

E-signing according to German law

Digitalisation in companies involves changes in work processes and a search for more efficient solutions for daily business. Signing documents using an electronic signature, along the lines of “click and send”, has already become common practice in many organisations and increasingly contributes to this development. In order to facilitate smooth running of this process in terms of organisation and, most importantly, to ensure full legal compliance, we are happy to present you with the following how-to-guide on e-signing in German legal transactions.

1. Legal background

German-law basis for the use of electronic signatures

In Germany, most contracts and declarations of intent may be concluded or made without observing any particular formal requirements, ie a contract may also be concluded verbally. In some instances, however, additional formal requirements stipulated by law must be observed, which may rule out the use of an electronic signature in certain situations.

Text form, sec. 126b of the German Civil Code (“BGB”)

The declaration must be documented in text form (but not necessarily on paper); a signature is not required as long as the issuer is named. In addition, the conclusion of a declaration must be obvious.

Written form, sec. 126 BGB

The declaration must be documented in a physical document, signed in the issuer's own hand and sent by hand, courier or post. The handwritten signature may usually be replaced by a qualified electronic signature (electronic form).

QES, § 126a in conjunction with sec. 126 (3) BGB

Unless required otherwise by law, the statutory/agreed written form may be replaced by a qualified electronic signature (“QES”).

Certification, sec. 129 BGB

The declaration must be given in writing and the signature of the issuer must be certified by a notary or an authority competent for public certification; this requires the personal presence of the issuer before the notary or public authority.

Notarisation, sec. 128 BGB

The declaration must be read out aloud by or in front of a notary, signed by the issuer and countersigned by the notary. This requires the personal presence of the issuer during the entire reading.

For contracts and declarations of intent which only require text form, it may be considered to use a simple or advanced electronic signature. For contracts and declarations of intent that require written form, only a QES is acceptable. For certain declarations, this is not possible. For documents and declarations of intent which are either certified or notarised, electronic signatures are not acceptable. Please see section 3 for a list of examples.

2. The electronic signature

Different types of electronic signatures are available

According to Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (“eIDAS”), there are three different forms of electronic signatures that may be applied in legal transactions under German law.



A QES is of higher probative value in civil-law proceedings

In addition to considering the form required to make the contract or declaration of intent legally valid, it is also necessary to be able to prove that a declaration was actually made, should this be disputed at a later stage. If no formal requirements apply and the SES or AES option is chosen, the authenticity of the document and the making of the declarations of the issuer are subject to the free assessment of evidence (sec. 286 of the German Code of Civil Procedure (“ZPO”). The certificate produced for an SES or an AES after the signing of the contract (with details of the issuer and circumstances) or the audit trail of an e-signing tool could be helpful, but some risk still remains.

By contrast, a document signed with a QES provides full evidence that the declarations in the document were made by the issuer (sec. 371a (1) sentence 1, sec. 416 ZPO); if the signature check is successful, this constitutes *prima facie* evidence of the authenticity of the document (§ 371a sec. 371a (1) sentence 2 ZPO).

3. Use cases and non-use cases for electronic signatures

In practice, the different forms of electronic signatures can be used for the types of declarations and contracts listed below.



SES

- E-mail signatures
- Loan agreements with business owners
- The majority of invoices
- Resolutions of managing directors of a limited liability company
- Non-disclosure agreements

Note: Depending on the individual case, the intended use and any agreement made by the parties

- Commercial contracts

Note: In some cases, written form/QES is required for choice of venue or arbitration clauses

- Agreements on intangible assets, eg software licensing agreements



QES, sec. 126a in conjunction with sec. 126 (3) BGB

- Temporary employment contracts (sec. 2 (1) of the German Act on Temporary Employment (AÜG))
- Consumer loan agreements (sec. 492 (1) sentence 1 BGB)
- Shareholders' resolutions of limited liability companies that are not registered with the commercial register
- Non-disclosure agreements

Note: Depending on the individual case, the intended use and any agreement made by the parties

- Transfer of shares of a stock corporation

Note: It might be advisable to include an explicit reference to the QES in the purchase contract

- Amendments to contracts which require the written form for amendments

Note: It might be advisable, in order to avoid surprises, to include wording to the effect that the written form may be replaced by a QES

- Receipts (sec. 368 sentence 1 BGB)
- Powers of attorney

Note: Depending on the individual case, the intended use and any agreement made by the parties. It should also be noted that if a power of attorney is presented, a revocation of such power of attorney may not be apparent for third parties. Therefore, appropriate precautions should be taken

- Rental agreements for residential and commercial premises (sec. 550 BGB), termination of rental agreements (sec. 568 (1) BGB), lease agreements (sec. 581 (2) BGB)



Written form, sec. 126 BGB (not electronically replaceable)

