Luxembourg Newsflash

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What's new in e-commerce?

The month of July has brought changes in the legal framework of e-commerce in Luxembourg and the EU. We would therefore like to share a brief overview of these changes:

(i) the law (voted on 7 July 2020, exempted from second vote on 10 July 2020 and pending publication) amending the e-commerce law of 14 August 2000 to ensure compliance with the eIDAS Regulation; and

(ii) the "platform-to-business" Regulation 2019/1150 introducing the first-ever set of EU rules framing the relationship between online platforms and business users, applicable in all EU Member States since 12 July 2020.

Amendments to the e-commerce law of 14 august 2000 to ensure compliance with the eIDAS Regulation

On 7 July 2020, bill of law n°7427 amending the law of 14 August 2000 on e-commerce (the "**e-Commerce Law**") in order to comply with 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 (the "**eIDAS Regulation**") was passed in Parliament.

Luxembourg's information and communication sector forms an integral part of the country's development and diversification strategy. That is why bill of law n°7427 was filed last year, with the primary objective of amending the e-Commerce Law in order to comply with the eIDAS Regulation and, in particular, to help clarify the role played by the relevant supervisory body in Luxembourg.

As you may recall, the eIDAS Regulation sought to enhance trust in electronic transactions in the internal market by providing a common foundation for secure and seamless electronic interaction between citizens, businesses and public authorities.

To this end, the eIDAS Regulation establishes a framework enabling the use of electronic identification means and trust services (*i.e.* electronic signatures, electronic seals, time stamping, registered electronic delivery and website authentication) to access online services or manage electronic transactions.

I. Key principles underpinning the eIDAS Regulation

The eIDAS Regulation has created a European internal market for electronic trust services by ensuring that these services work across borders and enjoy the same legal status as traditional, paper-based processes, to the extent that they meet certain technical requirements.

As a reminder, qualified trust services (such as the qualified electronic signature, or "**QES**", and the qualified electronic seal) enjoy a presumption of integrity. In particular, a QES has the equivalent legal effect of a wet-ink signature[1]. In the event of a dispute, therefore, a qualified trust service is presumed to be valid and the reverse burden of proof principle is applied, meaning that it will be up to the person questioning the trustworthiness of the service to prove that it is not valid.

That being said, the eIDAS Regulation also provides for a principle of non-discrimination, stipulating that a non-qualified trust service 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 trust services. Where any such non-qualified trust service is challenged, the burden of proof of the service's validity and trustworthiness is shifted to the service user.

Note that in commercial matters, any form of evidence may be used (as per Article 109 of the Commercial Code).

II. Amendments to the legal framework

The terminology used in the e-Commerce Law, as amended, is now fully aligned with the eIDAS Regulation.

In addition, the previous Article 18 on the legal effect of electronic signature has been repealed, as the legal effect is defined in the eIDAS Regulation.

The provision that no one can be obliged to sign electronically has also been repealed because it contradicts other laws mandating that certain documents be signed electronically (such as public procurement proceedings or filings with the Luxembourg Trade and Companies' Register).

Furthermore, **a new Section 2 on the obligations of trust service providers and certain certificate holders has been introduced**, notably with respect to information and cooperation with the Luxembourg supervisory body (*l'Institut luxembourgeois de la normalisation, de l'accréditation, de la sécurité et qualité des produits et services*, or "**ILNAS**").

The e-Commerce Law, as amended, also clarifies the role and powers of ILNAS with regard to qualified trust service providers.

Thus Article 17 of the eIDAS Regulation has been implemented, specifying that ILNAS is responsible for supervising Luxembourg qualified trust service providers through ex ante and ex post supervisory activities. Where necessary, ILNAS can also take action in relation to non-qualified trust service providers through ex post supervisory activities if those non-qualified trust service providers or the trust services they provide allegedly do not meet the requirements laid down in the eIDAS Regulation.

[1] For more information regarding e-signatures, see: « *Dématérialisation des relations contractuelles : vers une généralisation de la signature électronique* », Legitech, Pin Code 06/2020, Astrid Wagner and Faustine Cachera.

In particular, ILNAS now has the power to impose administrative fines from €250 to €15,000 on trust service providers in certain instances (*e.g*. refusal to provide ILNAS with documents or information during an investigation), and on entities using the name of a qualified trust service or provider in their corporate names or commercial communications (Article 34bis of the e-Commerce Law).

Finally, it is important to note that Article 45*bis* of the e-Commerce Law, as amended, also provides for criminal sanctions, notably for the illegal exercise of the activity of trust service provider without being registered on one of the trusted lists set out in the eIDAS Regulation.

Introduction of the first-ever set of EU rules framing the relationship between online platforms and business users

On 12 July 2020, **Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services** (the "**P2B Regulation**") entered into force.

In this respect, bill of law n°7537 (the "**Bill of Law**") was introduced in Luxembourg on 25 March 2020 for the purpose of implementing the procedure for complaints that companies having suffered damages may file against an online platform that has failed to comply with the requirements of the P2B Regulation.

