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Considerations Regarding the Validity of the Prosecutor's Procedural Documents appropriated through the Application of a Stamp Containing his Signature

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Abstract: The absence of the prosecutor when his participation is compulsory is sanctioned with the absolute nullity of all the procedural acts conducted without his involvement. In a criminal case where the ex officio notification report, the prosecutor's ordinances for the beginning of the criminal investigation, of extending the criminal investigation do not contain the prosecutor's holograph signature, the court cannot verify if these procedural acts were truly issued by the prosecutor mentioned in them. The holograph signature applied by the prosecutor on the original procedural acts is the only method of guaranteeing that the procedure and content of these acts were assumed by the public attorney. The application of a stamp that reproduces the prosecutor's signature is an indirect and mechanical method of signing that brings the absolute nullity of the procedural act brought by the public attorney's absence in the supposed issuing of the document. This indirect method of "signing" does not allow to ascertain that the prosecutor has signed the procedural act, because a stamp can be applied by anyone.

Keywords: prosecutor; holograph signature; public attorney's ordinances; mechanically applied impression

The Premise

In a case pending on Iasi Tribunal² that is in the preliminary chamber the defence noticed that all the procedural documents issued by the public attorney (original samples) were signed through the application of a stamp containing the prosecutor's signature. All of the signatures were identical, this being the reason why the defence requested that the judge nullifies these procedural acts based on the fact that the absence of the prosecutor's holograph signature leads to the fact that he did not participate in any way in their issuing.

The preliminary chamber judge has the authority to analyze the legality of the issuing of prosecution documents and to expunge the evidence obtained through illegal means.

The application of a stamp that contains the public attorney's signature on the prosecution documents like the ex officio notice, the ordinance of starting the prosecution, the ordinance of extending the

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² Iasi Tribunal, Case no. 3813/99/2018/a1, Preliminary Chamber.

prosecution, implies the illegality of evidence taking and to the conductment of the prosecution documents by the prosecutor as well as the nullity of the writ of summons.

Article no. 281 of the Romanian Criminal Procedure code provides under the penalty of absolute nullity the public attorney's participation in the prosecution's documents: "The breach of the following situations causes the absolute nullity of the prosecution documents: d) the participation of the prosecutor, when his participation is compulsory".

Based on article no. 281 paragraph 1 section d of the Romanian Criminal Procedure code on the compulsory participation of the public attorney, we are of the opinion that all the public attorney's prosecution documents that are not holographically signed by him and that have the application of a stamp containing his signature are struck by absolute nullity.

As resulted from the contents of the prosecution documents issued by the prosecutor, in a criminal case which is in the preliminary chamber phase, of the Iasi Court of Justice, the defence raised the objection of absolute nullity of the ex officio notice, the ordinance of starting the prosecution, the ordinance of extending the prosecution and all the other documents issued by the public attorney as these documents contained only his signature applied through the use of a stamp.

Arguments to Support the Claim that the Documents signed through a Mechanically Applied Signature or Digitally Signed are struck by Nullity

The originals of the prosecution documents are placed in the case files and at a visual analysis of their contents, it can be observed that neither have the holograph signature of public attorney that issued these documents, although they have mechanically or digitally applied impressions that imitate the holographic signature.

We are of the opinion that an individual's signature can only be conducted by the actual signing of the paper by the individual or his representative. Performing the impression of the signature through the application of a stamp or by printing the signature through the use of a personal computer, cannot be assessed as a veritable signature, but a reproduction of that signature which can be conducted by any individual, even without the consent and knowledge of the individual whose signature is reproduced.

The preliminary chamber judge, in the phase of verifying the legality of the prosecution documents, cannot verify if these documents have been issued by the individuals mentioned in the or by other people.

Relevant in this regard is the fact that the overlapping of the signatures applied through a stamp on distinct prosecution documents, issued on different dates, have revealed that all signature have the same size and are perfectly identic even if they have different sources. Obviously, even if a holographic signature is made by the same person, it will never be identic, only similar.

