ARTICLE:

AN OVERVIEW OF SOME RECENT CASE LAW IN BELGIUM IN RELATION TO ELECTRONIC SIGNATURES

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Although the Belgian legal framework in relation to electronic signatures has been implemented for more or less a decade now,[1] legal disputes in relation to the use and the validity of electronic signatures have been rare.

Digital evidence and electronic signature related litigation would appear to be most likely between companies active in the high tech sectors. It may therefore come as a surprise that a wave of case law in relation to electronic signatures has arrived in the context of opposition proceedings against negative decisions relating to obtaining entry to the territory, the residence and the establishment thereon as well as the removal therefrom.

Several factors can explain this situation. The most important reason is probably linked to the effort of the Belgian government to create an 'electronic government' as a catalyst to improve the uptake of new technologies by companies and citizens alike. Examples are the introduction of a general social security database, a company database, and the electronic identity card (containing a qualified certificate).[2] Second, the likelihood of proceedings in relation to (electronic) signatures is the greatest in cases where the evidence rules and formalities are regulated in a strict manner and where non-compliance leads to the annulment of the act in question. These two explanations meet in the context of immigration proceedings: the Office for Foreigners has implemented an electronic signature system that uses an electronic signature method that is based on a scanned version of the handwritten signature of a civil servant, but with additional security measures. Whenever a decision of the Office for Foreigners does not comply with any essential formal requirement, it can be annulled. The discussion of the validity of the electronic signature method that is being used by the Office for Foreigners is therefore high. This is less important in a commercial setting, where the evidence system is less strict: a signed paper document is not the only manner in which commercial agreements can be proven.

Since the beginning of 2008, the Council for Alien Claimants has had the opportunity to decide on a number of cases in which the validity of the electronic signature mechanism is disputed.[3] The facts for these cases are irrelevant for the appreciation of the legal issues at issue, and therefore they are not translated below. The modus operandi for all these cases is more or less similar: a decision is drafted and signed electronically (the signature being the method briefly described above) and subsequently remitted to the intended recipient on paper. The signature on the paper document appears to be a scanned copy of a

[1] *Law of 20 October 2000 introducing the use of telecommunications means and electronic signatures in judicial and extrajudicial proceedings (Belgian State Gazette of 22 December 2000) and Law of 9 July 2001 establishing certain rules in relation to the legal framework for electronic signatures and certification services (Belgian State Gazette of 29 September 2001). For a translation of this legislation into English, see: J. Vandendriessche, Digital Evidence and Electronic Signature Law Review, 1 (2004) 67 – 74.*

[2] *See for instance: Crossroads Bank for Social Security (http://www.ksz-bcss.fgov.be/en/international/home/index.html) and the Belgian electronic identity card (http://eid.belgium.be).*

[3] *The Council for Alien Claimants is an administrative court that is exclusively competent to hear appeal proceedings against decisions relating to obtaining entry to the territory, the residence and the establishment thereon as well as the removal therefrom. Its case law can be consulted at the following website: http://www.rvv-cce.be/. The Council of State is, amongst others, the supreme administrative court and, as such, competent for hearing proceedings to obtain the suspension and annulment of administrative decisions. Its case law can be consulted at the following website: http://www.raadvst-consetat.be/?page=index&lang=en. Prior to the creation of the Council for Alien Claimants, the tasks of the Council for Alien Claimants were attributed to the Council of State.*

handwritten signature. As a consequence, annulment proceedings are initiated and invariably it is argued that the decision has not been signed with a valid signature.

Except for one decision of the Council of State,[4] the case law has decided that the electronic signature method that was used by the Office for Foreigners was a valid signature. The case law remains interesting however, because it demonstrates that there still is a lack of understanding about the concept of an electronic signature. A number of decisions translated by the author are set out below.

Decision of the Council for Alien Claimants of 17 February 2009 (nr. 23.088)[5]

"3.1.1 Claimant puts forward a first argument:

> "[...]
>
> The act contains what appears to be an electronic signature of civil servant V.
>
> That no law allows the use of scanned signature on a decision.
>
> Such a scanned signature can hardly replace a real signature. That it cannot be verified whether or not the disputed decision was effectively taken by the concerned civil servant or by a third person who had copied the signature thereon. That there is no guarantee of authenticity.
>
> That consequently, it cannot be verified whether or not the disputed decision was taken by civil servant V. and consequently by the delegate of the Minister.
>
> That the decision must be annulled."

