

Law of 25 July 2015 on electronic archiving and amending:

1. **Article 1334 of the Civil Code;**
2. **Article 16 of the Commercial Code;**
3. **the law of 5 April 1993 on the financial sector, as amended.**

(Mémorial A – No. 150 of 4 August 2015)

Chapter 1. - General provisions relating to the dematerialisation and conservation.

Art. 1. Scope.

(1) The purposes of this law are to:

- define the conditions governing the dematerialisation of originals within the meaning of this law and the conditions governing the conservation of digital copies and originals;
- determine the conditions under which the copies referred to in the previous indent may benefit from a presumption of conformity with the original; and
- set out rules that apply to the activity of dematerialisation or conservation service provider.

(2) This law does not apply to the activities of mere data storage that do not consist in storing a copy or digital original while guaranteeing its integrity.

Art. 2. Definitions.

For the purposes of this law, the following definitions shall apply:

- a) "certifying body" shall mean any person accredited by ILNAS or any other accreditation body recognised by ILNAS within the scope of European or international mutual recognition agreements and whose notification has been validated by ILNAS;
- b) "electronic conservation" shall mean the activity which consists in conserving a digital original or a copy with probative value in the conditions that ensure reliable guarantees as to the integrity of the conserved document;
- c) "copy with probative value" shall mean faithful and sustainable reproduction of an original in digital form or in microform;
- d) "dematerialisation" shall mean the activity consisting in creating a copy with probative value of an original in analogue form in conditions that ensure reliable guarantees as to the conformity of the copy made from the original;
- e) "holder" shall mean any person legitimately holding or required by law to hold an original existing in analogue or digital form or a copy with probative value;
- f) "original" shall mean any private deed or any document referred to in Article 16 of the Commercial Code;
- g) "digital original" shall mean any electronic private deed or document originally created in electronic form;
- h) "dematerialisation or conservation service provider" shall mean any person exercising the activity of dematerialisation or electronic conservation, as a primary or secondary activity, for own needs or on behalf of third parties, and, under the conditions and arrangements set out in this law, certified to this end and registered on the list referred to in Article 4(3).

Art. 3. Dematerialisation and electronic conservation.

The dematerialisation of any original and the electronic conservation shall fulfill the requirements laid down by grand-ducal regulation.

Chapter 2. - Dematerialisation or conservation service providers.

Section 1. Status of dematerialisation or conservation service provider.

Art. 4. Application procedure and supervision of dematerialisation or conservation service providers.

(1) Only persons certified by a certifying body as having set up and complying with the rules relating to the establishment and management of an information security system and to the operational management that are specific to the process of dematerialisation or conservation may apply to ILNAS for registration on the list referred to in paragraph 3 in order to obtain the status of dematerialisation or conservation service provider.

The certifying body shall verify, by means of audits, that the rules referred to in the first subparagraph allow ensuring that reliable guarantees exist:

- regarding dematerialisation, with respect to the conformity of the copies with probative value with the originals, the readability of the copies with probative value, the confidentiality of the originals and copies with probative value, as well as the integrity of the copies with probative value as long as they are in the possession of the dematerialisation or conservation service provider; and
- regarding electronic conservation, with respect to the integrity, confidentiality and availability of the copies with probative value and the digital originals entrusted to the dematerialisation or conservation service provider.

The rules referred to in this paragraph shall be laid down by grand-ducal regulation.

(2) The elements verified for the validation of the application for registration by ILNAS referred to in the first paragraph shall cover:

- the current state and scope of the certifying body's accreditation;
- the current state and scope of the applicant's certification;
- the knowledge of the auditors that carried out the audit certification of the relevant national legislation;
- the scope of the certification audit based on the audit report;
- the drafting of the audit report in one of the three administrative languages as specified in the law of 24 February 1984 on the language regime or in English;
- where applicable, the resolution of major deviations identified by the audit.

