Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

27 March 2024*

(Appeal – Interim relief – Approximation of laws – Regulation (EU) 2022/2065 – Single market for digital services – Additional online advertising transparency – Decision to designate a very large online platform – Action for annulment)

In Case C-639/23 P(R),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, brought on 24 October 2023,

European Commission, represented by L. Armati, A. de Gregorio Merino and P.-J. Loewenthal, acting as Agents,

appellant,

supported by:

European Parliament, represented by M. Menegatti, E. Ni Chaoimh and L. Taïeb, acting as Agents,

Council of the European Union, represented by N. Brzezinski, M. Moore and E. Sitbon, acting as Agents,

interveners in the appeal,

the other party to the proceedings being:

Amazon Services Europe Sàrl, established in Luxembourg (Luxembourg), represented by A. Conrad and M. Frank, Rechtsanwälte, I. Ioannidis, dikigoros, and R. Spanó, avocat,

applicant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, M. Szpunar,

makes the following

* Language of the case: English.

Order

1 By its appeal, the European Commission seeks to have set aside the order of the President of the General Court of the European Union of 27 September 2023, *Amazon Services Europe* v *Commission* (T-367/23 R, 'the order under appeal', EU:T:2023:589), by which the President, first, ordered suspension of the operation of Commission Decision C(2023) 2746 final of 25 April 2023 designating Amazon Store as a very large online platform ('the decision at issue') in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ 2022 L 277, p. 1), in so far as, pursuant to that decision, Amazon Services Europe Sàrl ('Amazon') must make the repository required by Article 39 of that regulation publicly available, without prejudice to the obligation for Amazon to compile that repository, and, second, dismissed Amazon's application for interim measures as to the remainder.

Legal context

Directive 2000/31/EC

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 ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) provides, in Article 6(b) thereof:

'In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

…

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable'.

Directive 2005/29/EC

3 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22) provides, in Article 5(1), (2) and (5) thereof:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. …

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

4 According to Annex I to that directive, misleading commercial practices are among the commercial practices deemed to be unfair in all circumstances. Under point 11 of that annex, 'using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)' constitutes a misleading commercial practice.

Regulation (EU) 2016/679

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) provides, in Article 15(1)(b) and (h) thereof:

'The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

…

(b) the categories of personal data concerned;

…

(h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.'

Regulation (EU) 2019/1150

6 Article 5(1) of 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 (OJ 2019 L 186, p. 57) is worded as follows:

'Providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.'

Regulation 2022/2065

7 Recitals 75, 76, 95 and 155 of Regulation 2022/2065 are worded as follows:

‘(75) Given the importance of very large online platforms, due to their reach, in particular as expressed in the number of recipients of the service, in facilitating public debate, economic transactions and the dissemination to the public of information, opinions and ideas and in influencing how recipients obtain and communicate information online, it is necessary to impose specific obligations on the providers of those platforms, in addition to the obligations applicable to all online platforms. …

(76) Very large online platforms and very large online search engines may cause societal risks, different in scope and impact from those caused by smaller platforms. Providers of such very large online platforms and of very large online search engines should therefore bear the highest standard of due diligence obligations, proportionate to their societal impact. …

…

(95) Advertising systems used by very large online platforms and very large online search engines pose particular risks and require further public and regulatory supervision on account of their scale and ability to target and reach recipients of the service based on their behaviour within and outside that platform’s or search engine’s online interface. …

…

(155) Since the objectives of this Regulation, namely to contribute to the proper functioning of the internal market and to ensure a safe, predictable and trusted online environment in which the fundamental rights enshrined in the Charter [of Fundamental Rights of the European Union (“the Charter”)] are duly protected, cannot be sufficiently achieved by the Member States because they cannot achieve the necessary harmonisation and cooperation by acting alone, but can rather, by reason of territorial and personal scope, be better achieved at [European] Union level, the Union may adopt measures …’

8 Article 26(1)(b) to (d) of that regulation provides:

‘Providers of online platforms that present advertisements on their online interfaces shall ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise and unambiguous manner and in real time, the following:

…

(b) the natural or legal person on whose behalf the advertisement is presented;

(c) the natural or legal person who paid for the advertisement if that person is different from the natural or legal person referred to in point (b);

(d) meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.’