3.1.2. In its brief, the defendant admits that it did not create the decision in the classical manner, using a ballpoint pen or a fountain pen, but that it is incorrect to assert that there is no valid signature of an authorised civil servant, or that this cannot be verified. The authorised civil servant has taken the decision himself, and the decision has been signed with an "original signature" that has been placed on paper using modern technical means.

The legal basis for this approach can be found in the law of 9 July 2001 establishing certain rules concerning the legal framework for electronic signatures and certification services, which is in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. Article 4, §4 of this law provides that an advanced electronic signature which is based on a qualified certificate and which is created by a secure-signature-creation device is assimilated to a handwritten signature. Article 4, §5 of the law provides that an electronic signature cannot be denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that, inter alia, it is in electronic form or not created by a secure signature-creation device.

The legal basis for this approach is also based on the law of 20 October 2000 introducing the use of telecommunication means and electronic signatures in judicial and extrajudicial proceedings, that has, amongst others, added a second paragraph to article 1322 of the Civil Code: "Can, for the purposes of this article, comply with the requirements of a signature, a set of data in electronic form that can be attributed to a specific person and that can demonstrate the integrity of the contents of the act".

The system that is being used by the Office for Foreigners complies with the requirements of Annex III of the aforementioned law of 9 July 2001, which mentions the requirements in relation to secure-signature-creation devices for the creation of an electronic signature.

Indeed, the signature is uniquely linked to the signatory, as the name is inextricably linked to the signature of the concerned person. The name of the signatory appears automatically together with the signature in a frame section intended for the signature. The signature is identifiable. The signatory has exclusive control over the means required for the creation of the signature, and for every electronic signature a password and a code must be entered, which are only known to the signatory. Any subsequent modification can be traced. Once an electronic signature has been placed on the document that needs to be signed, the document is registered and it cannot be stored in a modified form.

The signatory is known as a civil servant employed by the Office for Foreigners in a capacity of assistant-advisor, which authorises him to take decision in the

[4] *As can be read below, the Council of State (8 May 2009 (nr. 193.106)) rejected the signature because the Office of Foreigners did not adduce evidence to substantiate the security measures in place. It may therefore be assumed that this case law cannot be applied in a general manner.*

[5] *The following decisions contain a reasoning that is almost identical or at least substantially similar: Decision of the Council for Alien Claimants of 24 February 2009 (nr. 23.535); Decision of the Council for Alien Claimants of 3 April 2009 (nr. 25.604); Decision of the Council for Alien Claimants of 12 May 2009 (nr. 27.239); Decision of the Council for Alien Claimants of 15 May 2009 (nr. 27.402).*

name of the Minister for Immigration. The identity and the capacity of the civil servant cannot be reasonably doubted. The decision contains a valid signature.

3.1.3. Claimant challenges the fact that the decision contains a "scanned" signature.

[...]

Concerning the scanned signature, the defendant refers correctly to the law of 9 July 2001 establishing certain rules in relation to the legal framework for electronic signatures and certification services.

Although the law of 9 July 2001 does not mention anywhere that it applies to the public sector, it must be assumed that this legal framework also applies to electronic signatures that are used in the public sector. The draft law of 16 December 1999 concerning the functioning of certification service providers in view of the use of electronic signatures (Parliamentary Documents, Chamber of Representatives, 1999-2000, second hearing of the 50th Session, Document nr. 0322/001, page 5) mentions explicitly that it aims to "develop the electronic legal acts in the private and the public sector". In accordance with article 4, §3 of the law of 9 July 2001, royal decrees can be issued to impose additional requirements in relation to the use of electronic signatures in the public sector. No such royal decree has been issued to date. In any case, article 4, §3 of the law of 9 July 2001 implies that the legal framework for electronic signatures, as set out in the law, is the legal basis for electronic signatures in the public sector.

Article 4, §4 of the law of 9 July 2001 provides the following:

> "Without prejudice to the articles 1323 and following of the Civil Code, an advanced electronic signature which are based on a qualified certificate and which are created by a secure-signature-creation device is assimilated to a handwritten signature, irrespective of whether this signature was created by a physical person or a legal entity."

