by the state, the amount of payment depends on how notaries have access to them.

- a true partnership in relations between notaries and the state, through competent public authorities and institutions

Insofar as the state, on the one hand, stipulates a payment for access to these information systems and public services, and, on the other hand, develops alternative services to notarial assistance, arguing that these services are cheaper - we observe a lack of consistency or the desire to liquidate the notary, as a public institution created by the state in the exercise of its competencies for the benefit of society.

Currently, notaries are only consumers of information systems and public services. The development of information technologies in this field by notaries, individually, or by the Notarial Chamber, as a professional body, has not been prohibited by law.

According to Law No. 126 of 26.05.2023, the state information system through which notarial deeds will be registered electronically in the state register of electronic notarial deeds will be developed by the Ministry of Justice, as the owner, with the support of the "Electronic Governance Agency" Public Institution. In other words, all investments already made for the development of IT technologies will not be compensated by anyone, and the role of the Notarial Chamber as a true partner of the state has been undermined.

The development of the system intended for notaries by an institution other than the Notarial Chamber directly affects the effectiveness of this information system and implicitly creates obstacles in the digitalization of processes related to the preparation of notarial deeds, which notaries are obliged to carry out. However, the state will not invest in these systems, and notaries will be limited in their development on their own and freely, being dependent on a foreign owner.

- ***the existence of legislation regarding the electronic archive***

Above, it was already reported that there is currently a lack of normative framework regarding electronic archive services. Without clear regulation in this field, notarial deeds in electronic format cannot exist.

- ***sufficient funding***

The creation, development, maintenance of information services and information systems requires sufficient funding. The lack of funding does not allow the creation and development or, at the maintenance stage, increases the risk of fraud. In countries where the number of applicants and, implicitly, notaries is large, the financial burden for funding per notary is smaller than in countries where this number is much lower. In the Republic of Moldova, there are less than 300 notaries. Autonomous funding cannot cover all these expenses and requires support from partners (state, foreign and international professional organizations, etc.).

- ***recognition of the mandatory legal force of electronic documents***

Currently, the legislation of the Republic of Moldova contraventional sanctions the unjustified refusal to accept an electronic document. Therefore, the use of electronic documents prepared by the notary should not create a problem in essence, although the entire society needs to adjust its own technologies to be able to work with notarial deeds in electronic format.

- ***training of notaries and applicants***

To prepare notarial deeds in electronic format, notaries must be appropriately trained. Lack of training can lead to an increase in errors.

Training of applicants is more important. However, the sudden intervention of information technologies in the citizen's life puts him at risk. On the one hand, these technologies offer him development advantages, and on the other hand, they pose risks of becoming a victim of fraud, because the responsibility for using these technologies is shifted from the state to the citizen, and the latter does not know methods to protect his interests and rights. It should be noted that, sometimes these methods are for an additional fee, which the citizen must cover from his own account.

4.2 Prerequisites for performing notarial deeds remotely

The premises reported above for drafting notarial deeds electronically are largely relevant and to remote notarial deeds. In other words, the development of information technologies must be more in-depth and specialized in this field, and the training of notaries and citizens more rigorous. In places, even the state is not interested in developing certain technologies necessary for performing notarial deeds remotely. For example, in some states to reduce the overhead cost of notarial assistance, the remote notarial deed is performed via videoconference, but without the use of artificial intelligence for additional identification of the applicant. Even in France, notaries use artificial intelligence for personal

identification provided by a private company and not created by the notarial professional body or by the French state. As a result, we supplement them with:

- *the development of artificial intelligence necessary for use in this process*

Dmitric (2006, p. 120) wrote that the notarial form demands the use of paper, as the civil circuit and the state registration system are based on documents prepared on this support. Currently, in the Russian Federation, electronic notarial deeds are used very frequently. Even the presentation of notarially authenticated contracts to the state registration body of real estate is made in electronic format.

In the Republic of Moldova, no artificial intelligence has been implemented in any field, including fields related to notarial activity, which presupposes the necessity of using foreign artificial intelligence.