As an example, the prosecutor's signature applied holographically on the ordinance through which a technical expertise was issued has a different size and shape than all of the signatures applied on the other prosecution documents.

Taking into account that the signature has not been applied holographically, but digitally or mechanically, this situation leads to the penalty of the absolute nullity of the prosecution documents and the preliminary chamber judge will expunge the evidence obtained with the used of such documents.

According to article no. 203 paragraph 2 of the previous Romanian Criminal Procedure Code, in force at the date of issuing the prosecution documents that are the subject of the case presented in this paper,

the ordinance and the resolution of the criminal investigation bodies must be reasoned and must always contain the date and place of their issuing, the name and the quality of the issuer, the case that it relates to, the subject of the procedural document or procedural measure, its legal basis and the signature of the issuer.

Provided by article no. 268 of the Romanian Criminal Procedure code, with the title “The purpose of the signature” “A signed document ascertains, until proven otherwise, that the party which signed the paper has given his full consent over the document’s contents. If the signature belongs to a public servant, it confers authenticity to that document. When the signature is digital, it is valid only if it was reproduced under legal conditions”.

Thus, provided that the signature has the purpose of attesting a person’s consent towards the document’s contents, it must be applied by the signer. The signature cannot be typewritten, printed or replaced by a stamp.

Relevant European and National Case Law

1. With regard to the absence of the holographic signature of the document’s issuer, the European Union Public Service Tribunal’s case law¹ views this issue as: the holograph signature applied by the lawyer on the original writ of summons is the only way that allows the guarantee that the responsibility of the elaboration and content of this procedural act is assumed by a person authorized to represent the complainant in front of the European Courts².

The requirement of a holographic signature provided by article no. 43 paragraph 1 from the European proceedings Regulation targets the reason of guaranteeing the authenticity of the application and the elimination of risk that such an act is not the work of the applicant authorized to use the procedure. As follows, this requirement must be considered a fundamental rule of form and to be the subject of a strict use, in such a way that the infringement of this rule shall determine the invalidity of the application.

Applying a stamp that reproduces the lawyer’s signature on the initiate proceeding does not allow the Court to verify if the document was signed by the lawyer, this being an indirect and mechanical way of signing.

As such, the inadmissibility objection raised in front of the European Union Public Service Tribunal must be admitted. Consequently the application must be rejected as inadmissible.

The infringement of the functional, material and by person competence rules (the authorization of obtaining an evidence by the preliminary chamber judge instead of the judge of rights and freedoms, the illegal delegation of the evidence-taking attribution, the disposal of evidence taking by a non-competent judicial body). The nullity of the act through which the evidence is administered usually refers to the procedural sanction of the means of evidence and the probative proceedings, as procedural acts (the minute of search warrants and the search as probative proceeding, the expert’s report and the expertise, the culprit’s statement and the proceeding of hearing, the minute of transcribing the intercepted phone conversation and the technical warrante etc.)”.

¹ European Union Public Service Tribunal, Decision from 23rd May 2007, Case T-223/06.

² European Union Public Service Tribunal, Ordinance from 24th February 2000, Case T-37/98.

2. In another relevant case, the Bucharest Court of Appeal¹ considered that the absence of proof according to which the signature of a document belongs to the issuer must be sanctioned by the judge in front of which the document was presented:

In the absence of a signature from the complaint, a signature that has been proven to belong to the complainant or a person authorised by him, the complainant's will of filing a complaint in front of the Court, as provided by article no. 278¹ of the Romanian Criminal Proceedings Code.

Consequently, the complaint bears a signature which could not be concluded if it belongs to a person mentioned by article no. 278¹ paragraph 1 from to Romanian Criminal Procedure Code or to an empowered person, as such, the Court finds the complaint inadmissible and will reject the application based on article no. 278¹, paragraph 8 section 2 of the Romanian Criminal Procedure Code.