It is not disputed by any party that the signature that has been affixed on the disputed decision is not a qualified electronic signature, as described in article 4, §4 of the law of 9 July 2001. However, the Foreigners Law does not require that decisions taken in its context must contain an advanced electronic signature.

The claimant asserts that "it cannot be verified whether or not the disputed decision was taken by the concerned civil servant or by a third person that has copied the signature thereon. That there is no guarantee of authenticity."

Article 4, §5 of the aforementioned law of 9 July 2001 provides the following:

> "an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
>
> - in electronic form, or
>
> - not based upon a qualified certificate, or
>
> - not based upon a qualified certificate issued by an accredited certification-service-provider, or
>
> - not created by a secure signature-creation device."

It follows that a simple electronic signature does not need to be denied legal effectiveness solely because it lacks a qualified certificate or because no use was made of a secure signature-creation device.

In this context, the defendant explains in its brief that the system that is being used by the Office for Foreigners complies with the requirements set out in Annex III of the law of 9 July 2001, which sets out the requirements in relation to secure signature-creation devices used for the creation of an electronic signature. The defendant gives the following explanation:

> "The system that is being used by the Office for Foreigners in this case complies with the requirements of Annex III of the aforementioned law of 9 July 2001, which sets out the requirements in relation to secure signature-creation devices used for the creation of an electronic signature.
>
> Indeed:
>
> - the signature is uniquely linked to the signatory because the name is inextricably linked to the signature of the concerned person. The name of the signatory appears automatically upon creation together with the signature in a frame;
>
> - the signatory can be identified;
>
> - the signatory has the sole control over the means

required for the creation of the signature, as for every electronic signature a password and a code that are only known to him need to be entered;[6]

- any modification of the documents that need to be signed can be traced. Once the electronic signature has been placed on the documents that need to be signed, the document is registered and it cannot be stored thereafter in a changed form."

This explanation, that demonstrates that in this case the electronic signature is secured with measures that serve to exclude exactly what claimant asserts, i.e. that a third person would have had access to the electronic signature of the concerned civil servant, is not manifestly unreasonable. The mere allegation of claimant, that a third person would have copied the signature on the decision, is not substantiated.

Consequently, it can be concluded that the disputed decision was taken and signed by civil servant K.V.

The first argument is not substantiated."

Decision of the Council for Alien Claimants of 13 March 2009 (nr. 24.496)

"The claimant applies the following reasoning:

"The act contains what appears to be an electronic signature of civil servant (V.).

That no law provides for the signing of such an act with scanned signatures.

Such a scanned signature can hardly replace a real signature. That it cannot be verified whether or not the decision was really made by the concerned civil servant or by a third party who has pasted the signature thereon. That there is no guarantee of authenticity.

That it cannot be verified whether or not the decision was made by civil servant (V.) and thus by the delegate of the Minister."

The defendant firstly asserts in its brief that the administrative file clearly demonstrates that the request for permission to reside on the territory was declared inadmissible by the administration, and not by a third party by means of a false signature. The defendant further asserts that the electronic signature used for the decision must be deemed authentic and that it must be assimilated with a handwritten signature because the signature is uniquely linked to the signatory and allows to identify the signatory. He stresses the fact that the signatory has the sole control over the means to create the electronic signature – more specifically a password and a code – and that any subsequent modification can be traced.

It must be noted that the claimant does not challenge the fact that civil servant (K.V.) is, in view of his title, competent to declare the request inadmissible, but only that it is not clear whether or not the civil servant (K.V.) is the author of the decision. He bases this assertion on the fact that the electronic signature was not written by hand by the civil servant (K.V.), but that the signature is a scanned version of the signature of this civil servant. The claimant also asserts that the law does not provide for the use of such a scanned signature.

The Council takes note of the fact that the claimant omits to indicate the provision that would prevent a delegate of the Minister to use such a scanned signature, nor does he indicate the provision that would impose on the civil servant the obligation to write his signature himself on each individual act. Moreover, it must be noted that the signature only serves to obtain certainty about the identity of the author of the disputed decision. The claimant does not contradict at the hearing that, in casu, the scanned signature of the civil servant (K.V.) can only be placed by civil servant (K.V.) himself, as he is the only person that disposes of the required password and the necessary code to place this signature. It is therefore not proven that civil servant (K.V.) is not the author of the decision, as it is filed in the administrative file and it appears moreover that civil servant (K.V.) is indeed the person who decided on the request."