9 Article 33(1) and (4) of that regulation provides:

‘1. This Section shall apply to online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, …

…

4. The Commission shall, after having consulted the Member State of establishment or after taking into account the information provided by the Digital Services Coordinator of establishment …. adopt a decision designating as a very large online platform or a very large online search engine for the purposes of this Regulation the online platform or the online search engine which has a number of average monthly active recipients of the service equal to or higher than the number referred to in paragraph 1 of this Article. …’

10 Article 38 of the same regulation provides:

‘… providers of very large online platforms and of very large online search engines that use recommender systems shall provide at least one option for each of their recommender systems which is not based on profiling …’

11 Article 39(1) and (2) of Regulation 2022/2065 provides:

‘1. Providers of very large online platforms or of very large online search engines that present advertisements on their online interfaces shall compile and make publicly available in a specific section of their online interface, through a searchable and reliable tool that allows multicriteria queries and through application programming interfaces, a repository containing the information referred to in paragraph 2, for the entire period during which they present an advertisement and until one year after the advertisement was presented for the last time on their online interfaces. They shall ensure that the repository does not contain any personal data of the recipients of the service to whom the advertisement was or could have been presented, and shall make reasonable efforts to ensure that the information is accurate and complete.

2. The repository shall include at least all of the following information:

(a) the content of the advertisement, including the name of the product, service or brand and the subject matter of the advertisement;

(b) the natural or legal person on whose behalf the advertisement is presented;

(c) the natural or legal person who paid for the advertisement, if that person is different from the person referred to in point (b);

(d) the period during which the advertisement was presented;

(e) whether the advertisement was intended to be presented specifically to one or more particular groups of recipients of the service and if so, the main parameters used for that purpose including where applicable the main parameters used to exclude one or more of such particular groups;

(f) the commercial communications published on the very large online platforms …;

(g) the total number of recipients of the service reached and, where applicable, aggregate numbers broken down by Member State for the group or groups of recipients that the advertisement specifically targeted.'

12 Article 92 of that regulation provides:

'This Regulation shall apply to providers of very large online platforms and of very large online search engines designated pursuant to Article 33(4) from four months after the notification to the provider concerned … where that date is earlier than 17 February 2024.'

13 Article 93(2) of that regulation provides:

'This Regulation shall apply from 17 February 2024.

However, … Article 33(3) to (6), … shall apply from 16 November 2022.'

Background to the dispute

14 The background to the dispute is set out in paragraphs 2 to 6 of the order under appeal. For the purposes of the present proceedings, that background may be summarised as follows.

15 Amazon belongs to the Amazon group, which is a multinational group of companies. Its business activities comprise online retail and other services such as cloud computing and digital streaming. It provides marketplace services to third-party sellers enabling them to offer products for sale via Amazon Store. It also supports third-party sellers, inter alia by offering them tools to assist them in managing and growing their activities, in particular on Amazon Store.

16 By the decision at issue, the Commission designated Amazon Store as a very large online platform on the basis of Article 33(4) of Regulation 2022/2065.

The proceedings before the General Court and the order under appeal

17 By application lodged at the Registry of the General Court on 5 July 2023, Amazon brought an action seeking the annulment of the decision at issue.

18 By separate document, lodged at the Registry of the General Court on 6 July 2023, Amazon made an application for interim measures seeking, inter alia, suspension of the operation of that decision until the General Court had given a final decision in the main proceedings, in so far as it imposes on Amazon, first, the obligation to provide users with an option for each of its recommender systems which is not based on profiling, in accordance with Article 38 of Regulation 2022/2065, and, second, the obligation to compile and make publicly available the repository required by Article 39 of that regulation.

19 By order of 28 July 2023, *Amazon Services Europe* v *Commission* (T-367/23 R), adopted on the basis of Article 157(2) of the Rules of Procedure of the General Court, the Vice-President of the General Court ordered suspension of the operation of the decision at issue until the date of the order terminating the proceedings for interim relief brought before the General Court.