The use of artificial intelligence in the exercise of public functions primarily requires a reassessment of national values, and new ethical standards should be developed that would correspond to subject-object relationships instead of the usual subject-subject approach. Moreover, in specialized literature, opinions can be identified according to which the emergence of absolutely autonomous artificial intelligence can change the usual paradigm, in which intelligence is a human resource, into one where man becomes a resource for artificial intelligence. In any situation, before using artificial intelligence developed in the private sector for the public domain, it is necessary to exclude any risk of using this intelligence for illegal purposes. As a result, as Zaloilo (2021, p. 102) reports, *delegating to information systems that operate on the basis of artificial intelligence technology some competencies of state authorities must not violate the rights, freedoms, legitimate interests of citizens, or threaten national security*.

Considering that the procedure for performing notarial acts is similar also for the case of drafting the remote notarial act, we will outline some basic elements (stages) of the authentication procedure of the document. Bărbieru and Macovei (2018, pp. 454-458) highlight the following stages:

a) *establishing the identity of the parties*

Some benchmarks regarding the establishment of identity can be found in my work (Pistriuga 2022, pp. 254-256). Establishing a person's identity remotely is not an easy task at all. The simplified position when only the electronic signature is used for identifying the person is not applicable to notarial procedures, as it does not report who used this signature. Indeed, anyone who knows the access password to the electronic signature can use it.

In the private sector, for establishing the procedure for remote identification and verification of a person's identity, sometimes the eKYC (Electronic Know Your Customer) solution is used. The same solution is proposed to be legally confirmed in the Republic of Moldova (it should be noted that currently no state has regulated the use of a specific technical solution for this purpose). At the same time, for example, eKYC was advocated by the Vietnamese Government with the

release of Decree No. 87/2019/ND-CP (effective from Nov 14, 19) which allowed financial institutions to decide whether to meet the client in person when the relationship is established for the first time. If not meeting the client in person, the reporting entity must apply measures, methods and technology to identify and verify the client. (Nguyen, 2020)

It should be noted that this identification system is more advanced than the simple use of electronic signatures, as it assumes more steps of identification. However, using this technology requires the system's access to state information resources to compare the data presented with the system's data, which raises the question of national security and personal data protection.

The use of eKYS technology, as well as any similar technology based on artificial intelligence, also requires the delimitation of responsibility for possible technological errors, so that the notary remains responsible only for the exact observance of the technological process, excluding liability based on wrong conclusions/results of this technology. It is unlikely that for procedures that can generate large scale damage, the use of this technology will be accepted by investors. Currently, this technology is used in the payment system to ensure remote payments.

In this context, it becomes clear that no private company will want to take responsibility for large value transactions (as this can lead to the bankruptcy of the private company), nor will the state guarantee the result of applying these technologies. Accordingly, the responsibility must be assumed by the notary himself, for which reason the application of this procedure is possible only for procedures with small values, which will not lead to the bankruptcy of the notary.

b) obtaining consent

Unlike notarial certification and legalization procedures, which generally do not require obtaining consent and checking the person's discernment, in authentication procedures this step is mandatory.

At present, no artificial intelligence has been identified that would ensure the consent-taking process.

The process of expressing consent in the banking system (this process was taken, given that remote services in the banking system have been applied for a long time, respectively, there are scientific papers that address this topic) is described by Bocşa (2010, pp. 191-192) as follows: by double click. This approach is based on the necessity of perfect understanding of the actions by the subject (which requires precontractual information/instructions, in other words, special preparation/training), with the guarantee of the person's right to revoke (in case of error/misunderstanding).

In another work, Duma and Şumandea-Simionescu (2022, pp. 375-376), consider that authorizing the operation of making the electronic payment is, therefore, implicitly expressing consent. And before authorizing the operation, the strict customer authentication process must be ensured, which *is based on two or*

more elements that are included in the knowledge category (something only the user knows: password, answer to a secret question), possession (user's phone or other electronic device, an electronic certificate etc.) and inherence (biometric authentication – facial or fingerprint) and results in generating an authentication code – so-called multi-factor authentication. The client authentication procedure largely corresponds to the stage of establishing identity and is included in the respective technology.

And regarding the authorization of the payment operation, it is mentioned that it must be agreed with the payer in advance. In other words, before carrying out any payment operation, the payment service provider and the payer must negotiate the form in which the payer's consent can be expressed, so that any other operation carried out by the payer is not qualified as expressing consent. In this context, subsequently the payer will not be able to revoke the operation performed on the grounds of error/misunderstanding of this or its legal effects.

