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Ladies and Gentlemen,

Enforceability of electronically executed and electronically confirmed contracts

1 Introduction

1.1 ISDA has requested advice with respect to the enforceability of electronically executed and electronically confirmed contracts under the laws of Luxembourg in the context of transactions under the ISDA Master Agreement, specifically addressing the points set out in the instruction letter from you dated April 2020 (the "**Instructions**").

1.2 The questions that we have been asked to address in the Instructions are set out below in italics, followed in each case by our analysis and conclusions.

1.3 This opinion speaks as of its date and is confined to and is solely given on the basis of the laws of Luxembourg as applied by the Luxembourg courts, published and presently in effect. We undertake no responsibility to notify the addressee of any change in the laws of Luxembourg or their construction or application after the date of this opinion.

1.4 In this opinion, Luxembourg legal concepts might be expressed in English terms and not in their original French terms. The concepts concerned may not be identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions. This opinion may, therefore, only be relied upon under the express condition that it is given under

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Luxembourg law and case law and that any issues of interpretation arising hereunder will be governed by Luxembourg law and be brought before a Luxembourg court.

1.5 This opinion is confined to the issue of enforceability and admissibility in court of an electronically executed contract under the laws of Luxembourg vis-à-vis equivalent contracts being executed on paper with handwritten signatures. We do not opine, amongst others and without limitation, on the legality, validity or enforceability of the terms of the ISDA Master Agreement (including but not limited to terms relating to netting or collateral) and any transactions entered into thereunder, or on compliance with regulatory requirements arising out of entry into the ISDA Master Agreement and any transaction entered into thereunder.

1.6 We express no views as to any laws other than the laws of Luxembourg and we have assumed that there is nothing in any other law that affects our views expressed herein.

1.7 We have assumed that none of ISDA's, ISLA's and their members' counterparties is a natural person.

2 Summary of applicable legislation

2.1 Luxembourg legal framework for electronic signatures

The Luxembourg legal framework for electronic signatures is set by:

(i) 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 and repealing Directive 1999/93/EC (the "**eIDAS Regulation**");

(ii) the Luxembourg law of 14 August 2000 on electronic commerce (as amended) (the "**eCommerce Law**"). The eCommerce Law is currently in the process of being amended to be fully compliant with the eIDAS Regulation[1]. The first version of the Draft Bill of Law has been deposited in March 2019 and the legislative process is still ongoing. On the basis of researches conducted on 11 May 2020 on the website of the Luxembourg's parliamentary chamber ("*Chambre des Députés*"), we understand that the Draft Bill of Law is tabled to a meeting of certain parliamentary committees to be held on 28 May 2020. We have however no visibility as to the date on which the Draft Bill of Law will be passed (and the eCommerce Law amended accordingly);

(iii) the various acts implementing the eCommerce Law; and

(iv) the relevant provisions of the Luxembourg Civil Code (as amended notably by the eCommerce Law).

For the purpose of this opinion, as the eCommerce Law is in the process of being amended, reference will be made to the provisions of the eIDAS Regulation[2]. We will nonetheless endeavour to highlight any Luxembourg specificities which are relevant in the context of the Instructions.

[1] Draft bill of law n°7427 (the "**Draft Bill of Law**").

[2] As a directly applicable EU Regulation, the eIDAS Regulation automatically forms part of Luxembourg law.

2.2 The various types of electronic signature recognised under Luxembourg law and their respective probative value

Three types of electronic signatures are recognised under the eIDAS Regulation:

(i) electronic signatures, which are defined as "*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*"[3];

(ii) "advanced" electronic signatures, which are defined as "*an electronic signature which meets the requirements set out in Article 26 of the eIDAS Regulation*"[4]; and

(iii) "qualified" electronic signatures, which are defined as "*an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures*"[5].

Under the eIDAS Regulation, a qualified electronic signature shall have the equivalent legal effect of a handwritten signature[6]. However, the eIDAS Regulation also lays down a non-discrimination principle, pursuant to which an electronic 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 qualified electronic signatures[7].

In a matter before the Luxembourg courts, there would be a presumption of authenticity for a handwritten signature (and consequently a qualified electronic signature meeting the requirements of the eIDAS Regulation and Article 1322-1 of the Luxembourg Civil Code). If the authenticity of the qualified electronic signature is challenged, in determining whether the electronic signature in question has been correctly used and what weight it should be given against other evidence, the courts would apply the same approach as if the signature were a handwritten signature. The more onerous identification requirements for qualified electronic signatures should mean that such a signature provides greater evidential weight than a "standard" or advanced electronic signature and therefore make it harder for a counterparty to challenge its validity in court.

In practice, this means that an electronic signature or an advanced electronic signature do not benefit from the same presumption as a qualified electronic signature and if it is challenged in front of a Luxembourg Court, it will be up to the parties claiming the validity of these electronic or advanced signatures to demonstrate that they meet the conditions of the first paragraph of Article 1322-1 of the Luxembourg Civil Code.

It is also worth mentioning that only the qualified electronic signature benefits from an EU-wide recognition. In other words, a qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States[8].

