

# Notary Services in the Digital Age

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**ABSTRACT:** Notary is a millennia-old profession. Ever since writing appeared, the notary was the trustworthy person who provided counsel and ensured the just fulfillment of certain acts and procedures. By the authority he is invested with, he supplies legal services and guarantees legal security, by ensuring the order of law. However, in Romania, the profession of public notary is not only inflexible, but it seems to struggle to keep up with the new realities of our times. The digital revolution is manifested in all areas of our lives, in trend with the new generation, and the profession of public notary has no choice but to modernize by achieving new values. In an attempt to modernize and align with the new realities, the Ministry for Digitalization in collaboration with the Ministry of Justice elaborated the law for the electronic notary activity. This article aims to analyze the suggestions made within this law to verify if indeed, Romanian notary services, a notary of tradition, are extremely rigid and would accept modernization and truly enter the digital age.

**KEYWORDS:** notary, digitalization, transition

## Introduction

Given the statute of his function, the role of the notary in society is quite complex. The public notary presents himself as (Ionaș 2021, 18-20): *the confidant of the party*: ever since notary services appeared, the notary was a “partner of the family” (Ciobanu 1997, 663). He fulfills notary acts and procedures upon request of the parties. However, the fulfillment of these procedures is a complex process which starts with the prefiguration of the goal and is finalized with the instrumentum, namely the legal will. During this process, the parties receive guidance and counselling from the notary. However, in order to provide counselling, the notary must know the true will of the parties, which entails direct contact between the notary and the client as well as the trust the client places in the notary; *counsellor of the party* – counseling the party entails providing advice in an objective, impartial and neutral manner by presenting every option to the parties in order to achieve their legal need, presenting the advantages and disadvantages and the legal consequences entailed by each presented option. The obligation to provide counseling is a unique trait of this profession, as it represents the center of notary activity (Popa 2016, 156); *the guarantee of lawfulness of legal acts and the security of the civil circuit* - article 270 of the Civil Procedure Code regulates the presumption of lawfulness of the notary act, which represents proof until it is declared a fake, in regard to the situation which is personally attested by the public notary. The notary is a professional invested with state authority, which entails the fact that his acts are presumed to represent the truth until proven otherwise in the civil circuit; *mediator, by achieving preventive justice* – by using mediation techniques, the public notary can suggest compromise solutions, without affecting the real will of the parties, thus preventing a potential conflict. He acts as a true mediator, by being neutral, impartial, ensuring confidentiality of information and the express of the free will of the parties, without any power of decision, but with the right and obligation to provide counselling regarding the lawfulness of all acts and procedures (Miron 2019, 49). He guarantees that justice reigns *a priori* in all non-contentious contractual relations, as his mission is that of achieving preventive justice, by verifying the acts he elaborates, as well as the advice he provides (Chaserant, Dauchez and Harnay 2021, 24); *partner in the act of justice*.

Fulfilling the role of a public notary is traditionally achieved by his direct contact with the parties. The great majority of notary procedures entail de presence of the party before the public notary, as the notary must identify the party and search the consent expressed by the party. This action generates a series of inconveniences in a world which is in full digital

revolution. In this context, given the measures adopted by the (UE) Regulation no 910/2014 of the European Parliament and the Council of July 23<sup>rd</sup>, 2014 regarding electronic identification and trust worth services for electronic transactions on the internal market and the rescind of Directive no 1999/93/CE which provides the necessary tools for the digital development of notary services, the Ministry for Digitalization, in collaboration with the Ministry of Justice has subjected to public debate a suggestion of law regarding the notary activity which we will name the Law in the content of this article. This represents an enforcement of the strategic objective of digitalizing public services and represents an answer to the new social realities. Its declared purpose is „to create a coherent legal background which regulates the transition of notary activities in the digital age by creating secure systems” (Ministry of Justice 2024, Introductory part). The legislative initiative is not necessarily new, as there were previous attempts to digitalize Romanian notaries. Thus, one of the first attempts to digitalize notary activity was Law no 589/2004 regarding the legal regime of notary activity, a law which was never enforced because of the difficult conditions for the authorization and performance of electronic notary activity. Subsequently, Law 214/2024 for the use of electronic signatures and the temporal stamp has created the general background for electronic notary activity.