Decision of the Council of State of 8 May 2009 (nr. 193.106)

"Considering that the claimants propose a second argument that is formulated as follows:

"Violation of substantial formal requirements, violation of the general principle of due

[6] *As an observation, it may be correct that the signatory might think they are the only person to know the password and code, but a third party may obtain such information relatively easily (as the data breach cases illustrate) and as the Russian digital signature cases illustrate, where the passwords of digital signatures belonging to the company have been used by criminals to transfer funds from company bank accounts, for which see Olga I. Kudryavtseva, 'The use of electronic digital signatures in banking relationships in the Russian Federation', Digital Evidence and Electronic Signature Law Review, 5 (2008) 51 – 57, and Olga I. Kudryavtseva, Case note: Resolution of the Federal Arbitration Court of Moscow Region of 5 November 2003* N КГ-А 40/8531-03-П, *Digital Evidence and Electronic Signature Law Review, 5 (2008) 149 – 151.*

administration, abuse of power.

The attacked decision is indeed null as a result of lacking a substantial formal requirement, i.e. the lack of a handwritten signature of the person authorised to take the decision.

The decision mentions that it was taken by "Nadira Lazreg, adjunct advisor" but bears no signature. Only a signature that evidently was scanned is place on the decision.

A signature is however defined as a handwritten sign by which the signatory habitually shows his identity to third parties. The handwritten signature guarantees the authenticity of the decision and the identification of its author. The signature by the author of an administrative decision must be considered as an essential element thereof, failing which the decision is not valid. It is therefore a substantial formality.

The disputed signature also cannot be considered as an electronic signature in the sense of article 2 of the law of 9 July 2001 concerning electronic signatures and certification services, which states:

> "... For the application of this law and its decrees, are deemed to be: 1. "electronic signature": data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication. 2. "advanced electronic signature": an electronic signature which meets the following requirements:
>
> (a) it is uniquely linked to the signatory;
>
> (b) it is capable of identifying the signatory;
>
> (c) it is created using means that the signatory can maintain under his sole control; and
>
> (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

An electronic signature is therefore deemed to be, inter alia, the digital signature and other technical mechanisms that allow the verification of the authenticity of data that are being sent by electronic means.

In this case, the signature was merely copied by means of a scanner. This signature does not meet the requirements of the definition of an electronic signature and even less those of an advanced electronic signature.

> "The dynamic signature must not be confounded with the process consisting of simply scanning a handwritten signature. This process, that permits an unlimited reproduction of the graphical elements of a handwritten signature, in the end only differs from the photocopy in its degree of perfection. It offers no guarantee in relation to the identity of the person that has made the reproduction. The document that contains such a signature has no more probative value than a photocopy." (P. Lecocq – B. Vanbrabant, La preuve du contrat conclu par voie électronique, Act. Dr. 2002/03, p. 256).

A signature that is scanned in that manner and that can be placed on the document by any person, does not permit the verification of who the real author of the decision is and consequently, what his capacity is. It can therefore not be excluded that the scanned handwritten signature could have been placed by an unauthorized civil servant.

The administrative decision of 11 December 2003 is therefore struck by a substantial irregularity and consequently null.

2.2 Considering that the defendant asserts the following in his brief:

> "Violation of substantial formal requirements, violation of the general principle of due administration, abuse of power.
>
> Claimants assert that the signature that appears on the disputed decision does not comply with the definition of electronic signature and/or advanced electronic signature.
>
> The defendant has the honour to reply thereto that the electronic signature that appears on the original decision does comply with the legal requirements. The use of the electronic signature by the Office of

> Foreigners finds its legal basis, inter alia, in the law of 20 October 2000 introducing the use of telecommunication and the electronic signature in judicial and non-judicial procedures (Belgian State Gazette 22 December 2000)."

