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TECHNOLOGY

EU Courts again refuse interim measures to suspend DSA obligations

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- In two recent decisions, *Aylo Freesites v Commission (Case T-138/24)* (**Aylo**) and *WebGroup Czech Republic v Commission (Case T-139/24 R)* (**WebGroup**), the EU General Court refused applications to temporarily suspend DSA obligations for Aylo and WebGroup, pending their challenges to the designation of their services as very large online platforms under the DSA. The decisions applied the Court of Justice's judgment in the similar application in *Commission v Amazon Services Europe (C-639/23)* (**Amazon**).
- Last week, the Court of Justice dismissed Aylo's appeal of the General Court's ruling (*Aylo Freesites v Commission* (C-511/24 P(R)), rejecting Aylo's attempt to rely on the risk of breaches to third parties' privacy rights as a reason for granting interim relief.
- The Aylo, WebGroup, and Amazon decisions reiterate the very high thresholds that applicants must meet before the EU Courts will grant interim measures to injunct the application of EU laws, with the applicants in those proceedings effectively having to demonstrate that the final order would be deprived of any practical effect unless the interim measures were granted. By contrast, it is noteworthy that, in opposing such interim measures, the EU Commission does not need to claim or demonstrate that the granting of such measures would definitely impede the achievement of the relevant EU legislative.
- In Aylo and WebGroup, the General Court was satisfied that both applicants had demonstrated that their designation challenges were *"not unfounded"* (i.e. there was a genuine issue to be resolved). The Court accepted that there was a question as to the compatibility of the Article 39 DSA obligation to publish certain advertiser information with Articles 16 and 17 of the EU Charter of Fundamental Rights (**the Charter**), which protect the freedom to conduct business and the right to privacy, respectively.
- The Court was also satisfied that, if the interim measures were not granted, there was a likelihood of the applicants suffering *"serious and irreparable damage"* (in the sense that the financial damage suffered by the applicants could not be quantified). This was due to the impossibility of knowing who would have actual knowledge of the published advertiser information, and what the consequences would be on the applicants' commercial and financial interests.
- However, in weighing up the applicants' interests in obtaining the interim measures against the interest in the DSA obligations having immediate effect, the Court concluded that the interim measures should not be granted because:
  - the applicants could still obtain effective relief if their challenge was ultimately successful - i.e. they could close their Article 39 advertiser repository
  - although the applicants may suffer irreparable damage, it was not apparent that complying with DSA obligations would jeopardise the applicants' existence, and
  - the DSA is central to the policy objectives of ensuring a safe, predictable, and trusted online environment, and delaying its application could threaten the protection of fundamental EU rights and could impact the competitive landscape of the digital sector.

Background

On 20 December 2023, the EU Commission issued decisions designating two adult websites run by Aylo and WebGroup as *very large online platforms* (**VLOPs**) under Article 33 of the DSA.

As VLOP providers, both Aylo and WebGroup services are required to comply with a number of enhanced DSA obligations, including the requirement under Article 39 DSA to maintain a publicly available, searchable repository of the ads on their platforms. This repository must include, among other things, information about the ad itself, the recipients of the ad and the persons on whose behalf the ad is presented.

On 1 March, both Aylo and WebGroup lodged individual applications seeking:

i. an annulment of the decision to designate their services as VLOPs; and
ii. a declaration that Article 39 of the DSA is not applicable to their services on the basis that it contravenes their Charter rights (the **main proceedings**).

They also lodged separate applications seeking interim measures to suspend the Article 39 DSA obligation to make an ad repository publicly available, pending the outcome of the main proceedings (the **interim measures application**).

Aylo and WebGroup's interim measures application was similar in substance to a successful application that Amazon had made to, among other things, suspend its Article 39 DSA obligations pending a challenge it was taking to designation under the DSA. On 27 September 2023, in Case T-367/23, the General Court had granted Amazon's application for interim measures, but that decision would later be overturned on appeal by the Court of Justice 26 days after Aylo and WebGroup lodged their applications for interim relief.

The Aylo and WebGroup interim relief decisions

In its decisions, the General Court reiterated the established test that interim measures would only be granted in exceptional circumstances. The Court outlined the three conditions which must be satisfied:

i. a prima facie case must be established
ii. such measures must be urgently required to avoid serious and irreparable harm to the applicant's interests
iii. the balance of competing interests in the case must favour granting the measures

i. Prima facie case established

In both decisions, the Court outlined that, in order to satisfy this condition, the applicant must demonstrate that at least one of the pleas in the main proceedings appears on its face, not to be not unfounded - ie it raises a substantial legal disagreement, the resolution of which is not immediately obvious.[1]