20 By the order under appeal, the President of the General Court, first, ordered that the operation of the decision at issue be suspended, in so far as that decision required Amazon to make the repository required by Article 39 of Regulation 2022/2065 publicly available, without prejudice to Amazon's obligation to compile that repository, and, second, dismissed Amazon's application for interim measures as to the remainder.

21 As regards, first of all, the condition relating to urgency, examined in paragraphs 26 to 69 of that order, the President of the General Court held, in paragraph 55 thereof, that Amazon had not established the existence of serious and irreparable harm which would result from Amazon Store's compliance with Article 38 of Regulation 2022/2065. By contrast, in paragraphs 65 to 69 of that order, the President of the General Court held that it had been established to the requisite legal standard that Amazon Store's compliance with Article 39 of that regulation would probably cause Amazon serious and irreparable harm.

22 Next, as regards the condition relating to the establishment of a prima facie case, the President of the General Court held, in paragraph 79 of the same order, that the third plea relied on by Amazon in support of its action for annulment of the decision at issue, alleging that Article 39 of the said regulation was unlawful, appears, prima facie, not to lack a serious basis and therefore called for a detailed examination which could not be carried out by the judge hearing the application for interim measures.

23 Lastly, the President of the General Court held, in paragraph 83 of the order under appeal, that 'the interest defended by [Amazon] must prevail over the interest in the dismissal of the application for interim measures'.

Procedure before the Court of Justice and forms of order sought

24 By order of the Vice-President of the Court of Justice of 13 December 2023, *Commission* v *Amazon Services Europe* (C-639/23 P(R), EU:C:2023:1006), the European Parliament and the Council of the European Union were granted leave to intervene in the present case in support of the form of order sought by the Commission.

25 The Commission claims that the Court should:

– set aside the order under appeal;

– itself give final judgment in the matter by dismissing the application for interim measures and rejecting the request for provisional interlocutory measures;

– in the alternative, refer the case back to the General Court;

– in the further alternative, vary the order under appeal so that Amazon's obligation to make the repository required by Article 39 of Regulation 2022/2065 publicly available is suspended only in respect of the information listed in Article 39(2)(d) and (g) of that regulation; and

– order Amazon to pay the costs of the present proceedings.

26 Amazon contends that the Court should:

– dismiss the appeal;

– order the Commission to pay the costs of the appeal; and

– in the event that the appeal is upheld, allow it a period of 28 days in which to comply with the obligation to make the repository required by Article 39 of the said regulation publicly available.

27 The Parliament and the Council request the Court to grant the form of order sought by the Commission.

The appeal

28 In support of its appeal, the Commission puts forward four grounds, the first alleging, in essence, an error of law and a manifestly incorrect application of the condition relating to the establishment of a prima facie case, the second alleging procedural defects and an error of law as well as a manifestly incorrect application of the condition relating to urgency, the third alleging an error of law and a manifestly incorrect application of the condition relating to the balancing of interests, and the fourth alleging breach of the principle of proportionality.

29 It is appropriate to begin by examining the second part of the second ground.

Arguments

30 By the second part of its second ground of appeal, the Commission claims that the President of the General Court, by holding, in paragraph 24 of the order under appeal, that he had 'all the information needed to rule' on the application for interim measures, even though he had not ruled on the application for a measure of organisation of procedure lodged by the Commission, infringed the principle that the parties should be heard, thereby also infringing Articles 88 and 90 of the Rules of Procedure of the General Court and the principle *audi alteram partem*.

31 In that regard, the Commission recalls that, on 28 July 2023, the President of the General Court adopted a measure of organisation of procedure following which Amazon made a lengthy submission to substantiate its claim that the information that Article 39 of Regulation 2022/2065 requires it to disclose is confidential in nature. The Commission explains that the President of the General Court, by contrast, refused to grant the application for a measure of organisation of procedure that it had lodged in order to be able to respond to the new arguments put forward by Amazon in that submission.

32 According to the Commission, the President of the General Court is required to respect the adversarial nature of the proceedings and the principle *audi alteram partem* when assessing the need to adopt a measure of organisation of procedure. Consequently, the Commission should have had the opportunity to respond to Amazon's arguments set out in the submission referred to in the preceding paragraph, especially since the grant of the suspension of operation at issue is exclusively based, in the present case, on the claim that compliance with Article 39 of Regulation 2022/2065 requires Amazon to make confidential information publicly available, a claim which is

set out only in that submission. Moreover, the considerations relating to the confidentiality of the information at issue set out in paragraphs 76 to 78 of the order under appeal are based, to a large extent, on those arguments.