In an age of growing digital commerce, end-users frequently opt to engage with intermediation services, meaning that more and more businesses are relying on these platforms to attract consumers. Following the emergence of COVID-19 in March 2020, consumer habits have changed even more in a matter of weeks, and the amount of online orders has increased massively. Providers of online intermediation services (also called online platforms) and online search engines ("**Providers**") have become major economic players, crucial to the success of many businesses. While this has numerous advantages, such growth has also raised many questions and increased pressure for further regulation of the services rendered by Providers. The reality is that Providers offer their services in a discretionary, and sometimes aggressive, manner. Platforms like Amazon holding leading positions in the online market have enormous power over their sellers, which are dependent on them to remain afloat.

The P2B Regulation introduces the first set of EU rules applying to intermediation services, in particular framing the relationship between providers of online platforms and business users. The P2B Regulation aims to redress the imbalance between both actors, notably by ensuring the fair and transparent treatment of business users by Providers and creating a predictable and innovation-friendly regulatory environment within the EU.

I. Who is affected?

The P2B Regulation applies to online platforms and search engines, irrespective of their place of establishment and the law otherwise applicable, which offer their services to **business and corporate website users having their place of establishment or residence in the EU** and **offering, through those online intermediation services or online search engines, goods or services to consumers, *i.e.* natural persons, located in the EU.**

Although one of the aims of the P2B Regulation is to improve consumer trust in the online platform economy, it applies only to B2B relationships, *i.e*. between professionals.

The rules provided by the P2B Regulation apply to a large variety of online intermediation services, including inter alia:

- online marketplaces (e.g. Amazon, Uber, Airbnb, Booking.com);
- app stores (e.g. Apple App Store, Google Play, Samsung Smart TV);
- social media and creative content platforms (e.g. Facebook, Instagram); and
- price comparison websites.

II. How to update documentation to support compliance with the new rules

a) For online intermediation services/online platforms

With the entry into force of the P2B Regulation, existing providers of online platforms must update their terms and conditions.

In order to comply with the new rules, they must be sure inter alia to comply with the following general requirements:

- ensure that their terms and conditions for professional users are **easily accessible** and written in **plain and intelligible language**;
- include a general explanation of the impact of the contract on the business user's ownership and control of **intellectual property rights**;
- reflect the fact that online platforms shall **act in good faith** (*e.g*. termination right for business users and post-termination conditions);
- include a description of the **technical and contractual access of professional users to personal or other data** that business users or consumers provide to online intermediation services or that are generated through the use of those services;
- if applicable, specify the legal, **economic or commercial consideration** for any **restriction of the ability of professional users to offer** their goods or services under different terms through other means to consumers; and
- provide information with respect to **dispute resolution procedures** (for more information, see section III below).

With respect to any kind of change in their relationship with business or corporate website users, online platforms must:

- notify their professional users **at least 15 days** in advance of any **change** to their terms and conditions;
- provide each individual professional user with a **statement of reasons** for any decision to **restrict, suspend or terminate** the provision of its services to such user; and
- notify their professional users **at least 30 days** in advance in the event of the **overall termination of the provision of its services**, in addition to a detailed statement of reasons for such decision (as mentioned above).

Furthermore, the P2B Regulation underlines the importance of "ranking", which it defines as the relative prominence given to goods or services offered through online platforms or the relevance given to search results by online search engines as presented, organised or communicated by Providers. The terms and conditions of online platforms must reflect certain information with respect to ranking, such as the main parameters determining such ranking and the reasons for the relative importance thereof, justifying their inclusion over other parameters. Where the main parameters allow for any possibility to influence ranking against direct or indirect remuneration, a description of such possibilities and potential effects must also be included.

Furthermore, the terms and conditions of providers of online platforms must include a description of any differentiated treatment given to such providers' own goods and services or those of professional users they control, compared to the treatment given to goods and services offered by other professional users, thereby placing them at a competitive disadvantage.

b) For online search engines

Only two sets of rules apply to the providers of online search engines:

With respect to ranking, providers of online search engines should provide users with the same information as providers of online platforms, in an easily and publicly available description drafted in plain and intelligible language.

Regarding differentiated treatment, again, the same rules apply as for online platforms.

III. The obligation for providers of online platforms to implement dispute resolution procedures

Online intermediation platform providers must set up an internal complaints system for business users. In particular, it must be easily accessible, free of charge and provide resolution within a reasonable time frame. The procedure should deal with complaints regarding non-compliance with any legal obligation laid down in the P2B Regulation, any technological issues, measures taken or behaviour by providers that could directly affect business users. In addition, providers of online platforms shall identify two or more mediators in their terms and conditions.

IV. Enforcement and review of the provisions of the P2B Regulation

Representative organisations and associations, as well as public bodies, have the right to take action before national courts and to stop or prohibit any non-compliance with the P2B Regulation by Providers. The Bill of Law provides more information with respect to the entities qualified to file a complaint, their powers, the different actions and the applicable sanctions in case of non-compliance with judicial decisions.

The Observatory on the Online Platform Economy, which was created along with the new rules in the P2B Regulation, will assist the Commission in monitoring the impact of these new rules as well as emerging issues and opportunities in the digital economy. Every three years (i.e. on 13 January 2022 for the first time), the Commission will assess whether additional or different rules may be needed as part of the scheduled review of the P2B Regulation.

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