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[3] Article 3 (10) of the eIDAS Regulation.

[4] Article 3 (11) of the eIDAS Regulation. According to Article 26 of the eIDAS Regulation, an advanced electronic signature shall (i) be uniquely linked to the signatory, (ii) be capable of identifying the signatory, (iii) be created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control and (iv) be linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

[5] Article 3 (12) of the eIDAS Regulation.

[6] Article 25 (2) of the eIDAS Regulation.

[7] Article 25 (1) of the eIDAS Regulation.

[8] Article 25 (3) of the eIDAS Regulation.

3 Questions

3.1 *Question 1: are there any laws or regulations in your jurisdiction that may restrict or prevent parties from electronically forming or electronically executing contracts?*

We are not aware of any Luxembourg laws, regulations or legal principles that would explicitly restrict professional parties[9] from electronically forming or electronically executing contracts. The eCommerce Law enables the formation and execution of electronic contracts in almost all scenarios where "wet-ink" written contracts were required to be entered into (save for a limited number of contracts and activities, as further detailed in Question 4 below, and save in respect of contractual arrangements involving the intervention of a Notary Public and the passing of a public deed ("*acte notarié*"), as further detailed in Question 5 below).

We have been further asked to analyse whether an electronic signature is required to execute a contract electronically or whether a party can accept the terms of a contract by stating its acceptance in an email. This question is actually linked to the evidentiary regime applicable to acts under private seal under Luxembourg law. Although this opinion does not aim at providing an exhaustive description of the applicable rules, we thought it useful to first clarify certain concepts.

From a Luxembourg law perspective, a contract will be valid if the validity conditions laid down by Article 1108 of the Luxembourg Civil Code are met (i.e., consent, capacity, certain object and lawful cause). This also means that a contract will be formed as soon as there is an offer and an acceptance on the essential elements of such contract.

One should however distinguish between commercial and civil matters, which are subject to different evidentiary regimes, which apply irrespective of the "paper" form or the electronic form of an agreement:

(i) in civil matters, Article 1341 of the Luxembourg Civil Code requires legal agreements ("*acte juridiques*") having a certain value (i.e., more than EUR 2,500) to be evidenced in writing, i.e., by a public deed ("*acte notarié*") or by an act under private seal ("*acte sous seing privé*")[10]. Depending on the form chosen by the parties, the written agreement will be subject to the rules laid down by Article 1317 to 1321 of the Luxembourg Civil Code (in case the parties opt for a public deed) or to the rules laid down by Article 1322 to 1332 of the Luxembourg Civil Code (in case the parties can opt for an act under private seal). As a general principle (and in addition to the specific rules laid down by Article 1322 to 1332 of the Luxembourg Civil Code), an act can only be qualified as an act under private seal in the sense of Article 1322 of the Luxembourg Civil Code if (i) it is in writing and (ii) it is signed by the parties (with a handwritten or an electronic signature);

[9] According to article L. 010-1 of the Luxembourg Consumer Code, a consumer is defined as a natural person acting for purposes outside his/her commercial, industrial, artisanal or liberal profession. We assume that ISDA's and its members' counterparties are all legal entities, therefore falling outside the scope of the additional requirements set forth by the Luxembourg Consumer Code.

[10] Two main limits to this requirement can be mentioned. Article 1347 of the Luxembourg Civil Code provides that when a party holds a written agreement which does not comply with the rules laid down by Articles 1322 and following of the Luxembourg Civil Code and hence cannot be considered an act under private seal, such written agreement cannot by itself serve as evidence, but it can be considered as a "*beginning of written proof*" ("*commencement de preuve par écrit*"). The second exception, which is laid down by article 1348 of the Luxembourg Civil Code, is based on the impossibility of proving in writing.

(ii) in commercial matters, evidence of legal agreements ("*acte juridiques*") can be brought by any means[11]. This principle of freedom of proof, laid down by Article 109 of the Luxembourg Commercial Code, means that in commercial matters, evidence of legal agreements can be brought by a written agreement (i.e., a public deed or an act under private seal), but also by the slip ("*bordereau*") or statement ("*arrêté*") of a stockbroker or broker, duly signed by the parties, an accepted invoice, by correspondence, through the parties' books and even by testimonial evidence (should the Luxembourg court choose to admit it).

Assuming in the scenario at hand that all parties to a contract are exclusively corporate entities acting in the context of their respective commercial activity, this means that this contract could be proven by any means since this situation would fall within the ambit of Article 109 of the Luxembourg Commercial Code. The Luxembourg case-law has ruled[12] in a situation involving commercial parties where a written agreement had not been formally signed, but where the acceptance of one of the parties had been expressed by email, that evidence of an agreement of the parties on the subject matter and price (and hence of contract between the parties) was brought[13].

On that basis, it can be supported that a commercial party can accept the terms of a contract by stating its acceptance by email, i.e., without signing a formal agreement (in which case the analysis included in this opinion would not apply). We kindly draw your attention to the fact that parties generally feel more comfortable with having duly executed (i.e., signed) documents but this is for practical reasons, rather than the result of a legal requirement.

