

## **ELECTRONIC EVIDENCE IN CIVIL PROCEEDINGS<sup>1</sup>**

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## **ABSTRACT**

The subject of analysis of this paper is defining the term electronic evidence, the legal nature of the electronic evidence, the types and basic sources of electronic evidence, the probative value of electronic evidence, as well as the implementation of the electronic evidence in Macedonian civil procedural law.

**KEY WORDS:** evidence, electronic evidence, civil proceedings, Macedonian civil procedural law

## **INTRODUCTION**

At the beginning of the XXI century, as never before, the topic of the electronic evidence has been in the focus of a scientific interest. This is due to the galloping pace of the information technology and digital economy that the judiciary and law must inevitably follow.

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<sup>1</sup> review scientific paper

According to the data from the World Statistics for Internet Users for 2021, every day worldwide through the Internet (Interconnected networks) and New communication media (SMS, WhatsApp, Skype ...) are received and sent over a billion messages, 1.86 billion are registered websites, 4.1 trillion email users, 4.8 trillion active Internet users or approximately 60% of the world's population.

This is why the technologicalization of law and procedure is inevitable because the new information society and digital economy are creating new forms of interpersonal relationships and exchange of information that must be followed by the legislation and judiciary. In the field of civil procedural law, this new information reality is initially materialized through the electronic evidence as a central point of e-litigation.

#### THE CONCEPT OF ELECTRONIC EVIDENCE

Electronic evidence in litigation is an information obtained through electronic devices or digital media that serve to gain knowledge of certain facts relevant that are relevant for rendering a decision. In the procedural theory, the electronic evidence is also known as audiovisual evidence, evidence obtained through electronic media, or evidence that enables proof with IT support.<sup>2</sup>

According to the Council of Europe Guide to Electronic Evidence in Civil and Administrative Procedures from 2019 Electronic evidence means any evidence derived from data contained in or produced by any device, the functioning of which depends on a software program or data stored on or transmitted over a computer system or network.<sup>3</sup>

#### LEGAL NATURE OF THE ELECTRONIC EVIDENCE

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<sup>2</sup> Jurkeviča, T. *Electronic evidence concept and essence in civil proceedings*, Riga, p. 26-39, 2018

<sup>3</sup> Council of Europe, *Electronic evidence in civil and administrative proceedings - Guidelines and explanatory memorandum*, Broché, 2019, 6.

In process theory there are three theories about the legal nature of the electronic evidence: a) autonomous, b) analog and c) the theory of functional equivalence.<sup>4</sup>

According to the autonomous theory of the legal nature of electronic evidence, the electronic evidence is distinct evidence, independent of the traditional evidence. According to this understanding, the new ways of proving by themselves do not fit into the existing boundaries for proving that exist in the law on civil procedure and they should fit into it with new legal rules that will apply on electronic evidence.

The analog theory of electronic evidence arose as a critique of the autonomous theory of electronic evidence. According to this understanding, the electronic evidence is not new evidence but a new source of proof - an electronic document. This electronic document requires a new technique in its application and when it is applied it has the effect and legal force of traditional written evidence. This is why, according to analog theory, traditional written and electronic means of proof are analogous, comparable, and should enjoy the same legal regime as new the media has replaced the written with electronic support. This means that the electronic evidence must not be privileged or discriminated versus the traditional written evidence.

The theory of functional equivalence arises as an upgrade and critique of the analogy theory. According to this understanding, the electronic and written documents have the same legal effect - probative value. However, this functional equivalence of electronic with other documents has limits. A basic condition that must be met for electronic evidence to have probative value is to be permanent and unchangeable. On the other hand, the electronic document must meet the following requirements for electronic support: it must always be readable by means of hardware or software systems, the document issued by the author must have the same content as the one received by the recipient, the storage of the document to be is feasible and can be renewed, as well as the content can be restored, the content of the document can be translated into the required language, the main subjects of the document can be identified, the document meets the conditions for authenticity and confidentiality, the authorship of the document is recognizable and the support to which the