This law introduced paragraph 2 in article 1322 of the Civil Code:

> "A set of data in electronic form that can be attributed to a specific person and that can demonstrate the integrity of the contents of the act, can, for the purposes of this article, comply with the requirements of a signature"

The legal basis for the electronic signature is also set out in the law of 9 July 2001 establishing certain rules in relation to the legal framework for electronic signatures and certification services (Belgian State Gazette 29 July 2001):

> "Article 4 §4 of the aforementioned law mentions:
>
> "Without prejudice to the articles 1323 and following of the Civil Code, an advanced electronic signature which are based on a qualified certificate and which are created by a secure-signature-creation device is assimilated to a handwritten signature, irrespective of whether this signature was created by a physical person or a legal entity.

Article 4 §5 mentions:

> "an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
>
> - in electronic form, or
>
> - not based upon a qualified certificate, or
>
> - not based upon a qualified certificate issued by an accredited certification-service-provider, or
>
> - not created by a secure signature-creation device."

The electronic signature that is being used by the Office for Foreigners complies with the requirements of Annex III of the aforementioned law in relation to secure signature-creation devices.

It is a fact that:

> - the signature is uniquely linked to the signatory;
>
> - the signatory is identifiable;
>
> - the signatory maintains under his sole control the means used to create the signature, because for each signature a password and a code that are only known to the signatory need to be filled in;
>
> - any subsequent change of the data is detectable. Once a signature has been placed on the documents that are to be signed, the document is registered and it cannot be stored under a changed form.

The signatory is known as being employed by the Office for Foreigners in a capacity that entitles him to take decisions on behalf of the Minister of Interior Affairs.

The competence of the concerned civil servant is confirmed by the ministerial decree of 17 May 1995 delegating powers of the Minister in relation to the access to the territory, residence, establishment and expulsion of foreigners.

It appears that a valid electronic signature is before us.

The disputed decision was taken in accordance with applicable legislation.

The first argument is void.

2.3 Considering that the claimants reply in their brief the following:

> "The Belgian State asserts that the signature that has been placed on the disputed decision is an electronic signature that complies with all legal requirements concerning the electronic signature.
>
> The Belgian State forgets to take into account the definition of "electronic signature".
>
> Article 2 of the law of 9 July 2001 concerning electronic signatures and certification services defines an electronic signature as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."
>
> The electronic signature is therefore a set of data in electronic form that is logically linked to an electronic document that can be sent by electronic means. By

means of the technology of public and private keys, the recipient of this electronic document can verify the identity of the sender and the authenticity of the contents of the electronic document.

This analysis is also found on the website of the Ministry of Economic Affairs:

> "An electronic signature is by definition a set of data in electronic form that is logically linked to other electronic data, and that is being used as a method of authentication. This signature can be used to identify the signatory of a legal act made by electronic means. Legally, it cannot be denied legal effectiveness and admissibility as evidence in legal proceedings. However, it is only admitted as an equivalent to the handwritten signature if it complies with a number of technical security measures; in this case, the electronic signature is called qualified."

The disputed decision that was notified to claimants is not an electronic document, but a paper document that was sent by post. Claimants can therefore not verify the claimed identity of the sender and the authenticity of the decision, as would be the case with an electronic document. The decision therefore had to be signed manually.

[...]

The scanned signature that was placed on the decision that was handed to the claimants does not comply with the definition of electronic signature, and neither is it a handwritten signature."

2.4 Considering that the claimants assert that the disputed decision is null due to the lack of a handwritten signature of the person authorised to take such a decision and that the signature can also not be deemed to be an electronic signature in the sense of article 2 of the law of 9 July 2001 establishing certain rules in relation to the legal framework of electronic signatures and certification services; that the defendant does not adduce concrete elements to prove that the signature is an electronic signature; that defendant does not make it likely that the printed copy of the scanned signature can be deemed to be an electronic signature; that the manual element is a substantial element of a valid normal signature and that therefore no value can be attributed to stamps, prints or other forms of signatures that are not made by hand; that the printed copy of a scanned signature should rather be assimilated to a photocopy, but not a handwritten signature and, failing evidence of any security measures or encryption, neither an electronic signature; that claimants correctly assert that the scanned signature could have been place by any person, (...), does not allow the verification of who the real author of the decision is nor its capacity and that "it cannot be excluded that the scanned signature could have been placed by an unauthorised civil servant"; that the dispute decision is struck by a substantial irregularity and that the first argument is therefore substantiated."

