

CASE NOTE: GERMANY

CASE CITATION:
10 A 11741/05

NAME AND LEVEL OF COURT:
Higher Administrative Court
of Rhineland-Palatinate (OVG
Rheinland-Pfalz)

DATE OF DECISION:
April 21, 2006

Summary of the decision

A time limit will run out if electronic documents submitted to the Administrative Court are not signed with a qualified electronic signature and submitted to the Court within the time limit.

“When an electronic document, deemed to be an equivalent of a written signed document is not provided with a qualified electronic signature as required by Section 55a Para. 1 Sentence 3 VwGO (Verwaltungsgerichtsordnung, German Administrative Court Act), it has no legal consequences, and in particular does not prevent the expiry of time limits.” (Leading record)

In a dispute concerning his service hours, the claim by a soldier was rejected before a lower administrative court. On the last day of the deadline for an appeal, he filed an appeal through his lawyer to the Higher Administrative Court. This appeal consisted of an electronic document without a qualified electronic signature as defined in Section 3 Number 3 SigG (*Signaturgesetz*, German Signature Act) and as required by the procedural rule of Section 55a Para. 1 Sentence 3 VwGO. The court rejected the appeal as inadmissible, establishing that the electronically transferred appeal lacked the required qualified electronic signature. Whereas some court decisions had accepted exceptions to the rule that a written appeal had to carry a signature by the author's own hand, these exceptions could not apply to electronic documents.

The court explained that the legislator, in modifying the rule of Section 55a VwGO in 2005, intended to impose stricter formal requirements upon procedural acts before the administrative courts. This was clearly shown, according to the court, by the history of the legislative process. Section 55a VwGO replaced the old Section 86a VwGO on April 1, 2005. According to the old Section 86a VwGO, the use of a qualified electronic signature was not an imperative formality but a mere procedural rule. The wording of the new Section 55a VwGO that was relevant in this case leads the court to the conclusion that the use of a qualified electronic signature is a mandatory formal requirement. In addition, the court affirms its opinion with the argument

that the legislator introduced similar sections into the German Administrative Procedures Act (*Verwaltungsverfahrensgesetz*) as well as the procedural rules of the other public law jurisdictions such as Finance Courts and Social Courts.

The court further stated that Section 55a VwGO, a German federal law, authorized the federal state governments to adopt executive by-laws (*Landesverordnungen*). The by-law governing the execution of Section 55a VwGO in the state of Rhineland-Palatinate (*Landesverordnung über den elektronischen Rechtsverkehr*, State By-law on Electronic Legal Communication, amended February 15th, 2006) required a qualified electronic signature for any such document that is normally required to be in written form.

Therefore, the electronic statement of appeal to an administrative court in the state of Rhineland-Palatinate had to carry a qualified electronic signature in order to produce legal effects.

Commentary

Not only the OVG Rheinland-Pfalz but also the Bundesfinanzhof (Supreme Tax Court, Ref. V R 40/05, date of decision: October 26th, 2006) had to decide on the validity of electronic documents submitted via e-mail to the Court. Like the OVG Rheinland-Pfalz compared the old Section 86a VwGO with the new Section 55a VwGO, the Bundesfinanzhof compared the respective old Section 77a FGO (Finanzgerichtsordnung, Statutes of the German finance courts) with the respective new Section 52a FGO replacing Section 77a FGO and reached the conclusion that according to the new Section a qualified electronic signature is a mandatory formal requirement. Section 55a Para 1 VwGO reads as follows:

“The parties may submit electronic documents to the court insofar as it is permitted by a by-Law of the Federal Government or the State Governments in the area of the court's responsibility. The by-Law stipulates the point of time from which onwards a document can be transmitted to the court electronically as well as the way in which electronic documents are to be submitted. A qualified electronic

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signature pursuant to § 2 No. 3 SigG [(Signaturgesetz, German Signature Act)] has to be required for [electronic] documents to be considered as an equivalent to a document to be signed in writing.[...]"

The wording of this section and the similar Section 52a FGO do not leave much room for the interpretation that the use of qualified electronic signatures is not mandatory. Therefore the decision of the OVG Rheinland-Pfalz is comprehensible.

But does the written form really always require a qualified electronic signature? German courts consider that one can comply with a time limit by sending a facsimile the court before the end of the time limit. As far as authenticity and integrity are concerned, facsimile transmissions do not offer more security than unsigned e-mails, because a facsimile is sent using the same telephone lines that are used to send e-mails. Furthermore, facsimile transmissions are often sent and received by computers or servers and are therefore exposed to similar risks of manipulation as e-mails and electronic documents. For this reason, it remains unclear why one should be able to comply with a time limit by sending a facsimile but not by sending an unsigned e-mail to the court. This situation is disappointing. Taking into consideration that German courts have stated on several occasions that a formal requirement does not have an end in itself, the legislator should amend the strict wording of Sections 52a FGO, 55a VwGO as well as the procedural rules of the other public law jurisdictions. This would leave a wider range enabling the courts to develop a jurisdiction as to when a qualified electronic signature is mandatory or not.

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Dr Eßer has agreed to join the editorial board of the Journal