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Amazon's Interim Relief to Suspend Obligations on Online Advertising Transparency under the DSA: One Swallow Doesn't Make a Summer

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On September 27, 2023, the European General Court (**GC or the Court**), for the first time, issued a decision related to the new set of rules for the digital space introduced by the Digital Services Act (DSA) in Case Amazon v Commission, T-367/23 R. The Court granted Amazon interim measures concerning the application of the public advertising repository disclosure obligations under Article 39 DSA. Although the Court did not entirely align with all the arguments presented by the platform provider and dismissed its request to suspend the obligation of providing at least one option for its recommender system that is not based on profiling as required under Article 38 DSA, it is fair to say that the world's largest online retailer emerged somewhat victorious from its initial (and, certainly, not the last) legal battle over interpreting the DSA's application scope and requirements. Yet, the broader implications of this decision may be less significant than the publicity it received would suggest.

This post summarises the main takeaways from the GC's order and analyses them in the broader context of enforcing the DSA.

Background and Amazon's submission.

After the European Commission (**Commission or the EC**) included in April 2023 Amazon Store in the group of 17 very large online platforms (VLOPs) under the DSA, the company decided to contest the EC's designation decision, claiming that it was "*unfairly singled out*" among other retailers operating in the EU. On a side note, Amazon is not alone in disputing its VLOP status; Zalando has also taken action to annul its designation as such by the EC.

In its application to the GC, Amazon not only sought to annul the designation decision but demanded the Court suspend its operation insofar as the decision imposes on it the following requirements designated for VLOPs under the DSA:

- The obligation to provide users with an option for each of its recommender systems which is not based on profiling (Article 38 DSA);
- The obligation to compile and make publicly available an advertisement repository (Article 39 DSA).

Article 39 DSA

Under Article 39 DSA, the VLOPs must publicly disclose detailed advertisement information in a searchable repository on their interfaces. The repository, excluding personal data, must contain comprehensive ad details, including content, payer, targeted demographics, presentation period, and reach, ensuring data accuracy and completeness (as examples of such a repository, one can refer to Ad Repository for Apple Search Ads launched by Apple end of August or the Commercial Content Library opened up by TikTok in July – both companies have been designated as VLOPs by the EC).

In its submission to the GC, Amazon voiced strong concerns that complying with Article 39 DSA would mean revealing its confidential information, which, if disclosed, would jeopardise its advertising strategies and, more broadly, its overall business activities. Amazon underscored that launching the repository would be tantamount to VLOPs revealing vital information regarding advertiser identities, targeting methods, and potential customer reach, thus arming the company's competitors with insights into their most effective advertising strategies and technologies. Therefore, in Amazon's view, complying with Article 39 DSA would gravely and irreversibly impair its competitive edge, leading eventually to losing its market position unrecoverably. The ripple effect, Amazon contended, would have also consisted of deterring third-party sellers who might choose to use alternative sales channels exempt from transparency obligations foreseen under DSA.

A noteworthy addition to this legal argument is Amazon's emphasis on the intangibility of the harm. Amazon suggests that pinpointing the exact ramifications and duration of damage would be a daunting task. Hence, any actions taken after the conclusion of the main proceedings regarding the EC's designation decision would be futile, especially when the disclosed repository would have already revealed the retailer's confidential information. In its submission for granting interim measures, Amazon proposed a less burdensome alternative to the obligations under Article 39 DSA: making a structured register available solely to regulators (EC and digital services coordinators) and vetted researchers, as indicated in Article 40(8) DSA. This approach, the company argues, would achieve the goal of oversight without compromising the confidential details in their airing to the broader public.