33 The Commission maintains that the urgency of the proceedings for interim relief does not justify depriving it of its right to defend itself and that institution would moreover, have been able to submit its observations within a very short period.

34 Amazon considers that the President of the General Court was not required to grant the Commission's request for a measure of organisation of procedure. The principle that the parties should be heard only prohibits the EU judicature from basing its decision on facts and documents on which the parties, or one of them, have been unable to comment. As Amazon was invited to comment on certain points of law, however, that principle was not breached. There is no principle requiring the President of the General Court to grant each of the parties the same number of submissions on legal matters.

35 In any event, according to Amazon, the Commission has not established that the President of the General Court would have reached a different outcome if he had offered the Commission an opportunity to respond to Amazon.

Assessment

36 An application for interim measures must by itself enable the defendant to prepare its observations and the judge hearing the application to rule on it, as necessary, without any other supporting information, since the essential elements of fact and law on which the application is based must be found in the actual text of that application (order of 19 July 2012, *Akhras* v *Council*, C-110/12 P(R), EU:C:2012:507, paragraph 55 and the case-law cited).

37 Moreover, taking into account the expedition which naturally characterises proceedings for interim relief, it is a reasonable requirement to make of the party seeking the interim measures that, save in exceptional cases, he, she or it submit at the time when the application is made all the evidence available in support of that application, so that the judge hearing the application can assess, on that basis, whether the application is well founded (order of 19 July 2012, *Akhras* v *Council*, C-110/12 P(R), EU:C:2012:507, paragraph 56 and the case-law cited).

38 The President of the General Court, in his capacity as the judge hearing the application for interim measures, has however, under Article 157(3) of the Rules of Procedure of the General Court, the power to adopt, where appropriate, measures of organisation of procedure and measures of inquiry.

39 It follows also from the case-law of the Court of Justice that, in that respect, the President of the General Court must enjoy a broad discretion in assessing whether such measures are appropriate (see, to that effect, order of the Vice-President of the Court of Justice of 1 December 2021, *Inivos and Inivos* v *Commission*, C-471/21 P(R), EU:C:2021:984, paragraph 45 and the case-law cited).

40 The discretion which he thus enjoys must, however, be exercised within certain limits, the judge hearing the application for interim measures being required, inter alia, to observe the principle that the parties should be heard. That principle applies to any procedure that may result in a

decision by an EU institution perceptibly affecting a person's interests and, in particular, proceedings before the EU Courts (see, to that effect, order of 22 November 2018, *Hércules Club de Fútbol* v *Commission*, C-334/18 P(R), EU:C:2018:952, paragraph 47 and the case-law cited).

41 In that regard, while it is true that Article 157(2) of the Rules of Procedure of the General Court allows the President of the General Court to order interim measures even before the other party has submitted its observations, that provision cannot be understood as authorising, as a general rule, the President of the General Court to give judgment without observing the principle that the parties should be heard. That provision provides only for a derogation procedure allowing the President of the General Court to adopt such measures as a precautionary measure, pending the decision which must be made on the application for interim measures at the end of the *inter partes* proceedings required by Article 157(1) of those rules of procedure (see, to that effect, order of the Vice-President of the Court of Justice of 28 September 2023, *Council* v *Mazepin*, C-564/23 P(R), EU:C:2023:727, paragraphs 60 and 61).

42 The principle that the parties should be heard confers inter alia on each party to proceedings, irrespective of its legal status, the right to be apprised of the documents produced and observations made to the Court by the other party and to discuss them. In order to satisfy the requirements relating to the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings (see, to that effect, judgments of 27 March 2014, *OHIM* v *National Lottery Commission*, C-530/12 P, EU:C:2014:186, paragraph 54; of 4 December 2019, *H* v *Council*, C-413/18 P, EU:C:2019:1044, paragraphs 103 and 104; and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraphs 58 and 59).

