CASE NOTE: GERMANY (UPDATE)

CASE CITATION:
19 February 2009, IV R 97/06

NAME AND LEVEL OF COURT:
Federal Finance Court (Bundesfinanzhof –BFH)

Statement of claim; submitted with a digital signature (qualified electronic signature); certificate; monetary limit; validity of signature

Electronically signed claim – on the interpretation of the term *monetary limitation*

Decision of the Finance Court of Münster dated 23.03.2006 annulled, *Digital Evidence and Electronic Signature Law Review* 3 (2006) 111 - 112 (previously the *Digital Evidence Journal* 2006 (3)(2) 121 (Summary and comment))

Summary of the decision

The plaintiff's counsel filed a statement of claim along with other documents via e-mail in a 'container' with a qualified electronic signature pursuant to the German Signature Act (Signaturgesetz). The corresponding signature certificate contained a monetary limitation of 100 euros. The plaintiff argued that the qualified electronic signature is valid because the monetary limitation in the signature certificate only applies to the conclusion of contracts, and not to any other declaration signed with the corresponding qualified electronic signature. The Finance Court of Münster dismissed the claim and judged that the claim had not been filed in writing or in an equivalent form, and had, in particular, not been signed with a valid electronic signature, because filing an action with the Financial Court causes financial consequences exceeding the monetary limitation of 100 euros.

The plaintiff filed an appeal with the Federal Finance Court (Bundesfinanzhof –BFH).

The BFH annulled the decision of the Finance Court. The BFH pointed out that according to its legal nature, the electronic signature is an equivalent to the manuscript signature. According to Section 52a FGO (Finanzgerichtsordnung – Statues of the German Finance Courts) – which replaced the former Section 77a FGO, electronically signed documents can be submitted to the Financial Courts.

The BFH explains that monetary limitations only refer to financial transactions, that is bank transfers or other money transactions. In accordance with this function, a monetary limitation is irrelevant if the electronic signature is used to submit a written pleading to the court. In such a case, only the evidence of the authorship is relevant because it is not a financial transaction. The monetary limitation as no meaning in this context and the signature serves its purpose to ensure the authenticity of the document.

Comment

This decision clarifies the confusion and uncertainty of lawyers using qualified electronic signatures with monetary limitations. It emphasises the function and importance of electronic signatures in their communication with the courts and brings a positive end to a discussion that caused unjustified scepticism towards electronic signatures.

Dr. Eßer is a member of the editorial board

CASE NOTE: GERMANY

CASE CITATION:
2 BvC 3/07, 2 BvC 4/07

NAME AND LEVEL OF COURT:
Bundesverfassungsgericht Second Senate (Federal Constitutional Court of Germany)

DATE OF DECISION: **3 March 2009**

MEMBERS OF THE COURT: **Voßkuhle Vice President, and judges Broß, Osterloh, Di Fabio, Mellinghoff, Lübbe-Wolff, Gerhardt, Landau**

The judgment is available in German at: http://www.bundesverfassungsgericht.de/entscheidungen/cs20090303_2bvc000307.html

A press release in English, Press release no. 19/2009 of 3 March 2009, is available at http://www.bverfg.de/en/press/bvg09-019en.html

Unconstitutional use of electronic voting machines

Facts

The Federal Constitutional Court of Germany gave a judgment on 3 March 2009 which defines the primary requirements relating to electronic voting. The court rendered its judgment on two complaints concerning the scrutiny of the 16th German *Bundestag* election of 2005. These complaints were directed against the use of computer-controlled voting machines within the election at hand. The use of these machines is permitted under German law by Sec. 35 of the Federal Electoral Act (*Bundeswahlgesetz* – BWG). The court decided that the present function of the voting machines and their use violates the principle of the public nature of elections (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law of the Federal Republic of Germany (*Grundgesetz* – GG), which prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception.

Commentary

The court decided that due to the wide-reaching effect of possible errors of the voting machines or of deliberate electoral fraud, special precautions are necessary in order to safeguard the principle of the public nature of elections. For this reason, voting machines have to enable citizens to examine the essential steps of the voting procedure and of the determination of the result in a reliable way and without any special IT knowledge. This decision means that this requirement must also be met by any electronic voting system, irrespective of the mode of use (with or without voting machines) in order to be in accordance with the Basic Law.

Furthermore, in the case at hand, the court found that the calculation process that was carried out in the voting machines, and the fact that the voting results were noted down merely by means of a summarising printout, did not correspond to the principle of the public nature of elections. According to the judgment of this Constitutional Court decision, electronic voting machines should enable a reliable examination and provide an insight into the accuracy of the voting result. An example to resolve such a problem would for an electronic voting machine, for instance, in which the votes are recorded in more than one way, other than the electronic storage of the machine, thus enabling a complementary examination by the voter, the electoral bodies or the general public. It goes without saying that printing the ballots is only one possible way of implementing this prerequisite.

The court also pointed out that the right of citizens to examine the voting procedure and the voting result cannot be replaced by a public authority which examines sample machines in the context of their engineering type and issues a license permitting their use for elections. The trust in the accuracy of an appraisal and an auditing procedure of a public authority cannot be a substitute for the trust in the voting procedure. The court did not go into the question of how a trust mechanism on complex IT based procedures can be generated.

The court concluded that the Federal Voting Machines Ordinance ((Bundeswahlgeräteverordnung - BWahlGV) vom 3. September 1975 (Bundesgesetzblatt I Seite 2459) (in der Fassung der Verordnung zur Änderung der Bundeswahlgeräteverordnung und der Europawahlordnung vom 20. April 1999 (Bundesgesetzblatt I Seite 749)) (Federal Voting Machines Ordinance - BWahlGV) dated September 3,

1975 (Federal Law Gazette I page 2459) as amended by Council Regulation amending Regulation Equipment Federal Election and the European Regulations from April 20, 1999 (Federal Law Gazette I, page 749)) is unconstitutional, because it does not ensure that only voting machines which meet the above mentioned constitutional requirements are permitted and used. However, because of the lack of any indications that the voting machines malfunctioned or could have been manipulated and in order to protect the continued existence of the elected parliament, the court decided that this decision does not result in the dissolution of the Bundestag.

Zoi Opitz-Talidou previously worked at the institute headed by Professor Dr. Roßnagel for the project 'voteremote'. The aim of the project was to develop a legal framework for secure remote online election procedures. Dr. Opitz-Talidou now works as a legal administrator at the international Law firm Nörr Stiefehofer Lutz in Munich.

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