Decision of the Council for Alien Claimants of 17 December 2009 (nr. 36.074)

In this case, the claimant asserts, amongst others, the following argument to dispute the validity of the decision of the Office for Foreigners:

> "In what can be considered as a second argument, the claimant also pretends that:
>
> "[...] moreover, it is also necessary that the signatory to a legal act can be identified;
>
> A signature is defined as a handwritten signature by which the signatory shows his identity to third parties in a habitual manner.
>
> In this case, the signature mentioned on the decision, as well as on the notification thereof, does not appear to be a handwritten signature that authenticates and identifies its author, but a stamped signature that resembles a simple scanned signature.
>
> In this case, the document that forms the decision of the Office for Foreigners has been delivered into the hands of the claimant in such as manner as to exclude any possibility of an electronic signature, as they can only be conceived and used in a context of electronic mails, which is not the case here.
>
> A scanned signature can be placed on a document by anyone and does not allow the identification of the real author of the decision. Given the fact that the signature of the author of an administrative decision must be considered to be an essential element of the decision, without which the decision would not be

valid, it concerns an essential formal element.

A decision that does not comply with the essential formalities related to the signature of that decision must be annulled. The Council of State has already decided in that sense by its judgment of 8 May 2009, nr. 193.106."

Even though the claimant does appear to have only a basic knowledge of electronic signatures – he pretends that their use is limited to electronic mails only – he correctly asserts that a printed copy of a scanned handwritten signature cannot be assimilated to a handwritten signature. A printed copy of a handwritten signature shall always be a copy thereof, irrespective of the technology that is being used to achieve the copy.

The claimant also correctly asserts that the use of a paper document excludes the possibility of an electronic signature. An electronic signature is defined in article 2, 1° of the Law of 9 July 2001 establishing certain rules in relation to the Legal framework for electronic signatures and certification services as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication". As the decision is a paper document, it cannot consist of "data in electronic form".

The claimant also argues correctly that, in principle, a printed copy of a scanned handwritten signature can be placed by any person and that consequently, it does not allow the identification of the author of the decision.

The decision of the Council for Alien Claimants is as follows:

"4.2.2. In relation to the second part of the second argument, the Council is of the opinion that the competence of the author of an administrative act is a matter of public order. This implies that the provisions of the act must permit the verification as to whether or not the decision was taken by the competent civil servant, given the fact that no presumption exists that allows to presume that an administrative act emanates from such a civil servant.

The powers of the civil servants of the Office for Foreigners are set out in the delegating ministerial decree of 18 March 2009 cited above. It follows that a decision taken by the delegate of the Minister must at least indicate the name and the grade of the civil servant that has taken the decision. By signing a decision, the civil servant appropriates himself thereof and authenticates it: he establishes that he is the person that has taken the decision. The whole, i.e. the mention of the name and the grade of the civil servant and his signature, demonstrate that the competent civil servant has taken the decision (in the same sense, Council of Alien Claimants, decision nr. 34.364 of 19 November 2009, rendered in a chamber composed of three judges).

Concerning the nature of the scanned signature that appears on the decision, the Council is of the opinion that it must be qualified as a (simple) electronic signature. It is indeed a signature that is electronically linked to another document that is also generated in an electronic manner (in the same sense: Council of Alien Claimants, decision nr. 34.364 of 19 November 2009, rendered in a chamber composed of three judges).

In this regard, concerning the argument of the claimant developed in the context of this procedure, according to which "the document constituting the decision has been handed to the claimant at the Office of Foreigners, so as to exclude the possibility of an electronic signature, the use of which could only be conceived in the context of electronic mails" the Council observer, on the one hand, that the claimant does not explain the legal basis of such an assertion and, on the other hand, that this assertion is not relevant in this matter in view of the definition of electronic signature set out in the preparatory documents to the law of 9 July 2001 establishing certain legal rules concerning the legal framework of electronic signatures and certification services, according to which "the specialists generally agree that the notion of electronic signature is a generic notion that envelops several technical methods that merit to be withheld as signature to the extent that they permit, alone or in combination with other methods, to present certain essential functions of this legal concept (identification of the author of the act, demonstration of the consent to the contents of the act, etc.). These methods can be regrouped in several categories: the scanned handwritten signature, the biometrical signature, the secret code associated to the use of a card, the digital or electronic signature and other future methods" (Parliamentary Documents, Chamber of Representatives, 1999-2000, Second term of the 50th Session, Document 0322/001, pages 6-7).