### **Short presentation of suggestions for this law**

This law would regulate the legal regime of fulfilling notary acts and procedures in an electronic manner. It details the creation of a new electronic platform called Top-Not. This platform would have to be developed and managed by the Association of Public Notaries in Romania and would manage and store all notary acts and supporting documents; it would also represent technical support for the exchange of information between notaries and public authorities.

Regarding notary acts and procedures, they would be performed by the public notary electronically by using the Top-Not platform. From a formal point of view, to perform such acts and procedures, the public notary would have to request authorization for this type of procedure from the Public Notaries Association as well as electronic access to the Top-Not platform. Elaborating notary acts in an electronic manner is seen as a right of notaries and not an obligation, as for those who choose as such, the Association would mention this in the National Registry of Public Notaries.

From a procedural point of view, the law regulates that notary acts and procedures would have to be performed at the office of the public notary, stating, in article 5, the express obligation of the parties to be present before the public notary. By exception, the personal presence of the parties would not be necessary for certain procedures such as: written legal advice, receiving electronic documents and storing them in the electronic archive, authenticating documents, legalizing the signature of the translator of certain electronic translations, filing documents, verifying successor registers, obtaining documents necessary for notary acts and procedures.

The law would create the possibility to release electronic duplicates of all documents which are elaborated on paper, but also the possibility to release documents in any other form than the one they were elaborated in. For the notaries who choose to elaborate electronic notary documents, the Law regulates the obligation to create electronic notary registries by using software integrated into the Top-Not platform, as well as the obligation to archive all documents in the electronic archive on the same platform. In performing electronic notary activity, notaries should use qualified certificates for electronic signatures provided by the Association. To ensure the security of the Top-Not platform, the law requires the archive of all documents and access to data in real-time, as this is a professional secret. The law would come into force within 1 year from the time it was published in the Official Bulletin. During this interval, the Association would have to ensure that the Top-Not platform is fully functional and the Ministry of Justice would have to adopt the regulations for the enforcement of the Law.

## Discussions regarding the project of Law

As shown in the introductory part, the Law would be an answer to the new social realities and the need to modernize a profession that is still stuck in the past. More and more nowadays, "justice is becoming hybrid" as people and machines interact, algorithms aid legal operators, and intelligent systems complete the activity of notaries (Silvia Barona Vilar 2023, 15). The project of law is thought to be revolutionary in a social context characterized by dynamism, change, digitalization and artificial intelligence. The Law aims to reform notary activity by reconfiguring the position of the public notary, without endangering his role. It would be the first step in transforming the notary in a cyber notary who uses cyberspace media, which is related to the duties and authorities in carrying out his position (Ridwan 2020, 64). Subsequently, we will verify if, indeed, this Law meets the actual needs of the beneficiaries of notary services, public institutions and public notaries.

Regarding the needs of the beneficiaries of notary services, it is noticed that the lawmaker is reserved and would prefer a moderate position by insisting on the need for the personal presence of the parties to fulfill notary acts and procedures. In light of the new Law, technology is seen as an instrument that helps to improve access to notary services and not the fulfillment of notary services. It represents the support of the beneficiary of the notary service, but it does not solve the problem, as the situations in which the presence of the party before the public notary is not necessary in some situations expressly regulated by Law. In the concept of the new Law, digital notary services would be enforceable in case of receiving and communicating information, filing requests and documents, thus emphasizing the intermediary role of the notary in the new digital era (Wuidar and Flandrin 2022). Surely, this is an advantage as it saves the interested party from some useless roads to the office of the public notary, but it does not answer the needs of those who are unable to appear before the public notary. This issue was extremely important in the context of Law no 36/1995 of public notaries and notary activity which established rules of exclusive territorial competence in case of certain procedures, such as successor procedure or divorce procedure, rules which require the presence in person of the party before a public notary who is in a certain area.