3.2 ***Question 2: how are electronic signatures defined in your jurisdiction? Does your jurisdiction have specific legislation giving legal recognition to transactions entered into "electronically" and/ or specific legislation dealing with the admissibility into evidence of electronic records? If there are no specific statutes, is it possible to justify the enforceability of electronic transactions and the admission into evidence of electronic records through legal reasoning, and how robust would such a position be?***

The latest available version of the Draft Bill of Law defines the concept of electronic signature by express reference to the definition included in the eIDAS Regulation, as described under paragraph 2.2 above.

The eCommerce Law, read in conjunction with the eIDAS Regulation, give legal recognition to transactions entered into "electronically" and deals with the admissibility into evidence of electronic records.

Indeed, following the implementation of the eCommerce Law, Article 1322-1 of the Luxembourg Civil Code has been amended and now provides that the signature necessary for the perfection of an act under private seal (i) shall identify the signatory and be the

[11] This rule may only be invoked only against the party having the status of merchant ("*commerçant*"). In the case of a mixed contract (i.e., a contract entered into between a merchant and a non-merchant), the non-merchant can prove the merchant's obligations by all means but the merchant will in principle be bound to prove the non-merchant's obligations in accordance with the formalities of the Luxembourg Civil Code.

[12] *Tribunal d'arrondissement de Luxembourg (commercial)*, 2 avril 2014, Tome 37 (2015-2016).

[13] Given the scarcity of relevant Luxembourg case-law in this respect, please note that there can be no certainty as to the possibility to generalise this solution.

expression of its consent, (ii) can either be handwritten or electronic and (iii) if electronic, shall consist in a set of data, inseparably linked to the act, which guarantees its integrity and satisfies the conditions laid down in the first paragraph of Article 1322-1 of the Luxembourg Civil Code (as described under indent (i)). In order to be assimilated to a handwritten signature, an electronic signature will need to be a qualified electronic signature (as explained under paragraph 2.2 above).

As explained in Question 1 above, as a general principle, there is no need for acts under private seal to be drawn up in any particular form.

With the recognition of electronic signatures, the concept of act under private seal has been automatically expanded to include electronic acts under private seal[14] and several other provisions of the Luxembourg Civil Code (dealing, for example and without limitation, with originals[15], mentions to be included in acts under private seal[16] or copies of acts under private seal[17]) have been amended so as to take into account the specificities of acts concluded electronically. The Luxembourg law dated 25 July 2015 on electronic archiving (the "**eArchiving Law**") also includes a definition of "*electronic original*", being defined as "*any act under private seal or document that was originally created in electronic form*"[18].

As explained in paragraph 2.2 above, the eIDAS Regulation lays down a non-discrimination principle pursuant to which an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings because it is in an electronic form or because it is not a qualified electronic signature. Such principle also extends to electronic documents. Indeed, the eIDAS Regulation provides 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*"[19]. This means that a document shall not be discriminated against (i.e., a Luxembourg judge cannot reject it from the outset) because of its electronic form.

3.3 *Question 3: would there be a presumption as to the authenticity, validity and integrity of the electronic records, and admissibility of electronic records at court? Further, is there any law, regulation or legal principle that would mean that electronically executed or electronically formed contracts would be treated differently to contracts physically executed with "wet ink" signatures?*

The validity conditions will not differ depending on the written or electronic form of a contract. In both scenarios, the four essential conditions laid down by Article 1108 of the Luxembourg Civil Code – consent, capacity, certain object and lawful cause – will have to be met. In respect of the admissibility of electronic contracts before a Luxembourg court, and by application of the non-discrimination principle laid down by the eIDAS Regulation (as described in paragraph 2.2 and in Question 2 above). In practice, this implies that a Luxembourg court would accept an electronic document and an electronic signature as *prima facie* evidence of the authenticity of the contract at hand.

[14] Article 1322-2 of the Luxembourg Civil Code.

[15] Article 1325 of the Luxembourg Civil Code.

[16] Article 1326 of the Luxembourg Civil Code.

[17] Articles 1333 and following of the Luxembourg Civil Code.

[18] Article 2 g) of the eArchiving Law.

[19] Article 46 of the eIDAS Regulation.

As a consequence of the above, a party using an electronic signature to execute an electronic contract would not be treated differently from a party using a "wet-ink" signature on a hard-copy contract as general contractual law will apply in addition to any separate provisions stemming from the specific nature of electronic contracts.

As explained before, we are not aware of any situation where electronically executed or electronically formed contracts would be treated differently from contracts physically executed with "wet-ink" signatures. The intention of the Luxembourg legislator was to implement a legal framework fostering the equivalence between hard-copy contracts and electronic contracts. This is in line with the provisions of the eIDAS Regulation, setting the principle of "*non-discrimination of the legal effects and admissibility of electronic documents in legal proceedings*"[20]. As a consequence, national courts cannot refuse electronic acts as evidence only because they are in an electronic form and "*have to assess these electronic tools in the same way they would do for their paper equivalent*"[21].