3. Another relevant case was ruled by the Romanian High Court of Justice² finds that the signature has the purpose of attesting the will of the party regarding the contents of the signed document, the signature must be written by the applicant's own hand and it cannot be typed, printed or replaced by a stamp.

Analyzing the file's documents, the High Court finds that the appellant had filed the appeal through fax, on the date of 12th February 2015, being registered at the first instance on 13th February 2015, bearing the signature of the Director/Legal Advisor B., a signature that is found in a printed form.

The High Court retains that at the document's file there is no physical copy of the appeal that contains the holograph signature of the legal representative of the appellant.

The High Court retains that the form conditions referred to in article no. 486 paragraph 1 of the Romanian Civil Procedure Code are not met, the appeal does not contain the appellant's signature (or his representative), which needs to be applied on the procedural acts filed to the Court, a printed copy of the signature is not sufficient.

The Public Attorney's Point of View

The prosecutor claimed that the irregularities brought to the Court's attention by the defendant, exceed the preliminary chamber's competence. The procedural acts fulfilled by the criminal investigation bodies are invested with the validity presumption until proven otherwise.

It cannot be claimed only based on a shallow examination by the defendant that the prosecutor which issued the procedural acts had not signed them, and thus did not participate in their conductment.

Conclusions

Consequential, given that the preliminary chamber judge cannot conclude beyond a reasonable doubt that the procedural acts were truly issued by the competent criminal investigation body, we consider that the provisions regarding the absolute nullity of the acts are to be applied, due to the prosecutor's absence.

Taking in account that the ordinance of commencing the criminal investigation and of exercising the criminal proceedings are the basis of criminal investigation, and that issuing new procedural acts is not

¹ Bucharest Court of Appeal - Criminal Section 1, Decision nr. 313/F/02.11.2009.

² Romanian High Court of Justice, Decision nr. 2050/31st May 2017.

possible in the preliminary chamber, we consider that the preliminary chamber judge must find the whole criminal investigation is struck by nullity, on the basis of *accessorium sequitur principale*.

At the same time, the absolute nullity of all the procedural acts must be found given that the documents were obtained based on void criminal investigation acts, as such, they are also struck by nullity.

The doubt regarding the signer of a procedural act equals to the absence of the signature from the document.

The signature applied holographically by the public attorney on the original prosecution documents is the only way that allows the guarantee that the responsibility and contents of such a document is assumed by the public attorney.

The requirement of the signature, referred to by the Romanian legislator has the purpose of guaranteeing the authenticity of the prosecution documents and the exclusion of the risk that such documents are not the work of the public attorney. As such, this requirement must be considered a fundamental rule of form and to be the subject of a strict application in such a way that the breach of this rule will bring the nullity of the document signed in this manner.

The digital and indirect way of “signing” does not allow by itself to determine if the prosecutor has signed the document or if he is the issuer of this document.

The nullity brought by applying a stamp that contains a signature is an absolute nullity, reasoned by the absence of the public attorney in the issuing of the act assumed to be signed by him.

On this subject, the Romanian Constitutional Court¹ has decided that the nullity of the document through which an evidence was authorized or administered may consist in: the infringement of the rules regarding the form of the document (the omission to mention the judicial body that issued the document, the absence of the judicial body’s signature, the absence of the operative part of the decision, etc.).

The absolute nullity sanction should be applied in the case that the prosecutor’s signature is not found on the essential criminal proceedings acts (the ordinance of commencing the criminal investigation and of exercising the criminal proceedings). In this case, based on the *accessorium sequitur principale* principle, the nullity of all the criminal investigation acts must be applied.

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Romanian High Court of Justice. *Decision nr. 2050/31st May 2017.*

¹ Romanian Constitutional Court Decision nr. 554/2017 regarding the unconstitutionality of article no. 282 paragraph 2 of the Romanian Criminal Procedure Code.