On the other hand, we must consider the national context: Romania is a country with an aged population. The difference between the aged population over 65 years old and the young population between 0-14 years old was 677 thousand in 2023 (3,762 thousand as opposed to 3085 thousand people), an increase from the 617 thousand people on January 1<sup>st</sup>, 2022, as seen in the press release of the National Statistics Institute no 215 of August 13<sup>rd</sup>, 2023. The trend is in accordance with the European one. In the Eurostat report of 2024, it is shown that over the period January 1, 2003 to January 1, 2023, the share of persons aged 80 and over grew in all EU countries, at EU level by 2.3 percentage points (pp), from 3.7% to 6.0%. The same report shows that, during the time 2013-2023, the medium age of the population in Romania has grown with 8,3 years, the greatest rise in all EU after Portugal. All these prove that we have an aged population. Aged citizens are not trained and familiarized with the digital domain. A significant number of people do not have access and do not know how to access the internet. In the study elaborated by the National Statistics Institute, it is shown that in 2023, almost 19% of the country's population did not use the internet once during their lifetime. Most of the population does not hold an electronic signature and prefers the classic variant of waiting in line; thus, it is unlikely that the Law would achieve the desired impact.

However, we cannot forget the special role of the public notary. The public notary ensures legal security through the authority he was invested with by the state, he performs preventive justice. The importance of notary activity derives from the fact that, by having direct contact with the parties and given his professional training, the notary can mediate between public interest and private interest (Carosi 2016, 1013) and to instrument an act in full accordance with the law and the will of the parties, and act with the desired legal force. It is of the essence of notary activity to have direct contact with the party, as the public notary is the only one who

can ensure the validity of consent. Artificial intelligence cannot replace, at least at this time, the central role of humans in evaluating legal will, whereas modernization must not be confused with dehumanization (Dauchez and Marguénaud, 2021). Notary is a millennia-old profession, as it has earned its place in legal life by fulfilling its social mission with a responsible and professional attitude, along with other professions, such as that of attorney at law. The rigor of this profession, exercised with responsibility and professionalism produces consequences in other professions, such as the previously mentioned one, given the profession of attorney at law is held by a certain rigor and the administrative and patrimonial liability of the attorney at law (Dinu, 2023, 137). Legal expertise and the personal relation between the notary and the beneficiary of the notary service is a relation based on trust and is indispensable regarding ensuring the legal security of performing a notary activity. Such relations cannot be built from a distance. Adopting measures without judgment, based exclusively on the personal interest of the beneficiaries of notary services would endanger not only the authority and credibility of the profession but also the state of law, as digitalizing notary services is a matter of sovereignty of the state (Dauchez and Cluzel-Métayer 2023, 1039). For these reasons, we believe to be just the position of the Romanian lawmaker, who chose, in accordance with the classic conservative vision, a moderate approach of the process of digitalizing notary activity.

At the same time, we cannot ignore the dangers of the digital world. “On the one hand, digitalization offers innovative solutions to some of the problems of the rule of law, such as: increasing the level of government accountability by expanding access to information; promoting transparency, as citizens can collect and disseminate evidence of human rights violations; and expanding the range of opportunities for access to effective remedies. On the other hand, digitalization also provokes negative consequences such as: insufficient level of privacy guarantees; risk of increasing the number of cybercrimes; the inability of legislation to fully protect citizens from unlawful manipulations in the field of digital technologies” (Korniienko et al. 2023, 994). Among these, the deeds of violating the security of data are the greatest danger, as this type of data is defined as the data for which a society/organization is responsible and suffers a security incident which results in the compromise of confidentiality, availability or integrity of data. Even if the EU undertook some measures for the protection of data online, among which we mention the general EU Regulation for the protection of personal data or the EU Directive for the confidentiality of electronic communication, the cases of theft of data are not isolated. A relevant example is that of 25-year-old Dutch hacker who stole and sold the personal data of all Austrian citizens, as well as those of some people from the Netherlands, Thailand, Columbia and Great Britain.