While the GC has not engaged deeply with this contention, it is worth highlighting the significance of Article 40 DSA as it marks a transformative moment in the EU's digital regulation regarding facilitating access to data held by VLOPs. Specifically, this provision requires VLOPs to grant data access to:

- Digital services coordinators (authorities designated by each Member State to oversee intermediary services within their jurisdiction) and the EC. This access, provided upon a reasoned request and within a stipulated timeframe, is restricted to data necessary to enable them to monitor and assess compliance with the DSA. The authorities must take due account of the rights and interests of VLOPs and their users, including *inter alia* protection of confidential information, in particular, trade secrets (Article 40(2) DSA);
- Vetted researchers, but only upon a justified request from the competent digital services coordinator. Their sole purpose of access is to enhance the understanding of systemic risks in the EU. Particularly, such researchers must be independent of commercial interests and capable of

fulfilling the specific data security and confidentiality requirements (Article 40(8)(b) and (d));
- Researchers, including those affiliated with NGOs, if they fulfil the criteria detailed in Article 40(12) DSA. Their access is restricted to openly available data on the platform's interface.

In contrast to creating a public repository of all ads displayed on Amazon's marketplace as per Article 39 DSA, providing data related to ads shown on its interface in response to the requests under Article 40 DSA is unlikely to result in the risks for VLOPs' market position associated with public disclosure. Such data would be namely shared exclusively with a closed group of entities under the circumstances specified in this provision.

For a more in-depth exploration of Article 40 DSA and other provisions related to accessing online platforms' data, readers may refer to resources such as the guidance prepared by Algorithmic Watch for researchers or CERRE's report titled "Access to data and algorithms: for an effective DMA and DSA implementation".

Article 38 DSA

Under Article 38 DSA, VLOPs are required to ensure that, beyond fulfilling all requirements under Article 27 DSA (e.g. including in their T&C in plain language, the main parameters used in their recommender systems, as well as any options to change such parameters), each of their recommender systems offers at least one option not based on profiling, as defined by Article 4(4) GDPR. Thus, VLOPs have an extra duty when utilizing recommender systems, surpassing the transparency standards set for all online platforms in Article 27 DSA. Amazon contends that complying with Article 38 DSA would necessitate significant modifications to its core software components, which could compromise the customer shopping experience.

Furthermore, Amazon noted that complying with Article 38 DSA would mean its inability to provide tailored product recommendations, which would position it at a discernible competitive disadvantage, especially when compared with online platforms not designated as VLOPs and, therefore, not subject to similar constraints. While not explicitly mentioned, one might infer that Amazon contrasted itself with eBay, a major competitor not designated as a VLOP. At the core of the retailer's argument is the belief that a lack of customisation could hinder its ability to meet customer expectations, undermining its primary role as an online marketplace in ensuring smooth transactions. Amazon expressed in this regard concerns that many customers when opting out of personalized product suggestions, might not fully understand the impact of their decision.

The company believes there is a notable risk: if these users have a less-than-ideal shopping experience due to non-personalized recommendations, they might mistakenly blame it on Amazon's broader performance rather than their own choice to decline tailored suggestions. As a result, these users could scale back their engagement with AmazonStore. In the long run, such a trend could result in a significant, possibly irreparable, loss for Amazon as disillusioned customers turn elsewhere.

The interim measures and EU legislation

Interim measures are crucial in safeguarding that parties' positions are not irreparably damaged

pending the main proceedings. As stipulated in Articles 278 and 279 TFEU, cases presented before the CJEU or the GC inherently do not halt or "*suspend*" the effect of the act in question. Nevertheless, the Court possesses the discretionary power to suspend such acts or even mandate other requisite measures when deemed essential. The provision of interim measures is an exception. Acts passed by the EU institutions are generally viewed with an inherent presumption of legality, pre-empting their enforceability.

However, under Article 278 TFEU, suspending the execution of a disputed act can be justified when the act in question exhibits legal consequences and is enforceable. Beyond this, Article 279 TFEU allows the Court to instruct or prohibit specific actions temporarily, ensuring the impending main action remains effective. For any application under Articles 278 or 279 TFEU, it is imperative to clarify the core issues of the proceedings, underscore the urgency, and lay out both factual and legal arguments supporting the plea for interim measures. The applicants will be granted interim measures only when three specific conditions are cumulatively met:

- **Necessity (*prima facie* case)**. At least one of the pleas in law presented by the applicant in support of the main action must appear, at first sight, not to be unfounded.
- **Urgency**. The applicants must present that they are likely to suffer serious and irreparable damage if not granted the interim measure.
- **The interest in having interim measures imposed must outweigh the other interests at stake**. When assessing an application for interim measures, the judge hearing the application must weigh whether the applicant's interest in suspending the act surpasses the interest in its immediate execution (for a more comprehensive analysis regarding interim measures and EU legislation, see: Schima, Article 279 TFEU, in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*).