In this context, Aylo alleged that Article 39 of the DSA infringed the principle of equal treatment and Articles 16 (the freedom to conduct a business) and 17 (the right to property) of the Charter. In its submissions, Aylo did not object to a requirement to compile the repository or to make it available to regulators and vetted researchers. However, it claimed that making the repository publicly available would cause severe harm to its business interests, in so far as that would lead to

[1] *Aylo Freesites v Commission* (Case T-138/24), at [19], *WebGroup Czech Republic v Commission* (Case T-139/24), at [17].

the unjustified disclosure of its strategic secrets to competitors and would encourage advertisers to turn to other platforms.[2]

WebGroup argued that the protection of confidential information is a corollary of the right to respect for private and family life guaranteed by Article 7 of the Charter. Furthermore, it submitted that the Article 39 DSA requirements infringed WebGroup's fundamental right to conduct business and its right to property under Articles 16 and 17 of the Charter respectively. Finally, it submitted that the Article 39 requirements also infringed the principle of proportionality, as its objectives could be achieved through less onerous means.[3]

Ultimately, in both cases, the Court accepted that the applicants had raised legal issues which were not unfounded. It considered that Article 39 did potentially limit the applicant's rights and freedoms under EU law, and while such a limitation was possibly permissible, determining whether such limitations were appropriate would require a more detailed assessment to be completed through the main proceedings. Accordingly, the applicants had raised sufficiently substantial and complex issues requiring detailed examination at a full hearing, such that a prima facie case existed.[4]

ii. Urgent requirement for interim measures to avoid serious and irreparable harm

In respect of this second condition, the Court reiterated that the concept of "urgency" should be assessed in light of the need to avoid serious and irreparable damage.

Both applicants submitted that the required public disclosure of the information under Article 39 of DSA would cause serious harm to both it and to its advertisers, as it could reveal the advertising strategies employed by the applicants and their customers, ultimately pushing customers to other competitors. The information disclosed could also be of significant utility to other market operators who are liable to exploit that information for their own benefit and to the detriment of the applicants.[5]

The Court accepted that both applicants had sufficiently evidenced that the obligation to comply with the Article 39 requirements until the outcome of the main proceedings would cause both applicants to endure serious financial damage. The Court noted that, as a general rule, financial damage will not be considered "irreparable", as compensatory payments can restore the aggrieved party to their original position. However, in accordance with previous EU case law, financial damage can be considered irreparable if it is of a type that cannot be quantified.

In that regard, the Court considered that the harm likely to be suffered by the applicants due to the publication of their confidential information would be highly dependent on a number of factors (e.g. the actions of customers, competitors and the general public) such that it would be impossible to properly assess the financial impact of the publication. As the likely financial damage would be unquantifiable, the Court concluded such damage was likely to be *"irreparable"*.[6]

As a result, the Court considered that the applicants in each case had established that the requested measures were urgently required to prevent serious and irreparable harm.

[2] *Aylo Freesites v Commission* (Case T-138/24), at [21]-[22].

[3] *WebGroup Czech Republic v Commission* (Case T-139/24), at [21]-[24].

[4] *Aylo Freesites v Commission* (Case T-138/24), at [34]-[46], *WebGroup Czech Republic v Commission* (Case T-139/24), at [41]-[55].

[5] *Aylo Freesites v Commission* (Case T-138/24), at [51]-[54], *WebGroup Czech Republic v Commission* (Case T-139/24), at [58]-[66].

[6] *Aylo Freesites v Commission* (Case T-138/24), at [85]-[87], *WebGroup Czech Republic v Commission* (Case T-139/24), at [91]-[93].

iii. Balance of competing interests

The Court then weighed the applicants' interests in obtaining the interim measures against the interests of the DSA obligations having immediate application.

The Court accepted that if the relevant information was published in the ad repository pending a decision in the main proceedings, such information would be definitively deprived of its confidential character.[7]

In this regard, Aylo specifically raised the argument that the repository requirement could place some of their advertisers at risk, thereby discouraging advertisers from using the platform. The ads repository must include information on the legal or natural person on whose behalf an advertisement is presented. Aylo claimed that this would require the public identification of certain performers who advertise their services on the platform and created a significant risk of doxing, harassment or discrimination of such individuals, which would in turn negatively impact the platform.[8]

The Court however, concluded that such a definitive deprivation of confidentiality would not render relief in the main proceedings ineffective and that it was not apparent that the envisaged irreparable damage would jeopardise the applicants' existence or development in the long run. In following the Court of Justice's decision in the Amazon case, the Court held that if the applicants were successful in the main proceedings, they could then close the public ads repository, with advertisers then being returned to a more attractive business environment and with the applicants being then free to develop new advertising strategies without competitors having visibility of same. It is noteworthy that when the General Court heard Amazon's application for interim measures, it originally reached a different conclusion, holding that relief in the substantive proceedings would be ineffective if Amazon had been unlawfully required to disclose confidential information (which would accordingly permanently lose its confidentiality).[9]

