

The newly adopted Luxembourg Law on electronic archiving

Luxembourg has taken a crucial step towards a “paperless office”.

In July 2015, after two years of discussions, the *Law relating to electronic archiving and amending Article 1334 of the Civil Code, Article 16 of the Commercial Code and the amended Law of April 5, 1993 in relation to the financial sector* has finally been adopted. The law of 25 July 2015 was published in the Luxembourg official gazette on 4 August 2015 (hereinafter the “Law”).

This new legal framework will attract multinational companies that seek to centralise their e-archiving management in a single European country.

1. Context and purpose of the Law

The Law aims at updating Luxembourg Law in the field of digitisation and electronic storage in light of the market needs and the strong technological advances that have occurred since the law of 22 December 1986 on the proof of legal acts and the regulation enacted thereunder.

The electronic signature, introduced in Luxembourg Law through the amended law of 14 August 2000 on electronic trade, was a first step in the development of dematerialised information and business. However, legal certainty in the area of electronic archiving was still awaited by business players in Luxembourg for the full implementation of new archiving policies while the country has already the necessary infrastructure facilities to host the dematerialised documents (cutting-edge datacentres, high-speed Internet connections).

In particular, Luxembourg law was unclear as to the probative value of documents that had been subsequently digitised.

In this context, the Law pursues three main goals:

- defining the conditions under which original documents (that is, under the Law, any private deed and any document referred to in Article 16 of the Commercial Code¹) may be digitised and the conditions under which electronic original documents (that is any electronic private deed or any document created *ab initio* in electronic form) and electronic copies may be stored,

¹ Books and accounts, charts of accounts, supporting documents, letters received, copies of the letters sent by traders and inventories. Under the Commercial Code, traders are required to store these documents.

- defining the conditions under which electronic copies may benefit from a **legal presumption of conformity to the original document**,
- setting the applicable rules of the **new certified activity of digitisation and storage service provider**.

It must be noted that the Law does not apply to authentic deeds and simple data storage activities that do not intend to store an electronic copy or original document while securing its integrity.

2. The probative value of documents digitised and/or stored by PSDCs

2.1 Uncertainty as to the probative value of copies before the enactment of the Law

The current legal framework was not favourable to the destruction of print original documents, even when they had been digitised.

At a time when business players pursue the goal of reducing the volume of print documents, legislative provisions were not adequate to the market needs and to the technological advances.

Prior to the Law, in accordance with Article 1333 of the Civil Code, the presentation of an original document (print or electronic) could always be requested when this original document still existed. The original document was prevailing over the copy, even when the copy met the requested criteria.

However, prior to the Law, Article 1334 of the Civil Code provided that, in the absence of the original document (print or electronic), the copies made out of this original document, under the responsibility of the person that was entitled to keep it, had the same probative value as the private deed if the copies had been created according to certain criteria and in particular the specific criteria set out by the grand-ducal regulation of 22 December 1986.

Moreover, under Article 1334, the compliance of the copy with these criteria had to be demonstrated by the holder of the copy. It is only upon such demonstration that copies are presumed faithful copies of the original document (unless the contrary is subsequently proved).

Because of the confusion in the articulation of Article 1333 and Article 1334 of the Civil Code, companies did not feel confident with the idea of destroying paper original documents even in presence of an electronic copy in conformity with the requirements of Article 1334 of the Civil Code and of the grand-ducal regulation of 22 December 1986.

In the CSSF's annual report for 2008, was mentioned that *"in the absence of a more tailored legal framework, [...], the CSSF recommends to the professionals in the financial sector not to destroy the documents usually received as evidence before the courts and that mainly remain in print form."*

2.2 A welcome clarification

The Law amends the Civil Code and clarifies the rules in the field of electronic archiving as follows:

(i) Article 1333 of the Civil Code specifically indicates that the provision *"does not apply to digitised copies that are probative value copies as defined by law"*;

A *"probative value copy"* is *"a faithful and durable reproduction in a digital or micrographic form of an original document"*.

The probative value of such copies no longer depends on the existence or not of the original document.

(ii) Article 1334-1 is introduced in the Civil Code and provides that *"digitised copies that are created by a digitisation or storage service provider have, unless the contrary is proved, the same probative value as the original document or as the document deemed equivalent to the original document"*.

The creation of a legal presumption to the original document for "probative value copies" digitised by a certified digitisation or storage service provider registered on a specific list ("PSDC") is the core of the Law.