3.4 *Question 4: assuming that there are legal provisions governing electronic contracts in your jurisdiction, are there any specific areas of law where the usual rules on electronic contracts would not apply? Please note specific areas relevant to banking and finance*.

The eCommerce Law, in its current version, includes in its Article 50 a list of contracts explicitly excluded from its scope of application (i.e., contracts that cannot be concluded electronically due to their specific features and/or dedicated legal regimes), which are (i) contracts creating or transferring rights over real estate (except rental rights), (ii) contracts for which the involvement of courts is required by law, public authorities or professions exercising public authority, (iii) security agreements and guarantees given by persons acting for a purpose outside the scope of their professional or commercial activity and (iv) contracts relating to family and inheritance law[22].

There is currently a discrepancy between the Draft Bill of Law and the current version of the eCommerce Law. The latest available version of the Draft Bill of Law indeed refers to Article 50 as having been repealed by a Luxembourg law dated 2 April 2014 (the "**Amending Law**"). However, the Amending Law only repealed the third paragraph of Article 50 (i.e., not the entirety of the article). It will therefore need to be monitored whether the amended version of the eCommerce Law will still enumerate contracts which cannot be concluded electronically.

In addition, Article 2 of the eCommerce Law excludes certain activities from its scope of application (such as taxation, agreements or practices governed by cartel legislation, gambling activity), which we assume fall outside ISDA's, ISLA's and their members' scope of activity for the purpose of this opinion.

We are not aware of any Luxembourg specific rules which would restrict the application of the usual rules on electronic contracts in banking and finance transactions (save in respect

[20] Questions & Answers on Trust Services under eIDAS, 29 February 2016, available on the Commission's website : https://ec.europa.eu/digital-single-market/en/news/questions-answers-trust-services-under-eidas.

[21] Please see footnote 20 above.

[22] This article is the transposition of Article 9 (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (so-called "Directive on electronic commerce").

of contractual arrangements involving the intervention of a Notary Public, as further detailed in Question 5 below).

3.5 ***Question 5: where a contract is required to be made or evidenced in writing, would the "in writing" requirement be satisfied by an electronic record?***

There are a number of document types which are subject to a statutory requirement to be in writing and/or signed, both of which can be satisfied by an electronic document and an electronic signature, respectively. There are, however, some situations where the specific features and/or dedicated regime of a limited number of contracts preclude their electronic execution (please see Question 4 above).

Any contractual arrangement requiring the intervention of a Notary Public and the passing of a public deed ("*acte notarié*") (e.g., real estate, maritime and aircraft mortgages) cannot be executed remotely by way of electronic signature. In such situation, the parties would have to appear before the Notary Public in Luxembourg (either in person or represented by other individuals by way of notarised powers of attorney).

For the sake of completeness, Article 2 (2) of the Luxembourg law on financial collateral arrangements dated 5 August 2005 (as amended) (the "**2005 Law**") expressly states that the provision of collateral must be evidenced in writing. The written instrument evidencing the provision of collateral can be in electronic format or any other durable medium. However, security interests granted over financial instruments and claims covered by the 2005 Law require specific dispossession formalities to be complied with, irrespective of the paper or electronic form of the contract.

3.6 ***Question 6: what are the conditions, if any, that would need to be satisfied with regard to:***

(i) legal enforceability of electronic transactions;

Luxembourg courts will enforce electronic transactions in the same way as a transaction concluded by way of a "wet-ink" written contract, in line with the principle of non-discrimination set-forth in the eIDAS Regulation[23], as explained under Question 2 and Question 3 above.

(ii) admissibility into evidence of electronic records;

Luxembourg courts would accept an electronic document as *prima facie* evidence without any further conditions, in line with the principle of non-discrimination set-forth in the eIDAS Regulation, as explained under Question 2 and Question 3 above.

[23] Recital 63 of the eDIAS Regulation expressly states that the eIDAS Regulation "*should establish the principle that an electronic document should not be denied legal effect on the grounds that it is in an electronic form in order to ensure that an electronic transaction will not be rejected only on the grounds that a document is in electronic form*".

(iii) presumption as to the authenticity, validity and integrity of the electronic records?

Whilst an electronic document is *prima facie* admissible as evidence before a Luxembourg court, there is no presumption regarding its authenticity or its integrity.

Traditionally under Luxembourg law, the legal notion of "*original*" implies the absence of any change to the material support containing the information[24]. Such traditional definition would not fit the specific features of acts concluded electronically (for which, by definition, a change of material support is usual). So as to avoid that acts under private seal concluded electronically be systematically requalified as copies, the Luxembourg legislator has introduced specific requirements applicable to electronic originals. Article 1322-2 of the Luxembourg Civil Code indeed provides that "a*n electronic act under private seal will be deemed to be an original if it offers reliable guarantees that its integrity will be maintained from the time when it was first created in its final form*". This article must be read in conjunction with the definition of "*electronic original*" included in the eArchiving Law, being defined as "*any act under private seal or document that was originally created in electronic form*"[25].