Further, in weighing the interests, the Court in Aylo and WebGroup emphasised that the DSA is a central element of the policy developed by the EU legislature. It stated that the DSA pursues objectives of great importance as it seeks to contribute to the proper functioning of the internal market and to ensure a safe, predictable and trusted online environment. It acknowledged that the Commission had not claimed that granting the requested interim measures until the outcome of the main proceedings would definitively impede the achievement of those objectives. However, it maintained that not applying certain obligations in the DSA could lead to significant delay to the full achievement of those objectives and ultimately allow an online environment which jeopardises fundamental rights.[10]

Notably, the Court also concluded that granting interim measures would not maintain the status quo, as it could alter competition in the digital sector, where DSA obligations applied to some VLOPs, but not others.[11]

Accordingly, the Court held that the interest of ensuring the DSA was in full operation outweighed the interests of the applicants.

[7] *Aylo Freesites v Commission* (Case T-138/24), at [100], *WebGroup Czech Republic v Commission* (Case T-139/24), at [113].

[8] *Aylo Freesites v Commission* (Case T-138/24), at [109].

[9] *Amazon v Commission* (Case T□367/23 R), at [82].

[10] *Aylo Freesites v Commission (Case T-138/24), at [100]-[103], WebGroup Czech Republic v Commission* (Case T-139/24), at [113]-[116].

[11] *Aylo Freesites v Commission* (Case T-138/24), at [119], *WebGroup Czech Republic v Commission* (Case T-139/24), at [132].

Aylo Appeal Decision

On appeal, Aylo argued (among other things) that the General Court should have taken into account the risk of infringement to the privacy rights of performers who advertise with Aylo if interim relief was not granted and their details had to be published as part of the ads repository.[12] While that argument was not a plea advanced by Aylo in the main proceedings, Aylo had argued that it was relevant to considering the urgency of the matter and in weighing up the interests.[13]

While the Court of Justice agreed with Aylo that the EU Courts can take into account arguments other than those pleaded in the main proceedings when weighing up the interests,[14] it held that such an argument would need to be raised in the context of satisfying the "urgency" criterion.[15] In this respect the Court noted that:

"the condition relating to urgency and the weighing up the interests involved are closely linked, since the very purpose of that weighing-up is to assess whether, despite the adverse effect on the interests of the applicant, which is at risk of suffering serious and irreparable damage, the taking into account of the interests in the immediate implementation of the decision at issue is such as to justify the refusal to grant the interim measures sought".[16]

The Court concluded that Aylo had not raised the performers' privacy issue in the context of establishing that serious and irreparable harm would be suffered by the performers, but had rather raised arguments in respect of the financial harm Aylo would suffer from performers fearing risks to their privacy rights.[17] Accordingly the appeal was dismissed.

Amazon decision

Both the Aylo and WebGroup decisions rely heavily on, and apply, the Amazon decision.

In the Amazon case, Amazon applied to the Court for interim measures to suspend the application of the obligations under Articles 38 and 39 DSA, pending the outcome of their challenge to, among other things, the designation of their service as a VLOP.

In the first instance, the General Court granted interim measures, suspending Amazon's obligation to make the Article 39 repository publicly available. This was without prejudice to Amazon's obligation to compile that repository.

On appeal, the Court of Justice applied much of the reasoning which was later followed in the Aylo and WebGroup decisions, accepting that the applicant had satisfied the conditions of (i) establishing a prima facie case concerning Article 39 DSA,[18] and (ii) demonstrating that a failure to grant the measures would likely cause the applicant serious and irreparable harm.[19] However, it ultimately found that the balance of interests favoured refusing the interim measures and ensuring the full application of the DSA until the full proceedings could be heard.[20] In particular, as mentioned above, the Court held that the final order would not be deprived of effectiveness if interim measures were not granted, because Amazon could then close down the ads repository.[21]