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<sup>4</sup> Arbós Llobet, R., Rodríguez, C.F., Pau Izquierdo B., Queral Carbonell, A., García, M.V., Pérez Daudí, V. *La prueba electronica*, Barcelona, 2011, p. 107-113.

document appears should not affect the assessment of the probative value of the document.<sup>5</sup>

### TYPES OF ELECTRONIC EVIDENCE

In general, electronic evidence is divided into two basic types: a) data contained in systems or information devices and b) information transmitted electronically through means of communication.<sup>6</sup>

The basic electronic evidence is data (messages received or sent over the Internet) and data stored digitally in software (exempli gratia, commercial digital books).

The electronic evidence is composed of two elements: a material element that is composed of one piece of hardware and can be seen (USB, SD, Smartphone etc) and an invisible element represented by software composed of metadata and electronic archives.

### BASIC SOURCES OF ELECTRONIC EVIDENCE

The sources of electronic evidence are elements that precede the litigation and are a reality that exists independently of the existence of the litigation. The main sources of electronic evidence are: e-mail, web pages, phone messages, WhatsApp and other instant messaging media and social networks (Facebook, Instagram). The source of the electronic evidence should be different from the electronic evidence itself that it can produce.

### PROBATIVE VALUE OF ELECTRONIC EVIDENCE

The question of the probative value of the electronic evidence is opened only if the conditions for legality and incorporation of the electronic evidence in the litigation are met (the so-called conditions for authenticity).<sup>7</sup> If

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<sup>5</sup> Turner, R. *Evidence in European Civil Procedure*, in book *Dimensions of Evidence in European Civil Procedure*, Netherlands, p. 29-53, 2016.

<sup>6</sup> More see: Magallón Delhaize, G.S. *La prueba electrónica y sus diferentes tipos: Tratamiento procesal y consideraciones jurisprudenciales*, Madrid, 2018.

<sup>7</sup> Gabri Barquiel, É. L. *Valoración de la prueba electrónica en el proceso civil*, p. 26-27, 2019.

these two conditions are met, the electronic evidence becomes the subject of the judge's assessment. This raises the question of the authenticity, completeness and accuracy of the evidence, a matter for which national courts decide in accordance with *lex nationalis*.

Evaluating electronic evidence means giving it the probability it deserves under a system of proof established by law. In the modern litigation law, the system of free evidence is generally accepted, i.e. the judge determines the probative value of the electronic evidence according to a free assessment.<sup>8</sup>

#### ELECTRONIC EVIDENCE IN MACEDONIAN CIVIL PROCEDURE

The current Law on Civil Procedure of the Republic of North Macedonia, like its predecessors, does not regulate the term electronic evidence nor does it contain special rules for electronic evidence. This means that the autonomous theory of the legal nature of electronic evidence is foreign to Macedonian civil procedural law.

However, the development of technology and the use of technology in the everyday communication are increasingly introducing informatics into legal science. Due to this, the question is rightly asked whether the evidence known to the Macedonian Law on Civil Procedure is sufficient to determine the legally relevant facts in the new computerized civil procedure, ie whether the electronic evidence should be regulated by the Law on Civil Procedure *pro futuro* as a separate means of evidence?

The Macedonian Law on Civil Procedure currently regulates inspection, document, witness, expert and hearing of parties as special means of evidence. These means of proof are stated *exempli causa* which means that other sources of knowledge of the legally relevant facts *ab inito* are not excluded. There is a legal possibility that electronic evidence be regulated as a separate means of proof if necessary.

Although there is a legal possibility for electronic evidence to be regulated as a separate means of proof, the question justifiably arises: is it necessary?