Unlike payment service providers, who enter into contractual relations by concluding a contract with the payer/client, the notary does not conclude any contract with the applicant for the provision of notarial assistance. As a consequence, the form of consent must be expressly provided for by law, or the legal framework must stipulate that remote notarial acts can only be drawn up on the condition that the applicant has previously submitted to this notary an application in which he has informed that he wishes to benefit from this form of communication with the notary and about the form of expressing consent that is to be recognized by the notary, as well as the form in which consent is to be considered defective (for situations where the externalization of the will is not free but affected by defects of consent, such as lesion etc.).

Taking consent is a long-lasting stage, given the fact that it presupposes the study of the project by the applicant, the reading of the project by the notary, the explanation by the notary of the legal effects of this act, etc.

c) signature of the parties and date of the document

Stereotypically, expressing consent consists in applying the signature on the document. In the case of remote notarial acts, the application of the holographic signature is impossible (probably, with the exception of the case when the document was previously signed, and the act consists in confirming the fact of signing). In this case, the qualified electronic signature must be applied, which the applicant must have.

Any electronic signature also contains a timestamp. Accordingly, the date of the document results from the timestamp applied by the system.

In this context, an incorrect approach must be observed in the Concept of the Automated Information System "Registry of representation powers based on electronic signatures" (MPower), which states that *the request for notarially authenticated powers of attorney in the context of providing certain services, to the detriment of a non-authenticated power of representation, is generated by the*

need to ensure that the signatures are genuine, which contributes to the avoidance of fraud (GD no. 375 of 10.06.2020). However, the authentication procedure is not based on the application of the signature, but on the expressed consent, and the signature applied in front of the notary only confirms the fact that it was applied by the competent person and with valid consent, understanding the legal effects of the signed act. No current technological process can perform this task.

- *development of the platform for videoconference*

To prove compliance with the rigours of a remote notarial act, a separate platform is needed that will ensure the security and secrecy of the data communicated at the state level (therefore, private videoconference systems, such as zoom, viber, google meet, microsoft times etc., cannot be accepted), and will ensure the recording and storage of these records.

Initially, for example, in Georgia, the drafting of remote notarial acts was allowed using only a private videoconference platform, with the assistance of witnesses and the recording of this session. We consider that the use of private platforms does not comply with the legislation in the field of personal data protection and cannot guarantee the correct conduct of the process, by assuming responsibility for the functionality of the platform. And the application of only the platform for videoconferencing without the use of artificial intelligence in establishing the identity of the applicant increases the risk of fraud.

In any situation, the technologies used, including artificial intelligence, are only tools that the notary must use in the drafting of these notarial acts, which cannot replace the role of the notary and his function in the procedure of providing notarial assistance.

4.3 Example of other states

The Republic of Moldova is not the first state that intends to implement electronic notarial assistance. In this context, we can exemplify some states, where electronic notarial activity is advanced through special technologies used in this field, such as France and the Russian Federation. At the same time, the countries imposed by objective circumstances (such as the Covid-19 pandemic), which have instituted the provisional period of applying electronic notarial assistance, among which we can name: the Kingdom of Belgium and the Portuguese Republic, deserve attention. Several states have tried to implement a simpler system to ensure the security of the procedure, by recording the videoconference, without using artificial intelligence in establishing identity.

The preparation of electronic notarial acts has been developed gradually and consistently with information technologies and with the creation of the necessary conditions for data encryption and ensuring the conditions for electronic archiving of documents. As a result, electronic documents containing the notarial act are used in several countries, including European ones.

Remote notarial acts do not enjoy such widespread use. The impetus for more countries to use remote procedures was the Covid-19 pandemic. Thus, in order not to restrict citizens' access to notarial assistance, several notaries were forced to develop their own special equipment (such as own platforms created by native notarial organizations or by the branch ministry) or to use simpler procedures. For example, in the Kingdom of Spain, Lithuania, Brazil, the platforms are created by national notarial organizations, and in the Portuguese Republic the platform was made available by the Ministry of Justice (2023). However, the notary in Lithuania alone establishes the method of carrying out its remote notarial duties.

Although several notarial acts are drafted remotely, the authentication procedure for legal acts is usually exempted when the communication between the notary and the applicant is at a distance. This approach is largely dictated by uncertainty regarding the identification of the applicant and the verification of the applicant's discernment and consent.

Recently, given the adoption of Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, several European countries have introduced the procedure for remote authentication of only commercial company formation acts (for example, Germany, the Kingdom of Belgium, Italy, the Portuguese Republic, the Kingdom of Spain). It should be noted that, the procedure for authenticating amendments and additions to the constitutive acts in most countries remained with physical presence.

