The Liability of the Entrepreneur deriving from the Use of Electronic Signatures in Commercial Transactions
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One of the most interesting yet at the same time forgotten questions regarding the current new legislative framework is that regarding the liability of the entrepreneur who, in the exercise of his activity, uses digital signatures or data packages, along with or bound to other electronic data, as a means to formally identify the author or authors of the document in which the same are included. The question is: in accordance with the current legislation, what type of liability can be demanded of the entrepreneur with regards to the customer with whom he establishes a mercantile relationship deriving from the use of the digital signature?

In this regard, two points should be taken into account:


2) Although no specific rules exist, this liability can be deduced from the sphere of liability set out with regards to intermediaries and from general common Law rules.

Liability of the Intermediary

The current legislation regulates the way of acting and the liability of the intermediary intervening between contracting parties using an electronic signature. This intermediary is the Certification Service Provider, namely the individual or entity whose activity consists of the issue of certificates to the public only, or who also renders other services related to electronic signatures, such as services to assign the date and time, directory services, or electronic document filing services. The liability of these intermediaries can be of a civil or proprietary nature (liability for damage caused to any person, which translates into economic compensation determined by the judge), or of an administrative nature (liability for breach of legal dispositions which can cause administrative sanctions, usually by way of penalties or fines, to be applied).

In general, all Certification Service Providers, with or without accreditation (of voluntary nature, controlled by the Communications Department) and with or without
the prior obligatory inclusion in the Register (overseen by the Ministry of Justice), shall be liable for damages caused to any person in the exercise of his activity, whether it be the party with whom the service has been contracted or whether it be a third party, whenever they act in breach of the law or negligently (the burden of proof is upon them, since they must show their diligent conduct, an aspect which the Directive also contemplates) and for undue use of the certificate whenever the same does not clearly and recognisably indicate the limit for third parties with regards to the use of electronic signatures and the amount of the value of the valid transactions admitted. This means that if the details are correctly specified in the certificate issued by the Certification Service Provider, he shall not be liable for damages caused due to the exceeding of the duly assigned limits (with regards to either the use or the amount of the value of the transactions), rather it shall be the entrepreneur, the transgressor, who shall be liable.

The Liability of the Entrepreneur

The entrepreneur, who signs the contracts taken out with customers (whether they be professionals or individuals, namely, users, consumers) using a digital signature, wishes to ensure the traffic of the commercial transactions or juridical business carried out online. For this he ought to turn to a third party, which shall be the entity which certifies the security of the electronic signature stamped on the document. As was said before, this entity is answerable to the entrepreneur (party with whom it shall engage through breach of contract) and to third parties (for damages they may cause if it breaches the legal obligations or acts negligently through non-contractual fault). In other words, the parties damaged through the use of the electronic signature can demand the liability of the Service Provider if in the exercise of its activity it breaches the obligations imposed by the rule, acts negligently or does not assign in a clear and comprehensible way the limit of the digital signature with regards to its use and to the value of the transactions.

However, the entrepreneur shall be liable for the incorrect use or abuse of the electronic signature when the limit stipulated in the certificate with regards to these areas (use and value of the transactions) is exceeded. In other words, if he exceeds those limits validly established or assigned in the recognised certificate (should the certificate only ensure the execution of specific contracts and not the execution of others (exclusively purchase and sale agreements), or should the amount of the transactions which can be carried out with the digital signature be set at 500,000 pesetas), he shall be solely liable before the contracting party and before third parties. This liability shall be demandable by civil procedure, in accordance with the general criteria on breaches of contract (that which derives from a contract and is based on the breach of contractual obligations with bad faith, imprudence or non-payment) and non-contractual fault (that which derives from the principle of not harming others, or, in other words, any party causing damage to another through its actions or through neglect shall be obliged to repair the said damage).

The proprietary liability of the entrepreneur deriving from abuse of the digital signature (being understood as such the exceeding of the limits assigned in the certificate) is a conclusion which is deduced from the text of the Royal Decree (specifically in article 14, which establishes the obligations of the Certification Service Providers).

Nevertheless, there are other possible situations in which the entrepreneur may liable before the parties with whom it engages and before third parties. Let us imagine a case of use in accordance with the certificate issued by the intermediary, who, moreover, acts
diligently and fulfils the obligations established in the law. In these cases of diligent conduct by the Certification Service Provider, liability cannot be attributed to him but only to the entrepreneur. Whilst there is no specific rule in force, common Law and general Civil Law rules regarding breach of contract or non-contractual fault are applicable. In this sense, the civil jurisdiction judge ought to determine if there has been negligence by the intermediary or by the entrepreneur and shall set the compensation for any damages which the plaintiff may have suffered.

**Final Valuations**

In conclusion, in accordance with the current legislation, the entrepreneur, as the contracting party in any juridical business (normally contracts) executed by electronic means, may be liable for his negligent act or act of bad faith, just as he may be liable for the damages caused to any person (whether the contracting party or a third party) in the exercise of his activity, even though no specific applicable regulation exists, since, as we have seen, the Royal Decree Law on electronic signatures is applicable to the activity of the certification service providers.

The ever increasing use of electronic documents by companies ought to be an element for the consideration of the legislator, who ought to specify the liability of all the parties involved in e-commerce in order to so protect the consumer or recipient of the product contained in the transaction.