ILNAS may, at any time, make additional verifications in the context of the granting or maintaining of the status of dematerialisation or conservation service provider. ILNAS may turn to the certifying body to carry out these verifications.

(3) Once the application for registration has been validated, ILNAS shall register the applicant on the list of dematerialisation or conservation service providers held by ILNAS and published on the website of ILNAS. ILNAS shall inform the applicant of the registration and of any change concerning this registration.

The dematerialisation or conservation service providers registered on the list referred to in the first subparagraph may use in their company name, commercial name or any commercial communication the denomination "dematerialisation or conservation service provider" or the acronym PSDC.

(4) The dematerialisation or conservation service provider shall demonstrate on an annual basis to ILNAS that it fulfils the conditions of paragraph 2, first subparagraph. ILNAS may at any moment verify or have verified on its own initiative, the existence of these conditions.

(5) The persons that carry out a dematerialisation or electronic conservation activity which is limited to their own needs or to those of one or several companies belonging to the same group may also be granted the status of dematerialisation or conservation service provider. The provisions of Article 5(3), as well as Articles 6, 8 and 9, with the exception of paragraph 1 thereof, shall not apply to these dematerialisation or conservation service providers.

Art. 5. Suspension of the registration or withdrawal from the list of dematerialisation or conservation service providers.

(1) At any time, ILNAS may suspend the registration or withdraw the dematerialisation or conservation service provider from the list of dematerialisation or conservation service providers should it become aware of any event, circumstance or incident likely to cause, or having caused, a breach of the provisions of this law or of its implementing regulations.

In such a case, ILNAS may, if such a disclosure is necessary in the public interest, publish a communiqué either in the Mémorial, or in one or several Luxembourg or foreign newspapers.

(2) The dematerialisation or conservation service provider shall inform ILNAS without delay of the discovery of any event, circumstance or incident such as to cause, or having caused, a breach of the provisions of this law or of its implementing regulations.

(3) The dematerialisation or conservation service provider is required to inform the holders without delay of any suspension of its registration or withdrawal from the list of dematerialisation or conservation service providers. In such a case, the holder is entitled to claim from the dematerialisation or conservation service provider the return or transfer to any third party of its choice of any document, copy with probative value or digital original that belongs to it, as well as of any information relating to the creation and conservation of copies with probative value or digital originals, without any application of penalties or excessive processing fees. Any contrary contractual provision shall be deemed unwritten.

Section 2. General obligations of dematerialisation or conservation service providers.

Art. 6. Obligation to provide prior information.

1) Prior to any contractual relationship with a holder, the dematerialisation or conservation service provider shall make available, on a durable medium and in easily understandable terms, information relating to the conditions for dematerialisation or electronic conservation for which it has been certified.

(2) Information provided shall, according to the services provided, deal at least with the following:

- a) the procedure in place for dematerialisation or electronic conservation;
- b) the procedure in place for returning the copies with probative value under a readable form while guaranteeing fidelity to the original;
- c) the terms and conditions for potential subcontracting including the location of data storage;
- d) the legal obligations incumbent on the dematerialisation or conservation service provider;
- e) the contractual conditions for providing the services, including any limitation of liability of the dematerialisation or conservation service provider; and
- f) the standards and procedures implemented, as well as the key technical characteristics of the facilities and equipments used for the provision of the services.

Art. 7. Obligation of professional secrecy.

(1) Board members, managing directors, members of supervisory bodies, directors, employees and other persons serving a dematerialisation or conservation service provider are obliged to keep secret any information, originals, documents and copies entrusted to them in relation with their professional activity, with the exception of those for which the holder accepted or requested disclosure. Disclosure of such information shall be punishable by the penalties laid down in Article 458 of the Penal Code.

(2) The secrecy obligation shall cease where disclosure of information is authorised or imposed by or in accordance with a legal provision, even prior to this law.

(3) The professional secrecy obligation shall not exist vis-à-vis ILNAS acting within the scope of its legal competence.