Given the high threshold placed by the requirements, the GC rarely orders interim measures. Thus, it is relevant to take a closer look at the Court's reasoning presented in this case.

The GC's reasoning behind the order

The Court's findings regarding Article 38 DSA

Upon scrutiny of Amazon's arguments, the GC dismissed the retailer's request to suspend the obligation of providing at least one option for its recommender system not based on profiling as required under Article 38 DSA. As the court rightly pointed out, the contested provision does not outright ban the use of recommender systems but requires VLOPs to offer an opt-out mechanism for consumers.

According to the Court, Amazon has the responsibility to inform its customers of the pros and cons of such systems, enabling them to make informed decisions about opting out of them. If Amazon effectively communicates this, customers who later regret following a recommendation not based on algorithmic decisions will be aware that their dissatisfaction is a direct result of that choice. Amazon could offer then a return to the algorithm-based system for those preferring the previous experience. The GC was sceptical of Amazon's claim that consumer usage of the Amazon Store would drop if given this choice. Additionally, the Court was unconvinced by Amazon's argument that it would suffer immediate and irreparable harm despite the expert opinion presented by the

retailer.

The essence of Amazon's claim regarding the suspension of Article 38 DSA revolved around its potential financial losses, particularly regarding a decrease in its market share. The GC did not favour this argument, finding the company did not assert, nor did it provide evidence, that adhering to Article 38 DSA would threaten its financial viability before a final judgement on the EC's designation decision. Moreover, while the potential loss of market share is indeed severe, it can only be considered irreparable under specific conditions – mainly if the loss is substantial enough to threaten the very existence of the company on the market (in a similar fashion to the DMA's suspension option under Article 9).

In this case, Amazon did not convincingly demonstrate that it faced such existential threats due to the application of the DSA's provisions. Lastly, the Court set aside Amazon's contention that the decision harms third-party sellers since, requesting interim measures, the applicant cannot base urgency on the damages faced by third parties.

The Court's findings regarding Article 39 DSA

The GC was much more favourable in assessing Amazon's arguments regarding the harm the retailer would have risked if it had to launch an ad repository as required under Article 39 DSA.

The Court maintained that to assess urgency, the information in question should be treated as confidential. One primary concern revolved around Article 39 DSA, which could potentially entail the unveiling of confidential information about both Amazon and its advertisers. The extent of the potential harm that could be derived from revealing supposedly confidential information depended on multiple factors. These include its professional and commercial significance to the company seeking its protection and its potential utility to other market players.

The Court stated that compliance with Article 39 DSA would allow third parties to gain insights into vital trade secrets related to Amazon's advertising strategies. Such disclosure could offer competitors real-time market insights, potentially harming both Amazon and its advertising affiliates. The information, if disclosed, would provide the public with intricate details of Amazon's daily operations, leading to a simulated increase in market transparency that would considerably harm the company. The Court underscored that such harm is irreparable as the effects of revealing this information cannot be reversed, which presented the urgency in granting the company the interim measure.

Further, Amazon argued that Article 39 DSA infringed the principle of equal treatment, imposing a disproportionate restriction on its rights under Articles 7, 16, and 17 of the Charter of Fundamental Rights . The advertisement repository, as mandated by Article 39, discloses vital strategic details, which Amazon contends, would disrupt its existing relationships with advertising partners, reduce its attractiveness to advertisers, and increase both its initial setup and recurrent costs. Furthermore, the Court's examination of various regulations and directives, such as Directive 2000/31/EC and P2B Regulation, confirmed that Amazon's obligations under Article 39 DSA seemed unique as the type of information required by this provision is not explicitly covered under these legal acts.