The new article 1334-1 specifies that *"a copy cannot be dismissed by the judge only because it is electronically presented or because it has not been created by a digitisation service provider."*

This provision follows the principle set out in Article 18 of the Law on electronic trade of 14 August 2000 that sets out that judges cannot dismiss an electronic signature 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.

A party that would not be in possession of a "probative value copy" may still try to demonstrate that his electronic copy complies with technical requirements applicable to PSDCs and has the same probative value as the original document or as the document deemed equivalent to the original document.

Conversely, the legal presumption of conformity to the original document created by the Law may be rebutted.

(iii) The provisions of Article 1334-1 are also added to Article 16 of the Commercial Code. Article 16 provides that books and accounts, charts of accounts, supporting documents, letters received and copies of the letters sent by traders and inventories may be stored in the form of copy contrary to balance sheets and profit and loss accounts which may not.

So far, Article 16 was only providing that copies were granted the same probative value as original documents when they fulfilled the conditions required by the grand-ducal regulation of 22 December 1986.

With the adoption of the Law, Article 16 will provide that *“digitised copies that are created by a digitisation or storage service provider have, unless the contrary is proved, the same probative value as the original or as the document deemed equivalent to the original”*.

The above-mentioned provisions are intended to strengthen business player’s trust in the dematerialised economy and to encourage the creation of probative value copies.

3. The new regulated activity of digitisation and storage service provider

The regulation of the activity of digitisation and storage service provider will guarantee a high level of security, confidentiality and technical requirements in this critical field.

3.1 Clarification as to the status of PSDC and the attached legal presumption

As mentioned above, only documents (pre-existing in analogue form) digitised by (i) **certified** persons (natural or legal persons) (ii) **registered on the list of the digitisation and storage service providers** hold by the Luxembourg Institute for Standardisation, Accreditation, Security and Quality of Products and Services (“ILNAS”) will benefit from the legal presumption of conformity to the original document.

However non-certified service providers have also the right to digitise and store documents and these service providers already existed prior to the Law. They will not have the status of PSDC and their electronic copies will not benefit from the legal presumption to the original document. It will be up to non-certified digitisation and storage service providers to demonstrate that their electronic copies are a faithful and durable reproduction of the original document.

3.2 PSDCs certification and registration process with ILNAS

PSDCs certification is subject to compliance with a complex set of technical and organisational rules that will be laid down in a Grand Ducal regulation. These rules will notably pertain to the implementation and management of an information security system and shall guarantee:

- as far as digitisation is concerned, the conformity of the probative value copies with the original documents, the readability of the probative value copies, the confidentiality of original documents and probative value copies as well as the integrity of the probative value copies;
- as far as electronic storage is concerned, the integrity, confidentiality and availability of probative value copies and digitised original documents entrusted to the PSDCs.

Once certified by certifying bodies accredited or recognised by ILNAS, service providers must request their registration on a specific list held by ILNAS and accessible on ILNAS' website.

The conditions verified by ILNAS before confirming the registration request are detailed in the Law (existence and scope of the certifying body's accreditation, existence and scope of the applicant's certification, etc.).

Only the registration on that specific list grants the service provider the status of PSDC and allows him to use the name "digitisation and storage service provider" or the acronym "PSDC" in the company name, trade name or in any commercial communication. The Law provides for specific criminal penalties in case of violation of this provision.

The new activity of PSDC will be strictly controlled by ILNAS which is entitled to carry out, in collaboration with the certifying body or not, additional verifications at any time regarding the grant and the maintaining of the status. Furthermore, the PSDC shall demonstrate each year that he keeps meeting the conditions that justify the maintaining of its registration on the list held by ILNAS.

The Law provides that ILNAS may at any time suspend the PSDC registration or remove the PSDC from the list held by ILNAS should it become aware of any event, circumstances or incident likely to result or having resulted in the violation of the provisions of the Law or of the regulations enacted thereunder.

3.3 Rules applying to PSDCs and guarantees attached to the status

In order to inspire confidence in digitisation and electronic storage, the Law places general obligations attached to the status of PSDC and provides for safeguards.

- Obligation to provide prior information (Section 6 of the Law)

PSDCs shall provide customers, on a durable medium and prior to any commercial relationship, with the conditions of digitisation and storage for which they are certified.