By definition, a hard copy document will have the same reliability level throughout the period for which it is retained – any modification to such hard copy document will be visible, or at least noticeable. On the contrary with an electronic act, there is the risk that such act will not keep throughout its lifetime the same level of guarantees it had at the moment of its creation, for example because of technological developments.

In the absence of any further guidance from the Luxembourg legislator, certain scholars consider that the integrity of the electronic act is ensured by a qualified electronic signature itself. One of the elements of a qualified electronic signature, as defined in article 1322-1 of the Luxembourg Civil Code, is to be composed of *a* set of data inseparably linked to the act and which guarantees its integrity. Therefore, the use of an electronic signature meeting the requirements of article 1322-1 of the Luxembourg Civil Code (i.e., a qualified electronic signature) would, on the basis of the above, enable an electronic act to be considered an original[26].

3.7 *Question 7: would the rules on electronic execution in your jurisdiction cover the execution of documents physically executed (using wet-ink signatures) but exchanged electronically (PDF) including, but not limited to master agreements[27], credit support agreements, confirmations, guarantees, electronic trading terms or similar documents?*

The rules stemming from the Luxembourg legal framework for electronic signatures, as laid down by the eCommerce Law and the eIDAS Regulation (as further detailed in paragraph

[24] André Prüm, *Le commerce électronique en droit luxembourgeois*, Edition Larcier, 2005, p.183.

[25] Article 2 g) of the eArchiving Law.

[26] Stéphan Le Goueff, *Internet et e-commerce en droit luxembourgeois*, Edition Portalis, 2003, p. 107.

[27] Such as ISDA Master Agreements, Global Master Securities Lending Agreements, Global Master Repurchase Agreements, Master Repurchase Agreement, Master Securities Loan Agreement and Master Securities Forward Transaction Agreements.

2.1) only cover the execution of documents by electronic way and would not be applicable to documents physically executed but exchanged electronically.

Where a document is physically executed and then exchanged electronically, the hard copy document (i.e., the paper version which is physically executed) will be considered the original version of the document whereas the PDF version would be considered a copy of such hard copy document. This position appears to be reinforced by the definition of "e*lectronic original*" included in the eArchiving Law, being defined as "*any act under private seal or document that was originally created in electronic form*".

From a general perspective, except if the signing of the original version of a document (together with the relevant copies of such document) is agreed between the parties or imposed by the requirements of any applicable law, an electronic exchange of the PDF copies of the physically executed signature pages is rather customary in commercial matters (with the hard copy documents being dispatched if required at a later stage to the parties).

3.8 ***Question 8: are there any jurisdictional considerations that would require specific wording to be added to agreements executed electronically or "click-through" agreements?***

For the purpose of the below, we will assume that click-through agreements are contracts in which a party can only either accept by clicking (e.g., on a button saying "I accept" or "I agree") or reject the terms of the contract. In other words, one of the parties lacks bargaining power, i.e., it is a contract of adhesion ("*contrat d'adhésion*"). We are not aware of any Luxembourg jurisdictional considerations that would require specific wording to be added to agreements executed electronically or "click-through" agreements.

More generally, we draw your attention to the fact that we are not aware on any relevant Luxembourg case law on electronic contracts and more generally on electronic signatures. Despite efforts from Luxembourg public authorities, the use of electronic signatures and corresponding electronic contracts in Luxembourg is far from being generalised.

Are there any specific requirements, including but not limited to any mandatory provisions of law, for "click-through" agreements to be enforceable, especially as relates to i) authorisation (of the individual clicking to accept the agreement) and ii) authentication (to confirm the identity of authorised individuals on behalf of an institution)?

As explained under Question 1 above, a contract will be formed as soon as there is an offer and an acceptance on the essential elements of such contract. If a party ticks a box to express its consent, it should, in principle, be a valid method of agreeing to the terms of an agreement. There can however be no certainty as to whether such clicking would in practice amount to an electronic signature.

There are no separate mandatory Luxembourg law provisions in respect of (i) authorisation (of the individual clicking to accept the terms of the agreement), or (ii) authentication (to confirm the identity of the authorised individuals acting on behalf of an institution). As in the "offline world" and as explained under Question 11 below, it shall be checked on a case-by-case basis whether the constitutional documents of a given entity include restrictions on the powers of its directors/managers/proxies to enter into transactions electronically or to execute documents by electronic signature.

With respect to i) could this be achieved/mitigated by including a reference that by clicking the "I agree" button or equivalent the person is confirming that they are authorised by the counterparty to enter into the agreement? Are there any practical considerations to rely on "click through" under the governing laws of your jurisdiction?"

The fact that an individual acting on behalf of a legal person clicks on an "I agree" button does not allow another party to assume that this individual is entitled to act on behalf of a legal person – it only means that the individual accepts the terms and conditions of the agreement, without this being of proof of his/her due authority to do so. At most, including an express confirmation may discourage an individual without due authority to enter into the agreement.