Lastly, to weigh the interests at play, the Court turned to the established case law. The essential consideration deriving from it highlighted the need to ensure the full effect of the main action's future decision. In this case, the Court's main proceeding will determine whether the contested decision, which mandates public disclosure as per Article 39 DSA, should be annulled. If the interim measures are not granted, and the information is disclosed, a future annulment ruling would be meaningless. Therefore, the Court concluded that Amazon's interests must take precedence, at least until the main action is decided, emphasising the need to maintain the *status quo* for the time being.

Is Amazon's interim measure 'a big win' for Big Tech?

Setting aside some somewhat sensationalist headlines (e.g. "Amazon prevails in EU legal battle over VLOP status", "Amazon's legal victory: EU's Digital Services Act might not work as intended") that emerged post-publication of the order, the case at hand should not necessarily be considered groundbreaking in the broader scope of the DSA's enforcement. Even though the Court's order exempts Amazon from launching a public ad repository, the company may still be required to provide ad-related data—including economically sensitive information—in response to requests from authorities responsible for enforcing the DSA and vetted researchers, as specified in Article 40 DSA. While this requirement does not entail the public disclosure of the company's confidential information, it nevertheless ensures that regulatory bodies and researchers can verify Amazon's compliance with the regulation and gain insights into its operations with a level of efficiency comparable to that of scrutinizing a public repository.

Importantly, the GC's reasoning does not provide any clear indication of its potential final judgment in the proceedings related to the annulment of the EC's designation decision. Disappointing as it may be, this should not come as a surprise as such an approach aligns with the general principle that the main action's admissibility is not usually assessed in an application for interim measures to avoid prematurely determining the case's merits (unless the main action is manifestly inadmissible, the Court might still review this aspect if interim relief is sought, see, e.g. GC's order in Case T-163/02 R Montan).

Commentators comparing the GC's decision with other cases involving the granting of interim measures to prevent harm from disclosing the applicant's confidential information (Meta's case in Facebook v Commission, T-451/20 R) suggest a growing trend in the case law. They observe that the court consistently recognizes the "irreversibility" of harms resulting from compliance with data public disclosure obligations under EU legal acts.

Although important for future cases concerning suspending the operations of EU legal acts under Articles 278 and 279 TFEU, such a legal development sheds no light on whether the GC considers that Amazon does meet the criteria to be qualified as a VLOP under DSA. For competition law practitioners, it may be noteworthy that both Amazon and the Court used terminology and lines of reasoning specific to this domain in their arguments.

On the other hand, the GC's arguments regarding its dismission of Amazon's submission to suspend the application of Article 38 DSA may provide additional insight into EU courts' general approach in cases revolving around weighing up Big Tech's economic interests against users' right to privacy and data protection.

By compelling VLOPs to provide the users with the possibility to receive at least one recommendation not based on personal data analysis. Article 38 DSA constitutes a significant breach in the platform-imposed "*choice architecture*". In my view, the GC's rationale in Amazon v Commission aligns intriguingly with recent trends in data protection case law (e.g. CJEU's judgement in Case C-252/21 Meta Platforms, EDPB's decisions and actions taken regarding the use of personal data for behavioural advertising) that fundamental rights and freedoms of users override the interests of a platform provider in gaining income from displaying personalised content (e.g. ads or content) and that such data processing is not indispensable for providing their services.

When analysing the GC's reasoning for rejecting Amazon's submission to suspend the application of Article 38 DSA, it is clear that the Court prioritises safeguarding users' personal data and informational self-determination over the potential economic losses Amazon might experience. Recommender systems in most digital services we use daily (on online marketplaces, social media or streaming providers) are designed to act as proxies for curating and presenting relevant information in contexts overwhelmed by information or where direct access to information is challenging. However, by reshaping the "*choice architecture*" based on inferred user preferences, these systems risk compromising individual self-determination, nudging users towards specific content, fostering dependency on certain content types, or even restricting the number of choices available to them. Article 38 DSA was included in the regulation to additionally mitigate the adverse effects that recommender systems deployed by VLOPs might have on individuals and their sense of autonomy in making decisions.

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