43 The Court of Justice has inter alia inferred from those requirements, in cases not falling within the scope of the procedure for interim relief, that, although the General Court may freely decide to put a question to a party within the framework defined by its Rules of Procedure, it must give the other parties an opportunity to comment on the answer given to such a question, at least where that question contains elements which are decisive for the outcome of the case in question (see, to that effect, judgments of 4 December 2019, *H* v *Council*, C-413/18 P, EU:C:2019:1044, paragraphs 105 to 116, and of 10 September 2020, *Romania* v *Commission*, C-498/19 P, EU:C:2020:686, paragraphs 75 and 76).

44 That rule also applies where the President of the General Court puts a question to a party, pursuant to Article 157(3) of the Rules of Procedure of the General Court.

45 Admittedly, first, it is apparent from the case-law of the Court that, in the light of the speed which, by its nature, characterises interlocutory proceedings, the judge hearing an application for interim measures is not required to hear systematically the party making the application on all the information provided by the other party which that judge intends to take into consideration in order to rule on the application for interim measures (order of the Vice-President of the Court of Justice of 1 December 2021, *Inivos and Inivos* v *Commission*, C-471/21 P(R), EU:C:2021:984, paragraph 47).

46 However, that solution results from the absence of a rule providing for the submission, in principle, of a reply and a rejoinder in proceedings for interim relief. It cannot therefore be inferred from that fact that, where the President of the General Court authorises the applicant to adduce additional information in support of his, her or its application for interim measures, the

defendant is not entitled to debate that information, even though it is clear from the considerations set out in paragraphs 36 and 37 of the present order that that application must contain all the information necessary for it to give judgment and Article 157(1) of the Rules of Procedure of the General Court guarantees the defendant's right to submit its observations on that application.

47 Second, although, in the order of 17 December 2020, *Anglo Austrian AAB and Belegging-Maatschappij 'Far-East'* v *ECB* (C-207/20 P(R), EU:C:2020:1057), the Vice-President of the Court of Justice rejected the complaint of the applicants in that case, alleging an infringement of the right to be heard resulting from the fact that it had been impossible to comment on an item of evidence that was not available on the date on which the application for interim measures was lodged, it must be pointed out that the absence of adversarial proceedings at issue in the case giving rise to that order did not stem from the adoption of a measure of organisation of procedure by the President of the General Court. In addition, the Vice-President of the Court of Justice relied exclusively, in order to reject that complaint, on the fact that the applicants in that case had waived their right to use a procedural guarantee available to them, by not requesting the President of the General Court, pursuant to Article 88 of the Rules of Procedure of the General Court, to adopt a measure of organisation of procedure.

48 In the present case, it is apparent from the file that the President of the General Court, by a measure of organisation of procedure adopted on 28 July 2023, invited Amazon to comment on paragraphs 109 to 118 of the written observations submitted by the Commission at first instance.

49 In its response to that measure of organisation of procedure, Amazon set out a series of arguments aimed at establishing that the information that Article 39 of Regulation 2022/2065 requires it to disclose is confidential, that the disclosure of that information would cause it significant harm and that the interests which would be harmed by such disclosure deserve protection.

50 As the Commission emphasises, in his assessment of the condition relating to the establishment of a prima facie case, the President of the General Court relied, in paragraphs 76 to 78 of the order under appeal, on a line of argument reproducing, in essence, the evidence that had been put forward by Amazon in its response to the measure of organisation of procedure of 28 July 2023.

51 It is therefore apparent that that response contained elements which were decisive for the outcome of the case.

52 However, the Commission was denied any opportunity to comment on the arguments put forward by Amazon in that response.

53 Thus, in the first place, Amazon's response to the measure of organisation of procedure of 28 July 2023 was notified, on 30 August 2023, to the Commission, without that institution having been invited to comment on that response.

54 In the second place, the President of the General Court did not grant an application for the adoption of a measure of organisation of procedure, made by the Commission on 15 September 2023 pursuant to Article 88 of the Rules of Procedure of the General Court, seeking that it be allowed to reply to Amazon's response referred to in paragraph 49 of the present order, in order to preserve the equality of arms and to enable the General Court to rule on the application for interim measures in full knowledge of the facts.

