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DSA: WHAT IS THE ACTUAL SIGNIFICANCE OF AMAZON'S TEMPORARY INTERIM RELIEF?

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As previously announced[1], Amazon Services Europe Sarl (*Amazon*) has contested its classification as a "very large online platform," within the meaning of Article 33 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022, on a single market for digital services (the *DSA*), before the Court of Justice of the European Union (the *Court*) (Case T-367/23).

Amazon has initiated ongoing substantive proceedings, as well as a **request for interim relief** before the President of the Court, Mr. van der Woude, seeking a **stay of execution of the decision by the European Commission of April 25, 2023** (C (2023) 2746 final) designating it as **a very large online platform (**the ***Decision*****).**

In an order dated September 27, 2023 (the *Order*), the President of the Court did not find Amazon's challenge to its classification as a "very large online platform" to be substantial. However, he deemed Amazon's indirect challenge to the legality of certain obligations under the DSA, specifically Article 39, to be substantial (which is different). As a result, Amazon is (temporarily) no longer required to make a public advertising register available, but it is still obligated to establish this register. The other obligations under the DSA also continue to apply to Amazon.

Ahead of the President of the Court's decision, the Commission argued that through Amazon's challenge to its classification as a very large online platform, Amazon is effectively contesting certain obligations under the DSA. Consequently, its substantive appeal would be inadmissible, at least on these points, and as a result, the request for a stay. However, the President of the Court did not share this view and, displaying an uncommon generosity in interim proceedings, agreed to examine Amazon's arguments regarding the legality of Articles 38 and 39 of the DSA. As a reminder:

- **Article 38** pertains to the obligation to provide users with an option for "recommendation systems" that do not rely on profiling. In other words, users must have the right to choose to opt out of such a recommendation system.

- **Article 39** concerns the obligation to establish and make publicly available an advertising register that provides information about advertisements displayed on the platform. According to Amazon, this obligation compels affected platforms to disclose highly strategic and confidential information, in violation of the principles of equality, the right to privacy, freedom of enterprise, and property rights, while more reasonable alternatives exist.

Only the issue regarding the advertising register convinced the President of the Court.

The interim decision – In addition to addressing the admissibility of the substantive appeal and the interim relief, the President of the Court begins by recalling that he can order the suspension of the execution of an act if the following **cumulative conditions** are met:

- First, the request must be *prima facie* justified, both in fact and in law (*fumus boni juris*)
- Second, it must be of an urgent nature insofar as, to prevent serious and irreparable harm, it must be issued and take effect before a decision on the merits is rendered. The judge in interim relief must also weigh the interests at stake.

The President of the Court reminds that he has a broad discretionary power and is free to determine, based on the specific circumstances, how these various conditions should be verified and the order of such examination since no legal rule imposes a predetermined analysis framework for assessing the need for interim relief. In this case, he began by analyzing the urgency, then the *fumus boni juris*, and finally the balance of interests.

Urgency regarding Article 38 of the DSA: Rejected - Amazon argued that the obligation to provide an option to deactivate recommendation systems would result in a significant and irreversible loss of its market share and thus cause serious and irreparable harm. In essence, Amazon explained that personalized recommendations cater to customer needs, and those who choose the deactivation option may not be aware of the consequences of their decision. They would not connect the deactivation decision to a poor shopping experience but rather perceive it as a general deficiency of Amazon.

The President rejects this argumentation on the grounds that:

- **The alleged harm is uncertain**. Article 38 of the DSA does not actually prohibit the use of recommendation systems but merely requires affected platforms to provide an option for their deactivation. It is therefore up to the consumer to decide whether to use them or not. In the event of a negative experience after deactivation, the customer would understand that this experience is due to their choice, and they can reactivate the recommendation system to regain the level of satisfaction they were accustomed to. Therefore, it is not certain that customers will reduce their use of the Amazon Store if they have the option to deactivate the recommendation system.

- The loss of market share constitutes **purely financial harm** as it involves the loss of revenue from sales in the relevant market. In this regard, Amazon neither establishes nor alleges that it is in a situation that could jeopardize its financial viability before the decision concluding the substantive proceedings, given the size of its turnover and the characteristics of the group to which it belongs.

Urgency regarding Article 39 of the DSA: Well-founded - According to Amazon, the obligation to create and make accessible an advertising register involves **the disclosure of confidential information** that would cause serious and irreparable harm to its advertising activities and, by extension, to its overall operations. This confidential information would pertain to both Amazon and its advertisers, so its disclosure would diminish its competitive position and result in an irreversible loss of market share, which would be practically impossible to quantify accurately.

The President of the Tribunal first considers that the information in question is indeed confidential. He then notes that the obligations related to the advertising register, which provides information about advertisements on Amazon's platform, allow third parties to access significant trade secrets concerning the advertising strategies of Amazon's advertiser clients. Strategic information such as campaign duration, reach, and targeting parameters is disclosed. This could enable competitors and advertising partners of Amazon to continuously gather market information to the detriment of Amazon and its advertising partners.

The President of the Tribunal believes that the arguments put forth by Amazon establish that it cannot await the outcome of the proceedings on the merits without suffering serious harm. Furthermore, the harm resulting from the disclosure of information is **irreparable** since it is evident that the annulment of the decision cannot reverse the effects of the disclosure of the disputed information, as those who have read it cannot unlearn what they have seen. Therefore, the urgency is established.

Fumus boni juris – The European Commission argued that the information that Amazon is required to compile in its advertising register is not confidential since several EU legislative acts already require that the relevant information be made available to the public.

The European Commission did not convince the President of the Tribunal, who decides that **Amazon's position is *prima facie* based on serious grounds:**

- Some of the information that Amazon is required to disclose in its advertising register is not yet made available to the public
- The information regarding "*the period during which the advertisement was displayed*" (Article 39(2)(d) of the DSA) is not covered by Article 6(b) of the E-Commerce Directive[2]
- The information regarding "*the total number of recipients of the service reached and, where applicable, the total numbers broken down by Member State for the recipient groups specifically targeted by the advertising*" (Article 39(2)(g) of the DSA) is not covered by Article 5(1) of Regulation 2019/1150 of 20 June 2019 promoting fairness and transparency for business users of online intermediation services
- Article 39 of the DSA does not provide for the same type of information as specified in Article 15(1)(h) of Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

The balance of interests – The President of the Tribunal notes that a cancellation judgment would be rendered effectively useless if Amazon's request for interim relief were to be rejected. Indeed, the rejection of the request would lead to the immediate disclosure of the relevant information.

As a result, the Tribunal considers that **Amazon's interest must prevail**.

The potential outcomes - From a procedural standpoint, the Tribunal's orders can be appealed within a two-month period, limited to questions of law. The appeal does not have a suspensive effect. At the time of writing, to the best of our knowledge, the European Commission has not yet indicated whether it intends to challenge the Order.

The case on the merits is ongoing and is expected to continue for several more months.

https://curia.europa.eu/juris/document/document.jsf?mode=DOC&pageIndex=0&docid=277901&part=1&doclang=FR&text=&dir=&occ=first&cid=2269660

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[1] Digital Services Act: Zalando and Amazon contest their qualification as very large online platforms

[2] 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.