The Council is of the opinion that a simple electronic signature can be considered to be the equivalent of a handwritten signature if it fulfils the functions of the latter. Reminding in this respect that legal doctrine attributes to a handwritten signature the double function of identification of the signatory and appropriation of the contents, and that a third function follows from the use of paper as a medium for the signature: paper has a characteristic that enables subsequent modifications of the act and contributes, as such, to the integrity of the contents of the act (cf. J. DUMORTIER and S. VAN DEN EYNDE, "The Legal Recognition of the Electronic Signature" (translated from Dutch), in Computerrecht 2001/4, page 187), the Council observes that in the present case the signatory can be clearly identified as the name of the civil servant appears next to his scanned signature. This signature is placed at the bottom of the decision, from which it can be deducted that the civil servant in question has appropriated the contents of the decision in his capacity of delegate of the competent Secretary of State (in the same sense: Council of Alien Claimants, decision nr. 34.364 of 19 November 2009, rendered in a chamber composed of three judges). Finally, the disputed decision was notified to the claimant on a paper medium.

Concerning the argument of the claimant according to which "a scanned signature can be placed by any person and does not allow the verification of who the real author of the decision is", the Council is of the opinion that this argument is void, to the extent that the claimant does not explain the reasons for which he challenges the identity of the author of the disputed act. This applies all the more so because the argument of imitation of the signature can also be invoked in relation to handwritten signatures.

More precisely, this argument, in essence is the allegation that a scanned signature has been obtained by a person lacking sufficient powers to take the negative decision or that such a person has copied and reproduced the signature of a competent civil servant on a decision taken by that civil servant with the help of a scanner and a copier, would require at least partial evidence thereof, quod non, and no element in the administrative file indicates any such acts (in the same sense: Council of Alien Claimants, decision nr. 34.364 of 19 November 2009, rendered in a chamber composed of three judges). The allegation is therefore a pure supposition of the claimant, which cannot suffice to lead to the annulment of the disputed decision.

In this case, the Council concludes that the claimant does not prove that the decision was taken by another person than the person whose name and capacity appears on the decision and that the provisions, formalities and principles indicated in the argument of the claimant have been violated.

4.2.3. It follows that the second argument is not substantiated in any of its parts."

Decision of the Council for Alien Claimants of 23 March 2010 (nr. 40.615)

"4.3.1. In a third argument, the claimant asserts the following:

"Third argument: violation of the principle of due administration and abuse of power.

The disputed decision has been signed neither manually nor electronically by an authorised civil servant of the defendant. On the contrary, there is only a scanned signature. In a recent decision, the Council of State annulled a decision of the defendant based on an essential formal irregularity because the signature of the authorised civil servant has been scanned (Council of State, decision of 8 May 2009, nr. 193.106, not published).

The manual nature forms an essential element of a valid ordinary signature, which means that no legal effectiveness can be given to stamps, prints and other forms whereby the signature has not been made by hand. The print of a scanned signature can rather to be assimilated to a copy, and not to a handwritten signature.

Until proven otherwise, it must be assumed that the signature on the disputed decision has been scanned. In accordance with the case law of the Council of State, the burden of proof that the signature has not been scanned falls onto the defendant.

Consequently, the disputed decision violates the principle of due administration and the defendant abuses the power that has been granted to her by law and special rules of law.

The argument is valid."

4.3.2. In its brief, the defendant responds, referring to case law of the Council, that the requirement of a signature is not a requirement for the validity of the decision. The defendant mentions that an verbal decision is also a decision that can be disputed and that it suffices that the decision can be attributed to a person that has sufficient power to take that decision. The defendant also mentions that the authority of the person that has taken the decision has not been challenged by the claimant. Moreover, and contrary to what the claimant asserts, the defendant points out that the decision does contain the handwritten signature of C.S. As the third argument of the claimant asserts that the decision does not contain a handwritten signature, whilst this is the case, the third argument lacks factual grounds and as such, it should be declared inadmissible.