For the sake of completeness, please note that the general terms and conditions of a contract which have been pre-established by one party can only be opposed to the other party if it had access to them when signing[28]. It is nonetheless not necessary to prove that the party effectively read them – the important point is that it has been given the possibility to read them. Therefore, in click-through agreements, if the general terms and conditions are available, then by clicking the "I agree" button, it would be presumed that the general terms and conditions have been read and accepted as a result of a free and informed choice.

The situation would be different if a "signing" button was used, which would trigger an electronic signing process with the use a qualified certificate, which would allow the presumption that the individual is duly identified and authorised to sign the agreement on behalf of the counterparty. As explained above, the parties should be given the possibility to read the terms and conditions of the agreement prior to signing.

"Click-through" agreements will be considered distance contracts in accordance with Luxembourg law (i.e., contracts concluded by two parties which are not physically present together at the moment of the conclusion). As we assume that ISDA's, ISLA's and their members' counterparties will all be professionals in the sense of Luxembourg law, specific consumer protective rules can be disregarded if ISDA's, ISLA's and their members' counterparties agree so prior to the entering into the electronic contracts (e.g., in the framework agreement governing their business relationship)[29], except for the prior communication of contractual provisions and the general terms and conditions.

3.9 ***Question 9: is an electronic contract or are electronic transactions made under an electronic contract (or made under an equivalent paper form contract) required to be governed by the law of your jurisdiction in order to be enforceable under the applicable rules for enforcing electronic contracts/ electronic transactions in your jurisdiction?***

We are not aware of any requirements for electronic contracts or electronic transactions made under an electronic contract to be governed by Luxembourg law in order to be enforceable under the rules stemming from the Luxembourg legal framework for electronic signatures. In accordance with the provisions of Regulation No 593/2008 of the European

[28] Article 1135-1 of the Luxembourg Civil Code.

[29] P. Ancel, *Contrats et obligations conventionnelles en droit luxembourgeois*, Bruxelles, Éditions Larcier, 2015 Bruxelles, Éditions Larcier, p. 198-200.

Parliament and of the council of 17 June 2008 (as amended) ("**Rome I Regulation**"), the Luxembourg judge will, except in specific circumstances, give effect to the law chosen by the parties[30].

3.10 ***Question 10: is a translation into a local language of the electronic access agreement required to permit enforceability in the courts of your jurisdiction against clients located in your jurisdiction?***

The official languages of the courts of Luxembourg are Luxembourgish, French or German. If a party intends to rely on a document which is not written in one of these languages, it shall upon request communicate to the Luxembourg judge and to the counterparty a translation of such document (generally into French).

3.11 ***Question 11: are there any capacity or other restrictions in your jurisdiction on the types of legal entity that can enter into such electronically formed contracts? In particular, would you confirm that there are no capacity restrictions on financial institutions and corporates for entering into electronically formed contracts?***

We are not aware of any general capacity restrictions on entities, including financial institutions and corporates, specifically related to the entering into electronically formed contracts. If an entity has capacity to enter into a given transaction, Luxembourg law does not provide additional requirements depending on the fact that the transaction is concluded via a paper medium or electronically. However, the eIDAS Regulation limits the concept of "*signatory*" to natural persons[31]. It is therefore necessary to properly organise the formalities and to verify the signatory authority to ensure that the directors/managers/proxies of the legal entity have been granted a certificate enabling them to electronically sign contracts on behalf of the legal entity.

As a general comment, it shall be checked on a case-by-case basis whether the constitutional documents of a given entity include restrictions on the powers of its directors/managers to enter into transactions electronically or to execute documents by electronic signature. Please note that we have not encountered this situation in practice.

3.12 ***Question 12: are there any other issues that you consider relevant to the matters raised above, such as on timing and place of sending and receipt of electronic records or in respect of electronic signatures?***

There are no standard rules on when electronic documents are deemed to be executed, sent or received. Certain Luxembourg scholars refer to so-called reception theory to determine the time and place of formation of a contract, according to which a contract will be deemed concluded at the place where the offeror has, or could have had[32], knowledge of the acceptance of its offer[33].

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[30] For the sake of completeness, Article 11 of the Rome I Regulation sets out the conflicts of law rule for the law applicable to the formal validity of the contract (i.e., the law which should be applied to ascertain whether the execution of a contract by electronic signature is valid).

[31] Article 3 (9) of the eIDAS Regulation.

[32] Luxembourg Court of Appeal, 18 November 1987, Pas. 27, p. 195.

[33] P. Ancel, *op.cited*, referring to a decision from the *Tribunal de Luxembourg*, 18 March 1961, Pas., 18, p.337.

From a practical perspective, the eIDAS Regulation implements the concept of electronic time stamp, which corresponds to "*data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time*"[34]. The eIDAS Regulation provides for the admissibility as evidence in legal proceedings of an electronic time stamp. If the time stamp is a qualified electronic time stamp[35] within the meaning of the eIDAS Regulation, then that time stamp carries a presumption of accuracy as to the date and time indicated and the integrity of the data to which such time stamp is applied.