(4) Subject to the rules applicable in penal matters, once information as referred to in paragraph 1 has been disclosed, it may not be used for any purposes other than those for which its disclosure has been permitted by law.

Art. 8. Ownership, collateral and guarantees for equipments and media for electronic conservation.

The dematerialisation or conservation service provider which provides electronic conservation services shall guarantee that, at any given time, at least one copy of all the copies with probative value and of the digital originals it keeps for the account of holders is stored on equipment and media of which it has full ownership. It may not grant guarantees or collateral on these equipments or media. Collateral and guarantees given in breach of this subparagraph shall be void. These equipments or media cannot be seized as long as the probative copies or digital originals have not been returned to the holders.

The provisions of this article shall not apply to the equipments or media on which the dematerialisation or conservation service provider stores any other copies with probative value or digital originals on behalf of holders.

Art. 9. Transfer and termination of the service.

(1) A dematerialisation or conservation service provider may transfer all or part of its activities to another dematerialisation or conservation service provider.

(2) The transfer of copies with probative value or digital originals shall be operated, with the agreement of the holder, under the following conditions:

- a) The dematerialisation or conservation service provider shall inform the holder at least one month in advance that it considers terminating the service as dematerialisation or conservation service provider and transferring its copies with probative value or digital originals.
- b) The dematerialisation or conservation service provider shall specify at that moment the identity of the dematerialisation or conservation service provider to which the transfer of the copies with probative value or digital originals is envisaged.
- c) It shall indicate at that moment to the holder that the latter has the right to refuse the envisaged transfer, as well as the terms by which the holder may express such refusal. In the event of a refusal of the holder, the dematerialisation or conservation service provider shall return to the holder, or to any dematerialisation or conservation service provider or to any third party designated by the holder, respectively, any copy with probative value or any digital original that belongs to it, as well as any information relating to the dematerialisation and conservation of copies with probative value and digital originals.
- d) The transfer shall take place at the latest on the day the dematerialisation or conservation service provider ceases its activities.

(3) The dematerialisation or conservation service provider that ceases its activities without them being taken over by another dematerialisation or conservation service provider, shall take the necessary measures to return to the holder, to any dematerialisation or conservation service provider or to any third party designated by the holder, and under proper conditions, any copy with probative value or any digital original belonging to the holder. Moreover, the dematerialisation or conservation service provider shall return any information relating to the dematerialisation and conservation of copies with probative value or digital originals.

(4) The dematerialisation or conservation service provider that intends to end its activities or that is unable to continue its activities shall immediately inform ILNAS thereof. It shall ensure, within three months, that these activities are taken over by another dematerialisation or conservation service provider, under the conditions provided for in paragraph 2, or, failing that, shall take the measures provided for in paragraph 3 and shall inform ILNAS thereof.

Chapter 3. – Penalties.

Art. 10. Criminal penalties.

A fine between EUR 251 and EUR 125,000 shall be imposed on persons that use in their company name, commercial name or any commercial communication the denomination "dematerialisation or conservation service provider" or the acronym PSDC without being registered on the list referred to in Article 4(3) of this law.

Chapter 4. – Amending provisions.

Art. 11. Amendments to the Civil Code.

(1) Article 1333 of the Civil Code is completed as follows:

"This article shall not apply to the digital copies which are copies with probative value within the meaning of the law."

(2) After Article 1334 of the Civil Code, an Article 1334-1 with the following wording is inserted:

"Digital copies that are created by a dematerialisation or conservation service provider shall have, unless proven otherwise, the same probative value as the original document or as the document deemed equivalent to the original.

A copy cannot be dismissed by the judge only because it is electronically presented or because it has not been created by a dematerialisation service provider."

Art. 12. Amendments to the Commercial Code.

Article 16 of the Commercial Code is completed as follows:

"Digital copies that are created by a dematerialisation or conservation service provider shall have, unless proven otherwise, the same probative value as the original document or as the document deemed equivalent to the original.