4.3.3 The Council can deduce from the claimant's assertions that the claimant does not challenge the authority of the authorised civil servant of the Office of Foreigners, being C.S., to take the disputed decision. According to the claimant, the disputed decision contains no handwritten signature, nor can the signature that appears on the disputed decision be considered an electronic signature. The claimant asserts that the manual character forms an essential element of a valid signature and that no legal effectiveness can be granted to a copy. The claimant refers to decision nr. 193.106 of the Council of State of 8 May 2009 and asserts that the disputed decision is struck with a substantial formal irregularity because the signature on the decision is a scanned signature. The claimant asserts that the defendant must adduce evidence that it is not a scanned signature.

4.3.4. The first question that must be answered is whether or not a decision of the civil servant of the Office for Foreigners must be signed. The Council points out that no legal provision generally imposes that administrative decisions must be signed in order to be valid. The Foreigners Law also does not mention that a decision concerning obtaining entry to the territory, the residence or the establishment thereon or the removal therefrom needs to be signed to have legal effectiveness.

Although claimant does not literally or explicitly questions the authority of the civil servant of the Office of Foreigners who has signed the disputed decision, in casu C.S., the Council points out – to the extent that claimant would have done so – that every act of the government must find its basis in a legal provision that grants the government powers. Whenever a government acts on a domain that is not attributed to it, there is an abuse of power. The authority of the decision maker is a matter that touches the public order. It follows that the mentions of the act must allow the verification whether or not the act was taken by the authorised civil servant. [...] From what is mentioned above, it follows that every decision that is being taken must mention at least the name and the grade of the civil servant. By (manually) signing a decision, the civil servant appropriates the decision and authenticates it: he shows that he is the one who has taken the decision and the (manual) signature of this civil servant almost entirely proves that the decision was taken by the authorised civil servant. Any person wishing to challenge the signature, must initiate criminal proceedings for fraud.

4.3.5. The next question that arises, is to know which kind of signature appears on the decision. That fact that signature that appears at the bottom of the decision is a handwritten signature or not, is in dispute.

First of all, it is remarked that neither the legal provisions mentioned by the claimant, nor the Foreigners Law or any decree thereof, impose that decisions concerning the access to the territory, the residence and establishment thereon, or the removal thereof, must be signed with a handwritten signature (cf. Council of State, decision of 30 September 2008, nr. 186.670).

Where the claimant asserts that the signature that appears on the decision is a scanned signature, it must be remarked that, in order to be able to speak of a scanned signature, the handwritten signature of the civil servant is scanned once and consequently attached as a digital file to an electronically made decision. When printing the electronically made decision, it appears as if the signature of the author is mentioned at the bottom of the document, but it is only a "digital image" of a signature (cf. S. VAN DEN EYNDE, "The digital signature: a state of matters", written in the context of a conference "Digital Governments, between dream and reality", Mechelen, 22 June 2000, published in the book "Digital Governments: between dream and reality, J. STEYAERT, U. MARIS and E. GOUBIN (ed.), Leuven, 71-

84). The preceding implies that every time the same identical signature, both in relation to its form as its general appearance, shall figure on decisions that are appropriated by the civil servant of the Office of Foreigners.

However, the Council can establish from the administrative file, that the signature placed on the disputed decision and on its notification, which is a part thereof, appears at first sight to have subtle but clear differences in their general external appearances, both as to form and pressure points, that can be linked to the irregularity and the changeable nature of placing several handwritten signatures.

Although the print of the disputed decision, that is also present in the administrative file, as a consequence of being printed, appears to have visible signs of digitisation, it is possible to deduce clearly from the entire disputed decision, i.e. the decision itself and the notification thereof, that the signature in casu is a handwritten signature. The Council hereby remarks that no provision of the Foreigners Law or any decree thereof prohibits that a print or a copy of an original decision is kept in the administrative file.

Where the claimant refers to the case law of the Council of State, i.e. decision nr. 196.106 of 8 May 2009, it must be mentioned that the claimant in referring thereto, only by reference, does not adduce evidence that its position is factually the same as the decision referred to. Moreover, the Council wishes to remark that, even though the decision says what it says, the defendant in that particular matter did not prove its assertion that the print of the scanned signature could be qualified as an electronic signature, partly because it did not adduce evidence of any security measures or encryption. From the preceding, it follows that in casu there is a handwritten signature and that there is no reason to accept the claimant's allegation of abuse of power or violation of an essential formality. [...]"

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