To answer this question, one must first answer whether the existing general rules of proof can be applied to the performance and evaluation of new

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<sup>8</sup> Šoljić, A. *Elektronički dokazi u parničnom postupku Bosne i Hercegovine*, br. XXVII., Mostar, str. 128-130, 2019.

electronic documents in court proceedings. The very fact that through court practice electronic documents are already used as evidence in litigation due to the interpretative principle of analogous application of norms, without any procedural blockages, indicates that the electronic evidence does not have to be regulated as a separate means of evidence in the Macedonian Law on Civil Procedure. This is because the general proof rules that apply to traditional ones also apply to electronic evidence.

However, the fact that electronic evidence does not need to be legally regulated as a separate means of evidence in the Law on Civil Procedure per se does not mean that the legal regime for electronic evidence should not be regulated at all or that the topic of electronic evidence should not interest the Macedonian litigation law. This is because the question of electronic evidence in litigation arises when determining the authenticity and evaluation of electronic evidence by the court.

The Macedonian legislator, although currently does not regulate the term electronic evidence, operates with the term electronic document as evidence. Given the fact that the electronic document can be evidence in litigation, a link is created between the Law on Civil Procedure and the Law on Electronic Documents, Electronic Identification and Confidential Services from 2019, which defines the term electronic document. In this context, the Draft Law on Civil Procedure, which is still in parliamentary procedure (September 30, 2021), for the first time contains provisions on electronic documents and their evidentiary force. On the other hand, the Law on Electronic Documents, Electronic Identification and Confidential Services not only defines the term electronic document but also determines the conditions for legal and evidentiary force of the electronic document in administrative and court proceedings.

According to Article 6 of the Law on Electronic Documents, Electronic Identification and Confidential Services "the electronic document has the same legal and evidentiary force as the written form of the document, in accordance with the law. The electronic document can not be challenged as evidence in administrative or court proceedings just because it is created in electronic form. When the written form of the document or acts is determined by law, the electronic document is considered as a document or act in written form." From this it can be concluded that the Macedonian legislator equates the electronic document with the written evidence in its legal and evidentiary force. However, this does not in itself mean that the electronic document used as evidence is analogous to the written document in its legal and evidentiary force.

That this is the case are the provisions for the digitization of the document (Article 9), verification of the printed form of the document (Article 10), legal and evidentiary force of the qualified certificates for electronic signature and seal (Article 41) and the qualified certificate of authenticity of web pages issued by a provider of qualified confidential services (Article 56) of the Law on Electronic Documents, Electronic Identification and Confidential Services. From this it can be concluded that the Law on Electronic Documents, Electronic Identification and Confidential Services has accepted the theory of functional equivalence in terms of the legal nature of electronic evidence.

This is a very important issue given the foreign initiative to propose evidence in litigation, because when proposing an electronic document as evidence it should prove the authenticity of the electronic evidence it proposes. On the other hand, the issue of authenticity of the electronic document used as evidence is also in the hands of the court when to establish or clarify certain facts requires expert knowledge that is determined by expertise. From here, according to the Law on Civil Procedure, the electronic evidence must go through two phases: verification of authenticity and assessment by the court.

Pursuant to the Macedonian Law on Civil Procedure, the court, upon free evaluation of the electronic document used as evidence, determines the facts on the basis of which it makes the decision. If the court can not independently determine the authenticity of the electronic document used as evidence, it can seek professional help - usually an expert in the field of information, electronic or communication technology.

## CONCLUSION

The digitalization of commerce and communications is leading to a new reality - an era of information society and digital economy, galloping a few steps before the law. The litigation procedure in order not to stand still and receive the blows of time must be transformed to adapt to the new information and communication reality. Because of this, as never before, academic interest is focused on electronic evidence in litigation.

Electronic evidence in litigation is information obtained through electronic devices or digital media that serve to gain knowledge of certain facts relevant to the decision in litigation.

Electronic evidence is a link between litigation and information technology. This is why the question of the legal nature, types, sources and probative value of electronic evidence is gaining in popularity.

These tendencies have recently started to be followed by the Macedonian legislator. That this is so is confirmed by the fact that the Draft Law on Litigation Procedure regarding electronic evidence refers to the Law on Electronic Documents, Electronic Documentation and Confidential Services.

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