- Termination of employment contracts (sec. 623 BGB)
- Reference letters (sec. 630 BGB)
- Works agreements (sec. 77 (2) sentence 1 of the German Works Constitution Act (BetrVG))
- Deeds of surety (sec. 766 sentence 2 BGB), promise of debt (sec. 780 sentence 2 BGB)

Note: Except for mutual commercial transactions according to sec. 350 of the German Commercial Code (HGB), where a QES may be used

Caution should be used with documents for submission to authorities: Formal requirements may ensue under official rules of procedure for registration, approval or simply acknowledgement – check carefully in order to avoid a pragmatic use of electronic signatures resulting in future problems



Certification, sec. 129 BGB (not electronically replaceable)

- Applications for entry in the commercial register or the land register



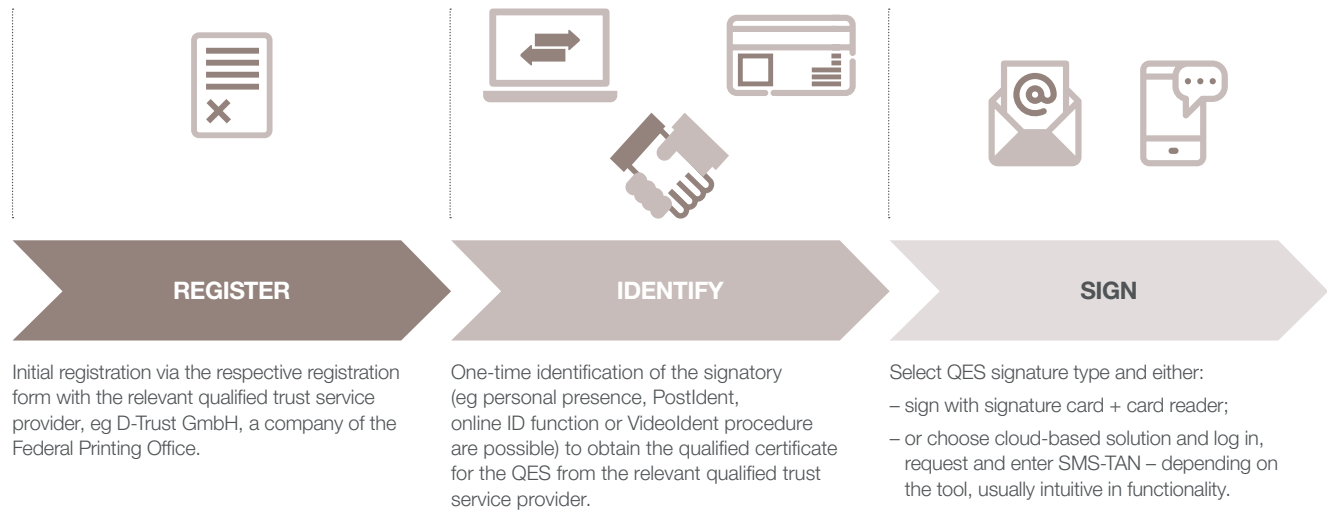
Notarisation, sec. 128 BGB (not electronically replaceable)

- Shareholders' resolutions of limited liability companies where the notarial form is prescribed by law
- Share transfer agreements for shares in limited liability companies
- Domestic and family-related declarations of intent, eg marriage contracts (sec. 1410 BGB)
- Contracts of inheritance (sec. 2276 (1) BGB) and contracts waiving inheritance (sec. 2348 BGB)

Where different options are available for choosing electronic signatures, aspects such as customer experience, document management, risk assessment and trust can be decisive when making this choice and may facilitate internal embedding in corporate policies and philosophy.

4. QES process in detail

According to Art. 3 (14) of the eIDAS Regulation, certificates for electronic signatures must be linked to a natural person; when issuing a qualified certificate, the issuing authority (eg Federal Chamber of Notaries) must establish the identity of the recipient. This means that each user of a QES receives a private “key” for creating QES. Consequently, internal company decision-making and approval processes would have to be adjusted accordingly (and ideally be software-based).



The following links provide detailed instructions from three electronic signature providers on the electronic signing process:

DocuSign

<https://support.docusign.com/en/guides/ndse-user-guide>

SignLive! CC

<https://www.intarsys.de/node/339/attachment/newest>

*only available in German

AdobeSign

<https://helpx.adobe.com/de/sign/using/digital-signatures.html>

5. Conclusion

In Germany, there are numerous possibilities to use electronic signatures in order to facilitate work processes and generate time savings. In addition to the choice of the electronic signature method, its implementation into corporate structures, policies and reporting obligations probably presents the biggest challenge. We will be happy to support you in considering your options and identifying suitable solutions.

For further information, please do not hesitate to reach out to your Allen & Overy contact.



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