Information provided shall at least deal with the following:

- (i) process followed for digitisation and electronic storage,
 - (ii) process followed for returning the probative value copies under a readable form while guaranteeing that they remain faithful to the original document,
 - (iii) conditions applied for potential subcontracting (including the place where data are stored),
 - (iv) legal obligations incumbent on the PSDC,
 - (v) terms and conditions for the performance of the services, including the potential limitations on the PSDC's liability,
 - (vi) norms and procedures carried out as well as the crucial technical characteristics of the facilities used for the performance of the services.
- Duty of professional secrecy (Section 7 of the Law)

PSDCs shall keep secret any information, original document, document and copy that are communicated to them in the course of their business.

The disclosure of information or documents in breach of this provision is a criminal offence.

It should be noted that PSDCs are not bound by professional secrecy towards ILNAS.

- Obligations in case of transfer or cessation of the PSDCs' activities (Section 9 of the Law)

The Law also provides for specific obligations upon PSDCs in the event of the transfer of part or all of business activities to another PSDC, these obligations aiming at protecting the interests of PSDCs' customers.

PSDCs' customers may of course choose themselves the PSDC to which the electronic documents will be transferred.

- Guarantees as to the electronic storage equipment or media (Section 8 of the Law)

PSDCs shall guarantee that at any time at least one copy of all the electronic original documents and probative value copies they store for customers are placed on equipment or media that they wholly own.

PSDCs are prohibited from granting guarantees or security rights on these equipment or media. Failing that, these guarantees and security rights would be void by law.

Moreover, these equipment and media cannot be seized as long as probative value copies or electronic original documents are not returned to the customer. However, this protective provision against seizure does not apply to other equipment or media on which additional copies of electronic documents would also be placed.

The above provisions are strong safeguards for PSDCs' customers and are necessary for the efficiency of the system.

3.4 Specific categories of PSDCs

Two other elements must be highlighted with regard to this new activity.

(i) PSDCs do not necessarily work for third parties. PSDCs may operate, as a principal or subsidiary occupation, for their own needs or for the needs of companies within the same group.

Some of the obligations or safeguards described above will not be applicable to these PSDCs such as the obligation of providing prior information or the obligation to place at least one copy of the electronic original documents and probative value copies they store on equipment or media that they wholly own. There is no prohibition either on the grant of security rights or on the fact of carrying out seizures on storage equipment or media.

However PSDCs operating for their own needs or for the needs of companies within the same group both have the duty of professional secrecy.

(ii) PSDCs that wish to operate in the financial sector² shall fulfil additional requirements to those described above. They cannot be natural persons. Moreover, they shall justify of a share capital of a minimum amount (at least 50 000 euros for digitisation service providers and at least 125 000 euros for storage service providers). Finally, once registered on the PSDC list hold by ILNAS, they will have to obtain a license from the Surveillance Commission for the Financial Sector (CSSF) such as any other support professional of the financial sector (PFS). The CSSF will grant a specific licence for each of the activities (digitisation and electronic storage).

The CSSF and ILNAS will work together for the purpose of controlling the PSDCs operating in the financial sector.

In order to include these new requirements for the PSDCs that wish to operate in the financial sector, the Law provides that new Articles 29-5 and 29-6 will be added to the amended law of April 5, 1993 on the financial sector.

4. Conclusion

Electronic archiving allows companies to considerably reduce storage costs and space and to share information much more easily. With the implementation of a legal presumption of conformity to the original document for copies processed by PSDCs, the Law will undoubtedly render Luxembourg more attractive than the other European Member States in matter of electronic archiving. In that way, Luxembourg appears as a leader country in the dematerialised economy.

Given this innovative new legal framework in Luxembourg, it is recommended, whenever possible, to expressly refer to Luxembourg law as the applicable law to the contract when the business relationship between the parties includes cross-border elements. It is true that Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market³ specifies that *“an electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form”*. However, the legal presumption of conformity to the original document implemented by the Law may not apply as such in other EU Member States.

² This refers to PSDC that digitise documents or store digitised documents for credit institutions, professionals of the financial sector (PFS), payment institutions, electronic money institutions, collective investment schemes, specialised investment funds, venture capital investment companies, pension funds, accredited securitisation entities, insurance or reinsurance companies registered under the laws of Luxembourg or under foreign law.

³ See Article 46. As a general rule, Regulation (EU) 910/2014 is applicable as from July 1st, 2016. However other applications dates are also provided for specific provisions.

Finally, it remains to be seen how business players will deal in practice with the physical transmission of tons of print original documents (most of them containing sensitive and confidential information) to PSDCs. In the future, the choice of “in-house” PSDCs may be preferred for obvious reasons of confidentiality and efficiency.

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