55 In the third place, the President of the General Court considered, in paragraph 24 of the order under appeal, that he had all the information needed to rule on the application for interim measures, without there being any need first to hear oral argument from the parties.

56 Furthermore, since it is apparent from the Commission's observations that, if it had been invited by the President of the General Court to comment on Amazon's response referred to in paragraph 49 of the present order, it would have put forward additional arguments intended to demonstrate that the information that Article 39 of Regulation 2022/2065 requires Amazon to disclose is not confidential, it cannot be ruled out a priori that the examination of those arguments could have led the President of the General Court to dismiss the application for interim measures in its entirety.

57 It follows from the foregoing that the President of the General Court breached the principle that the parties should be heard, with the result that the second part of the second ground of appeal must be upheld.

58 Since the assessment made by the President of the General Court of the condition relating to the establishment of a prima facie case is based decisively on matters which were not subject to the principle that the parties should be heard, the breach of that principle is sufficient, in itself, to justify setting aside point 1 of the operative part of the order under appeal, by which the President of the General Court ordered that the operation of the decision at issue be suspended, in so far as, under that decision, Amazon will be required to make the repository required by Article 39 of Regulation 2022/2065 publicly available, without prejudice to Amazon's obligation to compile that repository.

59 However, that breach of that principle cannot lead to the setting aside of point 2 of the operative part of that order, by which the President of the General Court dismissed the application for interim measures as to the remainder.

60 That point 2 is based on the assessment of the President of the General Court, set out in paragraph 55 of that order, according to which Amazon had not established the existence of serious and irreparable harm which would result from Amazon Store's compliance with Article 38 of Regulation 2022/2065.

61 First, however, that assessment is based on reasoning, set out in paragraphs 35 to 54 of the same order, in the context of which the President of the General Court does not rely in any way on the elements put forward in Amazon's response referred to in paragraph 49 of the present order.

62 Second, the other parts of the second ground of appeal and the other grounds put forward by the Commission in support of its appeal are not directed against those paragraphs 35 to 54.

63 It follows that, without there being any need to examine those other parts and those other grounds, it is necessary to dismiss the appeal in so far as it seeks to have set aside point 2 of the operative part of the order under appeal.

The application for interim measures made before the General Court

64 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, that Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. That provision also applies to appeals brought under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union (order of the Vice-President of the Court of Justice of 2 February 2024, *Mylan Ireland* v *Commission*, C-604/23 P(R), EU:C:2024:117, paragraph 38).

65 In the present case, since, first, the Commission presented to the Court the arguments that it intended to make against the elements put forward in Amazon's response referred to in paragraph 49 of the present order and since, second, in the form of order sought in its appeal, the Commission requested the Court to give final judgment in the dispute, it is necessary, in the light of the speed which characterises interlocutory proceedings, to rule on Amazon's application for interim measures to the extent that it concerns the suspension of operation of the decision at issue in so far as that decision requires Amazon to compile and make publicly available the repository required by Article 39 of Regulation 2022/2065.

66 To that end, it should be recalled that Article 156(4) of the Rules of Procedure of the General Court provides that applications for interim measures must state the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for. Thus, according to settled case-law of the Court of Justice, the court hearing an application for interim relief may order the suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable damage to the interests of the party making the application, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that applications for interim measures must be dismissed if any one of them is not satisfied. The court hearing an application for interim relief must also, where appropriate, weigh up the interests involved (order of the Vice-President of the Court of Justice of 2 February 2024, *Mylan Ireland* v *Commission*, C-604/23 P(R), EU:C:2024:117, paragraph 40).

Prima facie case

Arguments

67 In order to establish a prima facie case, Amazon relies on three pleas in law in support of the main action.

68 In its line of argument relating to the third of those pleas, which it is appropriate to examine at the outset, Amazon raises a plea of illegality of Article 39 of Regulation 2022/2065, alleging breach of the principle of equal treatment and infringement of Articles 7, 16 and 17 of the Charter.

69 In that regard, Amazon claims that the obligation, laid down in that Article 39, to publish, in a repository accessible to everyone, a set of detailed information on advertisements presented on Amazon Store seriously infringes Article 7 of the Charter and the general principle of the

protection of business secrets. In addition, given the strategic nature of that information, the obligation to disclose hampers Amazon's commercial activity and thus infringes Articles 16 and 17 of the Charter.