For all these reasons, the moderate position of the Romanian lawmaker can't be criticized. Regarding the collaboration with public institutions, we notice that the Law does not bring upon major changes. It allows checks, communication, receiving and communicating decisions and filing documents in an electronic manner, but this is not necessarily a novelty, as, at present times, public notaries have the possibility to communicate with national notary registries or with public institutions based on their electronic signature. For example, according to article 1, letter f of Order no 3654 of December 15<sup>th</sup>, 2015, for the procedure of issuing a fiscal certificate, or a fiscal obligations certificate, as well as the model and content of these documents, the fiscal authority will provide the certificate upon request from public notaries, by filing a request in an electronic manner. Also, communication with national notary registries is performed exclusively in an electronic manner, based on the electronic signature of the public notary. At present, the Association manages seven national notary registries through the National Center for the Management of National Notary Registries – Infonot, namely: the national notary registry for succession, the national notary registry for successor option, the national notary registry of liberalities, the national notary registry for letters of attorney and their revocation, the national notary registry for individual creditors and opposition in successor partition, the

national notary registry of divorce filings and the national notary registry of matrimonial regimes. Communication with these registries is performed exclusively online, through the software app which can be accessed based on the electronic signature of the public notary. Communication with cadastral registries to verify the legal situation of immobile goods, registration or obtaining documents from this registry is performed through E-terra application; access is provided based on an electronic signature.

Even if, at this time, there is a possibility to communicate with public institutions and authorities online by using digital instruments, we can't neglect the fact that, regarding the digitalization of public administration, Romania is situated in the last place in Europe. In addition to the reduced availability of public digital services, there is a certain conservative mentality, namely that 24% of online users in Romania are actively using e-government services, as opposed to the EU population of 74%. Why? The reason is simple: Romania is a country where half of the population resides in rural areas, and digitalization is not easily accessible in villages. Thus, despite the good intentions, this law cannot make up for the lack of other domains, and only mutual effort from all state institutions can valorize it.

Regarding the needs of public notaries, this is a sensitive subject, especially for notaries. Everyone enjoys prompt and quality services. However, behind the service provided by the notary, there is a lot of work and many obligations pertaining to obtaining and communicating information, filing reports, registries, archives, timely checkups all of which are excessively burdening for notaries. All these obligations and responsibilities have exponentially grown in the last years. This Law and the option of elaborating digital acts would only bring new obligations and duties for the notary who is already suffocated with bureaucracy. Thus, the rhetorical question of the President of the Notary Chamber of Bucharest: "Public notaries carry a lot of duties, but how much duties can the public notary carry?"

We cannot lose sight of the fact that notary services are a traditionalist and conservative sector. "The usual connection between the notary and the past can be explained by the fact that this profession is extremely old. Each notary is the heir of a centuries-old history" (Bourassin, Dauchez and Pichard 2021, 10). Notaries, even if they are not entirely hostile to change, do not want (or can't!) modernize. Digitalization appears as a threat to a profession which was not touched by the passing of time. As long as the electronic notary act is merely an option, it remains to be seen how many notaries will assume the role of pioneers in this field.

### **Digitalization of notary activity in other states**

The digital notary act was first mentioned in Quebec in 2000. Even though it was expressly regulated in 2000 by the Public Notaries Law, neither the electronic act, nor the simple electronic act were implemented in notary practice in Quebec before April 2020. At present times, according to Law no 34 for the modernization of the profession of public notary and the promotion of access to justice, passed on October 24<sup>th</sup>, 2023, documents signed from a distance are valid but only if one of the parties or a witness demand it and if the circumstances are justified. Evaluation of the exceptional criteria is based exclusively on the judgment of the notary.