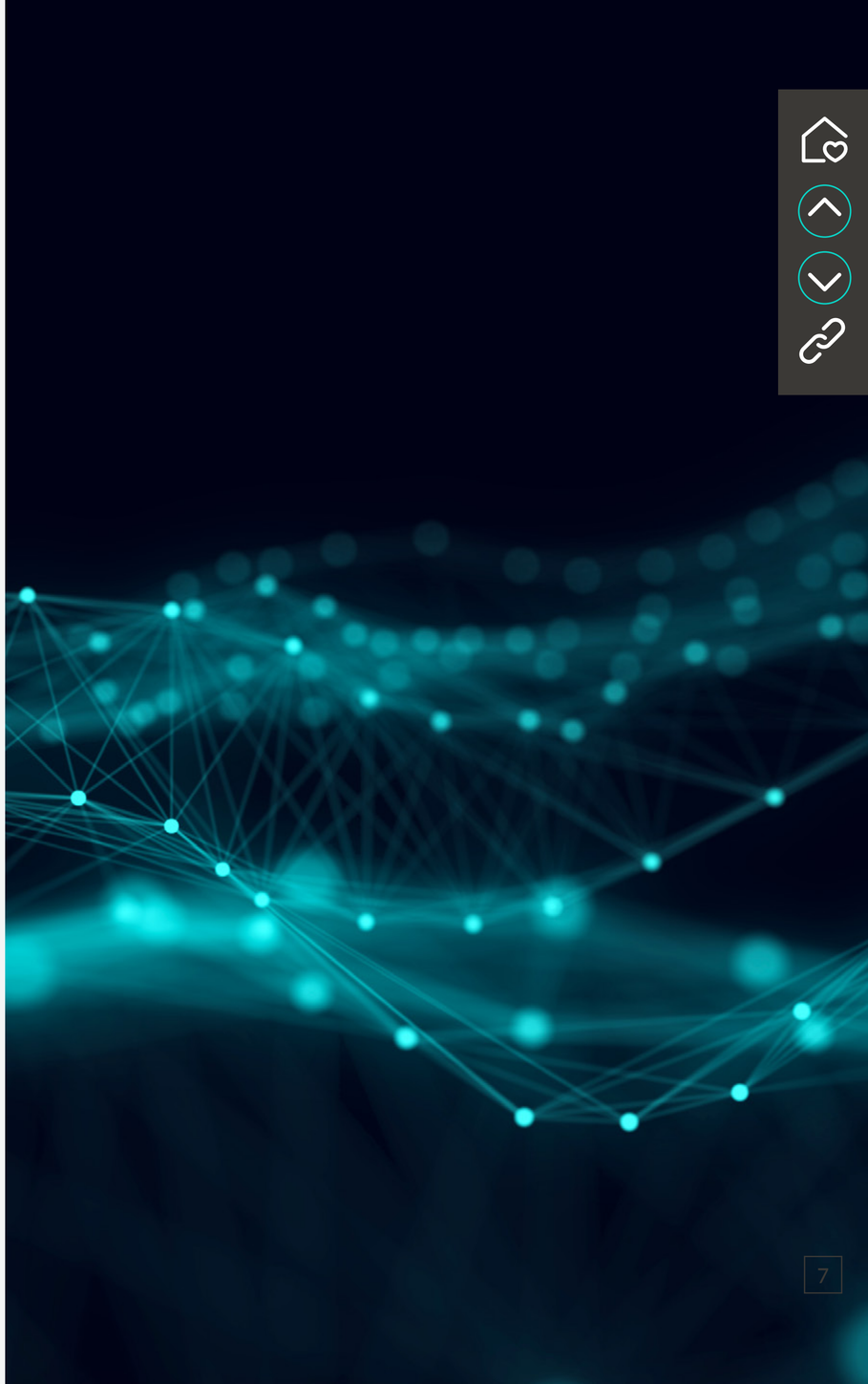
[12] *Aylo Freesites v Commission* (C-511/24 P(R), at [12].
[13] *Aylo Freesites v Commission* (C-511/24 P(R), at [13].
[14] *Aylo Freesites v Commission* (C-511/24 P(R), at [23].
[15] *Aylo Freesites v Commission* (C-511/24 P(R), at [27].
[16] *Aylo Freesites v Commission* (C-511/24 P(R), at [29].
[17] *Aylo Freesites v Commission* (C-511/24 P(R), at [30] - [32].
[18] *Commission v Amazon Services Europe* (C-639/23), at [112].
[19] *Commission v Amazon Services Europe* (C-639/23), at [137].
[20] *Commission v Amazon Services Europe* (C-639/23), at [164]-[165].
[21] *Commission v Amazon Services Europe* (C-639/23), at [147]-[148].

Commentary

While it is well established that the EU Courts will only grant interim measures in exceptional circumstances, *the Amazon*, *Aylo*, and *WebGroup* decisions reiterate the difficulties that applicants will face in satisfying the Courts that the balance of interests weighs in granting the measures.

There is also a noteworthy distinction between how the various Courts dealt with the issue of the loss of confidentiality of the information that would have to be published pending a final order in the substantive proceedings. The General Court in the Amazon case accepted that the loss of confidentiality of such information would deprive the final decision of practical effect in respect of that disclosed information whose confidentiality had been permanently destroyed.

In the subsequent rulings, the EU Courts did not focus on the loss of confidentiality of the disclosed information itself, but rather, in line with the applicants' pleadings, focussed on whether the serious and irreparable harm that would be caused by virtue of the the permanent destruction of the confidential information was such as to warrant injuncting the application of the Article 39 DSA obligations in respect of the applicants. In those cases, the EU Courts held that there was no evidence that the permanent loss of confidentiality of such information would jeopardise the existence of the applicants.



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