

COVID 19 - Validity and legal effect of electronic signatures under Luxembourg law

Posted 20.04.2020

Due to current restrictions and teleworking recommendations, many people do not have access to printers and ask whether they can sign documents electronically. Although this article was drafted in the context of the Covid-19 outbreak, the principles set out herein remain valid in all other circumstances.

1. General principle: validity of electronic signatures

Electronic signatures are generally a valid means of signing private deeds (*actes sous seing privé*). However, if the validity of the electronic signature (and therefore the validity or enforceability of the contract or its formation) is challenged, the burden of proof will depend on the type of electronic signature used.

2. Types of electronic signatures

The eIDAS Regulation¹, which is directly applicable in all EU Member States (including Luxembourg²), defines three categories of electronic signatures:

- “simple” *electronic signature*, i.e. “data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign”;
- *advanced electronic signature*, i.e. “an electronic signature that (a) is uniquely linked to the signatory; (b) is capable of identifying the signatory; (c) is created using electronic signature creation data that the signatory can use, with a high level of confidence, under his sole control; and (d) is linked to the data signed with it in such a way that any subsequent change in the data is detectable”; and

- *qualified electronic signature ("QES")*, i.e. "an advanced electronic signature that is created by a QES creation device, and which is based on a qualified certificate for electronic signatures" ("QCES").

QCES are issued by qualified trust service providers. The current list of certified trusted service providers delivering QCES is available at <https://webgate.ec.europa.eu/tl-browser/>. QCES are mutually recognised in all EU Member States.

3. Legal effect of electronic signatures

QES have the same legal effect as handwritten signatures. In the event of a dispute, the party challenging the validity of the QES must prove its invalidity.

A signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for QES.

The legal effect of non-QES is defined by the national law of the relevant EU Member State.

The Luxembourg Civil Code defines an electronic signature as a set of data, inseparably linked to the deed, which guarantees its integrity, identifies the signatory and expresses their adherence to the content of the deed. In the absence of any additional requirements, the general principles on proof apply according to which the burden of proof that the requirements of the electronic signature are met lies with the person wishing to avail themselves of the signature. The burden of proof therefore shifts compared to QES.

Under Luxembourg law, evidence can be brought by all means (testimony, etc.), including when non-QES is used.

The evidence of the existence or content of an agreement may thus result from elements surrounding the entry into the agreement such as the correspondence between the parties, including the content of the email/message conveying the signed document, the beginning of the performance of the agreement (including payment for example) or other behaviour of the parties, experts' analysis, etc.

In this respect, providers of AES products should be able to produce sufficient elements (multifactor authentication, audit trail, etc.) to ease the management of evidence in case the validity of the non-QES electronic signature is challenged.

However, for transactions of a value above EUR 2,500.-, valid evidence against non-merchants (*non commerçants*) can in principle only result from written documents (there are exceptions).

4. Agreement on proof

Save under certain exceptions, it would be possible to shift the burden of proof contractually. The language, to be agreed in advance of and separately from the document that will be signed electronically³ (or with the use of a QES), could either restrict the possibility for the parties to challenge the validity of the type of electronic signature they agree to use, and/or negate the burden-shifting effect of not using QES.

If the relevant language is added in the document to be signed electronically itself, additional elements must be kept as evidence that may be used as a complement to the document having a non-QES, the legal effect of which is not automatically recognised as equivalent to wet ink signature.

5. Limitations

With the exception of specific statutory rules, the principles mentioned above apply to private deeds only. A number of documents can in principle not be concluded electronically, such as for example notarial deeds, contracts transferring ownership of (Luxembourg) real property, contracts which require the intervention of the courts, public authorities or public officers, guarantees (*contrats de sûretés*) and collateral guarantees provided by non-professional persons.

For all cases where Luxembourg provides that documents must be kept at the registered office of the company, it would be useful in case documents are signed electronically, in addition to the electronic version, to keep a paper version in case the information system hosting the electronic version is temporarily or definitively unavailable. Such paper version would however not be considered an original.

For legal entities, it should be checked that nothing in the constitutional documents impedes the use of electronic signatures for the intended documents, e.g. for all corporate documents.

Certain regulations, including for example the fight against money laundering and terrorism financing, or the procedures adopted pursuant to such regulations, may hinder the use of electronic signatures as paper originals with wet ink signature may still be required.

6. Risks

In our view, from a Luxembourg standpoint, the main risk associated with electronic signatures is whether its validity (and thus the validity and enforceability of the deed itself) is challenged outside of the EU, i.e. in a country not recognising the legal effects of such signatures. This could occur even if the laws of Luxembourg or of another EU Member State were chosen to govern the agreement or if Luxembourg or another EU Member State was chosen as having jurisdiction. This may require legal advice from local counsel in those countries (e.g. the countries in which the other parties have

their habitual residence).

This may also interest you :

- E- Commerce – Luxembourg Electronic signature regime to fully aligned with eIDAS Regulation
- COVID 19 – Telework in light of the Labour and Data Protection Law

- 1 Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the **eIDAS Regulation**).
- 2 Electronic signatures were first introduced by the amended Law of 14 August 2000 on electronic commerce (the **e-Commerce Law**). Given that EU law prevails over national laws and a bill of law adopted in March 2019 is currently being discussed with a view to amending the e-Commerce Law to align the Luxembourg regime on electronic signatures with the later adopted eIDAS Regulation, we have not elaborated further on the regime applicable under the e-Commerce Law.
- 3 E.g. general terms and conditions.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

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