The eIDAS Regulation and the eCommerce Law do not address the question of the place of execution or the subsequent location of an electronically executed document. For cross border electronically documented transactions, the place of execution might be uncertain and different jurisdictions might have different approaches to where an electronic document is executed and where such document is located. Consequently, where the place of execution has particular legal consequences (e.g., the application of stamp duty), local law advice in the jurisdiction should be sought to determine the approach in that jurisdiction to the place of execution and location of an electronically executed document. Please note that we have not encountered this situation in practice.

Are there any additional considerations in relation to certifying documents as being the true copy of the original electronic record?

The Luxembourg legal framework for electronic archiving is mainly set by the eArchiving Law, as supplemented by:

(i) the Grand Ducal Regulation of 25 July 2015 implementing Article 4(1) of the eArchiving Law, as amended (the "**GDR for PSDCs**"), which lays down the technical conditions that govern the provision of digitisation and electronic archiving services;

(ii) the Grand Ducal Regulation of 25 July 2015 relating to the digitisation and the archiving of documents (the "**GDR for digitisation and e-archiving**"), which lays down, amongst others, the conditions which must be complied with for a copy to qualify as "a copy with probative value" and the conditions of authenticity and durability applicable to copies with probative value and original documents in electronic form.

It must be noted that the eArchiving Law does not apply to authentic deeds (which cannot be executed in electronic form for the moment) and to simple data storage activities, i.e., activities that do not consist in keeping an electronic copy or an original document in electronic form whilst guaranteeing its integrity[36].

The rules on digitisation and e-archiving laid down by the eArchiving Law are based on international standards and good practices. However, in the absence of a harmonised legal framework at EU level, local advice shall be sought to check the cross-border acceptance of documents which have been digitised and/or archived pursuant to the eArchiving Law. In theory, such acceptance should in principle be ensured by Article 46 of the eIDAS Regulation, stating that "*an electronic document shall not be denied legal effect and*

[34] Article 3 (33) of the eIDAS Regulation.
[35] A "*qualified electronic time stamp*" is an electronic time stamp that meets the requirements set out in Article 42 of the eIDAS Regulation.
[36] Article 1 (2) of the eArchiving Law.

admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form". Please note that we have not encountered this situation in practice.

The eArchiving Law pursues three main objectives[37]:

(i) determining the conditions for the digitisation of original documents and the archiving of original documents in electronic form and electronic copies. This first objective is addressed in the GDR for digitisation and e-archiving.

(ii) determining the conditions under which these copies benefit from a presumption of conformity with the original documents. This second objective is achieved through the reversal of the burden of proof in favour of copies with probative value, as further described below.

(iii) fixing the rules that provider of digitisation or electronic archiving services ("*prestataires de services de dématérialisation ou de conservation*") ("**PSDCs**") need to adhere to. This last objective is addressed in the GDR for PSDCs and will not be further explored in the context of this opinion

3.12.1 First objective of the eArchiving Law: determining the conditions for the digitisation of original documents and the archiving for original documents in electronic form and electronic copies.

Pursuant to Article 3 of the eArchiving Law, "*digitisation of original documents and electronic archiving must meet the requirements laid down by grand ducal regulation*", i.e., the GDR for digitisation and e-archiving. The conditions laid down by the GDR for digitisation and e-archiving are deemed fulfilled where the activities contemplated therein are undertaken by a PSDC.

Constitute copies with probative value copies which are (i) created through a process which does not alter or interpret the information contained in the original document, but is limited to creating an image identical to the original, (ii) created in a systematic manner and without gaps, (iii) created in accordance with working instructions which shall be kept for as long as the copies and (iv) carefully stored in a systematic order and protected against tampering[38].

The authenticity of a copy with probative value shall be guaranteed. To this end, (i) the transcription process must not alter the content and appearance of the original, (ii) each copy with probative value must systematically include the date and time of its creation and (iii) a detailed and up-to-date history of the copy with probative value must be available at all times[39].

Copy with probative value and original document in electronic form must be durable. Will be deemed to fulfil this criteria copies with probative value and original document in electronic form which are (i) archived in such a way as to avoid any modification or alteration or (ii) recorded as soon as they are created in a secure electronic document or electronically signed within the meaning of Article 1322-1 of the Luxembourg Civil Code[40].

[37] Article 1 (1) of the eArchiving Law.

[38] Article 1 of the GDR for digitisation and e-archiving.

[39] Article 2 of the GDR for digitisation and e-archiving.

[40] Article 3 (1) of the GDR for digitisation and e-archiving.

If, for any reason, copies with probative value or original documents in electronic form are transferred from a support or an electronic format to another, the holder must demonstrate their concordance[41].

In addition, the systems used for the electronic archiving of copies with probative value or original documents in electronic form (i) shall include the necessary safeguards to prevent any modification or alteration and (ii) must allow documents to be returned at any time in a directly readable form, ensuring fidelity to the original[42].

3.12.2 Second objective of the eArchiving Law: determining the conditions under which these copies benefit from a presumption of conformity with the original documents

The legal framework preceding the implementation of the eArchiving Law was not favourable to a shift towards a paperless environment. Companies did not feel confident with the idea of destroying their paper documents due to the combination of Article 1333 and 1334 of the Luxembourg Civil Code, which have since been amended.