A copy cannot be dismissed by the judge only because it is electronically presented or because it has not been created by a dematerialisation service provider. "

Art. 13. Amendments to the law of 5 April 1993 on the financial sector, as amended.

The law of 5 April 1993 on the financial sector, as amended, is amended as follows:

(1) In Article 29-1(1) the words "electronic money institutions, " shall be added in the introductory sentence and in the first indent after the words "payment institutions,".

(2) In Articles 29-2(1) and 29-3(1) the words "electronic money institutions, " are added after the words "payment institutions,".

(3) Article 29-4(1) is amended as follows:

- a) in the first subparagraph, the words "electronic money institutions, " are added after the words "payment institutions, " and
- b) in the last subparagraph, the words "electronic money institution, " are added after the words "payment institution, ".

(4) The following Articles 29-5 and 29-6 are added:

"Art. 29-5. Dematerialisation service providers of the financial sector.

(1) Dematerialisation service providers of the financial sector are dematerialisation or conservation service providers within the meaning of the law of 25 July 2015 on e-archiving in charge of the dematerialisation of documents on behalf of credit institutions, PFS, payment institutions, electronic money institutions, UCIs, SIFs, investment companies in risk capital (SICARs), pension funds, authorised securitisation undertakings, insurance undertakings or reinsurance undertakings, governed by Luxembourg law or by foreign law.

(2) Authorisation to act as dematerialisation service provider of the financial sector shall only be granted to legal persons. It shall be conditional on the production of evidence of a share capital of not less than 50,000 euros.

(3) The CSSF and ILNAS shall cooperate for the purpose of performing their respective tasks of supervising the dematerialisation service providers of the financial sector.

Art. 29-6. Conservation service providers of the financial sector.

(1) Conservation service providers of the financial sector are dematerialisation or conservation service providers within the meaning of the law of 25 July 2015 on e-archiving in charge of the conservation of electronic documents on behalf of credit institutions, PFS, payment institutions, electronic money institutions, UCIs, SIFs, investment companies in risk capital (SICARs), pension funds, authorised securitisation undertakings, insurance

undertakings or reinsurance undertakings, governed by Luxembourg law or by foreign law.

(2) Authorisation to act as conservation service provider of the financial sector shall only be granted to legal persons. It shall be conditional on the production of evidence of a share capital of not less than 125,000 euros.

(3) The CSSF and ILNAS shall cooperate for the purpose of performing their respective tasks of supervising the conservation service providers of the financial sector.

(4) Activities of mere data storage which do not consist in storing a copy with probative value or a digital original within the meaning of the aforementioned law of 25 July 2015 while guaranteeing its integrity do not fall within the scope of this article."

(5) Article 41(5) is amended as follows:

"(5) The obligation to secrecy does not cover credit institutions and support PFS where the information communicated to those professionals is provided under an agreement for the provision of services."

Chapter 5. – Transitional and final provisions.

Art. 14. By way of derogation from Article 24(1) and (2) of the law of 19 December 2014 on the State revenue and expenditure budget for the financial year 2015 and by crossing the ceilings laid down in this law, ILNAS shall be authorised to hire three additional *carrière supérieure* employees in 2015.

Art. 15. The digital copies and originals created and stored by an undertaking entitled thereto under the existing legal provisions, under the control of a distinct public authority and prior to the entry into force of this law, shall be copies with probative value and digital originals within the meaning of this law, created and stored in accordance with the provisions of the Grand-ducal regulation of 25 July 2015 on the dematerialisation and conservation of documents, provided the digital copies and originals are signed electronically within the meaning of Article 1322-1 of the Civil Code within 24 months following the entry into force of this law.

Article 16. In any future legal or regulatory provisions, this law may be referred to under an abbreviated form by using the terms "loi du 25 juillet 2015 relative à l'archivage électronique", in French and "law of 25 July 2015 on e-archiving", in English.