In France, the first talks regarding the electronic notary act took place once Decree no. 2005-973 of August 10<sup>th</sup>, 2005, for the change of Decree no. 71-941 of November 26<sup>th</sup>, 1971, was passed; this decree regulated electronic notary acts with the presence of the parties before the same public notary or before another public notary who takes part in elaborating the act. The first electronic notary act was signed in France in 2008, at which time French notaries became „electronic notary”, a concept suggested in 1918 by the French delegation at TEDIS Group (Trusted Electronic Data Interchange System), a concept for ensuring integrity and confidentiality for EDI (Electronic Data Interchange) transactions and the use of digital signatures (Kooos 2023, art. 1).

The first long distance authentic act was signed in 2018. It entailed the personal presence of the parties before two public notaries, who checked the authenticity of the signature of the parties. In the context of the COVID-2019 pandemic, there was the question of signing an authentic act without the presence of the parties before the notary. In this context, on April 3<sup>rd</sup>, 2020, Decree 2020- 395 of April 3<sup>rd</sup>, 2020, for the authorization of long-distance notary acts during the time of medical and sanitary emergency was passed. It was meant to be in force until August 10<sup>th</sup>, 2020. Subsequently, on November 20<sup>th</sup>, 2020, decree no 2020-1422 for establishing notary letter of law with long distance presence revived the long-distance acts, but it was limited to letters of law. The Decree entails the use of a qualified electronic signature, issued to the parties by DocuSign, and to the notary by the Superior Council of Notaries in France. The signing of the act occurs through the LifeSize platform, the only video conference software approved by the Superior Council of Notaries in France (Barreda, 2021, 103). The notary instruments which ensure notary and digital security in France are Id.Not., a system of digital authentication of notaries with a unique identificatory, founded in 2015 by the Superior Council of Notaries and Clé Réal, which allows notaries to authenticate an electronic act by applying a digital signature. Currently, 90% of authentic acts are signed in France by using an electronic signature.

In Belgium, it is possible to sign long distance documents by video conference. As documents are signed in physical format, the presence of the parties before the public notary is mandatory. By exception, Law of July 6<sup>th</sup>, 2017 for the simplification, harmonization and modernization of civil law and civil procedure law provisions, as well as the different measures for justice, known as the “pot-pourri V” Law acknowledges the digital authentic letter of law, given by video conference and electronically signed by the party through be.ID or its.me app. Belgium also uses two notary instruments developed by FedNot, namely eRegistration, an electronic platform for registering notary acts and Biddit, a platform which allows sale and buy at on-line auctions, founded in 2018. None of these implies that the parties are not to be present when notary acts are signed.

In Germany, starting from August 1<sup>st</sup>, 2022, German companies can use a combination of physical and virtual means for the procedures of legalizing and registering limited liability companies (“GmbH”) entrepreneurial companies (“Unternehmergeellschaft”, “UG”), 26 because of the implement of the EU Directive 2019/115127 of June 2021, known as the Directive for the Digitalization of DiRUG (Law for the enforcement of the Directive for digitalization) (Kooß, 2023, article 1). The new online procedure is regulated in detail in the German law of notaries (BeurkundungsG) and section 2 of Law for limited liability companies (GmbHG). The process of virtual legalization is also applied to decisions of stake holders but can't be extended to other notary acts and procedures.

In Spain, on May 9<sup>th</sup>, 2023, the European Parliament and Council Directive 2019/1151 for the use of digital instruments and procedures for companies was passed in national law by the coming into force of Law no 11/2023 also known as the Law for digitization. The Law provides the possibility to authorize notary acts by video conference, a procedure criticized by doctrine for lack of security protocols for the tools it uses. (Chamorro 2024, 258).

## Conclusions

Romania is taking small steps towards digitalization. The digital revolution has surprised us, but we are trying to handle it. However, to adapt to these changes is a complex long-term process and the lawmaker approaches this topic with caution, by learning from the example of the more audacious countries. The suggestion of law regarding electronic notary activity is not by far revolutionary, but it represents a first step towards digitalization. Other measures are required, but until then we must see what the final form of the Law will be, if it will keep track of suggestions and recommendations, which are to be published by the Ministry of Justice.

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