The widest competence of the notary to draft notarial acts remotely is identified in the Russian Federation. More detailed can be studied in the work of Ushakov (2021), and after the latest modifications, in the work of Volos (2023, pp. 50-61). However, both in France and in the Russian Federation the process of implementing these technologies lasted more than 10 years, unlike the 3 years provided for in the legislation of the Republic of Moldova.

At the same time, in the case where the legislation only allowed the drafting of notarial acts in electronic format, without providing it with the necessary equipment, the notary, for various reasons, including financial and security, could not ensure the implementation of this process. In this case, the example of Romania can be seen, which adopted Law no. 589 of 15.12.2004, but notarial acts in electronic form are not drafted in its realization.

5. THREATS TO IMPLEMENTATION OF NOTARIAL ACTS IN ELECTRONIC FORMAT

The introduction of new forms of notarial assistance, which can be applied including to authentication procedures, requires the evaluation and avoidance/reduction of these threats. Currently, the biggest threat that exists is the

impossibility of drafting notarial acts both those in electronic format, and remote notarial deeds, due to:

- lack of necessary technological instruments;
- the absence of a clear and efficient delimitation of competencies in the field of notarial procedure in electronic format and at a distance;
- lack of a regulatory framework that would clearly and realistically describe these procedures;
- the notary's assumption of responsibility for processes that are outside his control.

The informative note to Law no. 126 of 26.05.2023 does not highlight the aforementioned threats, including the one resulting from the lack of technological tools necessary for the implementation of notarial acts in electronic format and remote notarial deeds, although without these technologies their realization is impossible. Even in the economic-financial justification chapter, the necessary amount for the implementation of this law is not specified, only reflecting that the cost of information systems will be covered from the account of international development partners. Later, maintenance expenses will be included in the notary fee. For example, Article 50 of Law no. 246 of 25.11.2018 has not been implemented to date, for technical reasons.

It is at least puzzling that the Notarial Chamber has tried several times to promote the development of its own information system, which was not supported by the Ministry of Justice on the grounds of lack of policy document in this area, and in the end, being the most interested in implementation, it has no competence in this field (except for consultation). Consequently, the creation and implementation of the system requires additional costs for third parties who will manage this system and offer it to notaries, expenses that will ultimately be included in notarial fees to emphasize additional financial expenses for the final applicant.

The approved legal framework does not contain a clear regulation of the notarial procedure with instruments that can be realized under the conditions of the Republic of Moldova. And the obligation of the Ministry of Justice to regulate these procedures, inserted in the law, does not solve this problem, in light of the fact that to date all the necessary normative acts in the execution of Laws no. 69 of 14.04.2016 and no. 246 of 15.11.2018 have not been adopted.

Considering the basis that imposes the necessity of the authentic form of legal acts, the introduction of these procedures should be examined in great detail and strictly regulated to protect the civil circuit. In the absence of the necessary, clear and real regulatory framework for implementation, this law may negatively affect the national economy (by challenging and cancelling notarially authenticated contracts) and demotivate foreign investors, who risk losing properties, without sufficient guarantees in the security of the civil circuit, instead of attracting foreign

investment. The same fact will demotivate notaries to apply this procedure to avoid responsibility for acts performed outside their control.

6. CONCLUSIONS

Cara-Rusnac (2012, p. 93) exposed that the citizen must choose on what support the notarial act should be drawn up: electronic or paper, and that we cannot guarantee 100% data security in electronic format just as fraud is committed when drafting acts on paper support.

While fully agreeing with the right to choose, I believe that fraud in the drafting of acts on paper support is largely due to the lack of a clear regulatory framework. And if these frauds are due to the notary's fault, the notary risks with his own license and freedom for the act committed, which will eliminate such a notary from the notarial system. For this reason, I do not consider it relevant to repeat the mistakes detected in the drafting of notarial acts on paper and against the drafting of notarial acts in electronic format and remote notarial deeds, but to eliminate them through a clear and relevant regulatory framework to the realities of the Republic of Moldova.

In conclusion, I consistently support (Pistriuga, 2015, p. 167) the desire to implement in the Republic of Moldova the notarial act in electronic format and the remote notarial acts, but Law no. 126 of 26.05.2023 does not allow the realization of this ambition, hence it should be conceptually revised in this regard.

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