- Article 1333 of the Luxembourg Civil Code now provides that "*copies, where the original document or an authentic act within the meaning of Article 1322-2 subsists, are evidence only of what is contained in the original document or authentic act, the representation of which may always be required. This article does not apply to electronic copies which are copies with probative value within the meaning of the law*". Article 1333 of the Luxembourg Civil Code specifically provides that it does not apply to electronic copies that are copy with probative value as defined in the law. In other terms, the probative value of such copies no longer depends on the existence or not of the original document.

- Article 1334 of the Luxembourg Civil Code now provides that "*where the original document or an authentic act within the meaning of Article 1322-2 no longer exists, copies made from it, under the responsibility of the person who has custody of it, have the same probative value as the acts under private seal of which they are presumed, in the absence of proof to the contrary, to be a faithful copy when they have been made as part of a regularly followed management method and when they meet the conditions laid down by a grand-ducal regulation."*

  Prior to the implementation of the eArchiving Law, it was only when the paper original no longer existed that the copy, made under certain conditions, was presumed a faithful copy of the original document. The grand ducal regulation to which Article 1334 refers used to be the grand ducal regulation of 22 December 1986, which has been repealed by Article 5 of the GDR for digitisation and e-archiving.

  The equivalence conditions which are now laid down in the GDR for digitisation and e-archiving are neutral from a technological perspective and aligned with current archiving practices.

[41] Article 3 (2) of the GDR for digitisation and e-archiving.

[42] Article 3 (3) of the GDR for digitisation and e-archiving.

- Article 1334-1 of the Luxembourg Civil Code finally provides that "*Copies in electronic form which are made by a [PSDC] shall, in the absence of proof to the contrary, have the same probative value as the original or the authentic act. A copy may not be rejected by the court solely on the grounds that it is in electronic form or that it has not been made by a [PSDC].*" Article 1334-1 of the Luxembourg Civil Code introduces a legal presumption in favour of electronic copies which are created by a PSDC, which will have, in the absence of evidence to the contrary, the same probative value as the original document or the document deemed equivalent to the original document. The content of Article 1334-1 of the Luxembourg Civil Code is mirrored in Article 16 of the Luxembourg Commercial Code.

  As a consequence, a party that would not be in a possession of a copy with probative value may still try to demonstrate that its electronic copy complies with the technical requirements applicable to PSCDs and has the same probative value as the original document or the authentic act.

  Article 1334-1 of the Luxembourg Civil Code (and the new Article 16 of the Luxembourg Commercial Code) therefore creates a rebuttable presumption of probative value equivalent to original documents for electronic copies that are made by a PSDC.

3.13 *Question 13: an electronic transaction confirmation subject to stamp duty or any other similar duties or taxes in your jurisdiction?*

Three situations must be distinguished in Luxembourg in respect of registration duties[43] ("*droits d'enregistrement*") to be paid to the *Administration de l'Enregistrement et des Domaines*, which consist of (i) acts which are subject to mandatory registration as enumerated in the Luxembourg Tax Code (which is not the case of electronic transaction confirmation), (ii) acts under private seal voluntarily submitted to the *Administration de l'Enregistrement et des Domaines* in Luxembourg and (iii) acts which are normally not subject to mandatory registration in Luxembourg, but which are appended to a document that requires mandatory registration in Luxembourg.

4 Pending developments

As explained above, the eCommerce Law is in the process of being amended to be fully aligned with the eIDAS Regulation. This is due do the fact that the eCommerce Law was the implementation into Luxembourg law of Directive 1999/93/EC, which has since been repealed by the eIDAS Regulation. As a consequence, there are currently some divergences between the concepts used at local and at EU level, which the Draft Bill of Law seeks to address. For the sake of completeness, to the extent that the Draft Bill of Law pursues an

[43] Registration duties will vary depending on the type of documents submitted (i.e., registration duties can either be fixed or proportional).

objective of harmonisation, and as the provisions of the eIDAS Regulation are already part of Luxembourg law, we do not expect our views in this opinion to be substantially impacted[44].

Other than the above, there are no pending developments of which we are aware that would have a material and adverse impact on the conclusions in this opinion.

5 Reliance

This opinion is addressed to ISDA for its benefit and the benefit of its members and the members of ISLA. No person may rely on this opinion for any purpose without our prior written consent. This opinion may, however, be shown by ISDA, ISLA or their members to their professional advisors and to an affiliate, a competent regulatory or supervisory authority for such ISDA or ISLA member for the purposes of information only, on the basis that we assume no responsibility to such authority or any other person as a result, or otherwise.

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* *

Yours sincerely

Linklaters LLP

by

NICKI KAYSER

Janine Biver

[44] On the basis of the latest available version of the Draft Bill of Law and without prejudice to (i) the discrepancy between the Draft Bill of Law and the current version of the eCommerce Law in respect of Article 50 (as described under Question 4) and (ii) further amendments which could potentially be made in the course of the legislative process.