70 Amazon states that, although some of that information must indeed be disclosed pursuant to various acts of EU law, that is not the case, in particular, of information relating to the period during which a particular advertisement was presented or to the number of recipients of the service reached. Moreover, those EU acts require the disclosure of information not to the public as a whole but only to the recipients of the advertisements.

71 According to Amazon, first, the application of Article 39 of Regulation 2022/2065 is not appropriate in the light of the differences between online marketplaces and other very large online platforms. Second, the EU legislature could have achieved the objectives of preventing the risk of illegal advertisements or manipulative techniques and disinformation with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality, by means of an alternative solution less prejudicial to Amazon's rights, by requiring it only to make a reasonably structured repository available solely to regulators and vetted researchers.

72 The Commission considers that Amazon's third plea in law cannot reasonably succeed.

73 In the first place, that plea in law is manifestly inadmissible. In accordance with the case-law of the Court of Justice, a plea of illegality, raised under Article 277 TFEU, of Article 39 of Regulation 2022/2065 is admissible only in so far as Article 39 constitutes the legal basis of the decision at issue or has a direct legal connection with that decision. However, that is not the case here. In particular, the fact that the provisions of Section 5 of Chapter III of Regulation 2022/2065 are applicable to Amazon only after the Commission has adopted a decision, such as the decision at issue, designating it as a very large online platform or a very large online search engine for the purposes of that regulation, is not sufficient to constitute a direct legal connection between those provisions and that decision. The contrary approach would, moreover, deprive those provisions of their directly enforceable nature. Moreover, in the light of the nature of the connection between the decision at issue and Article 39 of that regulation, the unlawfulness of that article cannot lead to the annulment of that decision.

74 In the second place, Amazon has not substantiated in any way the claim that Article 39 of Regulation 2022/2065 infringes its fundamental rights. Thus, the application for interim measures does not contain any argument establishing the confidential nature of the information which Article 39 of Regulation 2022/2065 requires Amazon to disclose. In particular, Amazon has not proved that that information is known only to a limited number of persons, that its disclosure is likely to cause it serious harm and that the interests likely to be harmed by disclosure are objectively worthy of protection.

75 In any event, that information is not confidential, since Amazon is already required, under other acts of EU law, to make most of that information available to the public. The Commission refers, in that regard, not only to Regulation 2022/2065 but also to Directives 2000/31 and 2005/29 and to Regulations 2016/679 and 2019/1150. Certain of that information could, moreover, be obtained from commercial offers or advertising metrics and data analyses offered on the market.

76 In the third place, the distinction Amazon makes between online marketplaces and other very large online platforms is not justified in the light of the objectives of Regulation 2022/2065.

Assessment

77 It follows from settled case-law of the Court that the *fumus boni juris* requirement is met where at least one of the pleas in law relied on by the applicant for interim measures in support of the main action appears, prima facie, not unfounded. That is the case, inter alia, where one of the pleas relied on reveals the existence of complex issues of law the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the court hearing the application for interim relief but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious (order of the Vice-President of the Court of Justice of 24 May 2022, *Puigdemont i Casamajó and Others* v *Parliament and Spain*, C-629/21 P(R), EU:C:2022:413, paragraph 188 and the case-law cited).

78 The parties disagree, in the first place, on the admissibility of the third plea in law relied on by Amazon, alleging the illegality of Article 39 of Regulation 2022/2065.

79 Under Article 277 TFEU, 'any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the [European] Union is at issue, plead the grounds specified in Article 263, second paragraph, [TFEU] in order to invoke before the Court of Justice of the European Union the inapplicability of that act'.

80 According to the Court's settled case-law, that article gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, with a view to obtaining the annulment of a decision addressed to that party, the validity of acts of general application which form the legal basis of that decision (judgment of 16 March 2023, *Commission* v *Calhau Correia de Paiva*, C-511/21 P, EU:C:2023:208, paragraph 44 and the case-law cited).

81 Since the purpose of Article 277 TFEU is not to allow a party to contest the applicability of any act of general application in support of any action whatsoever, the act the legality of which is called in question must be applicable, directly or indirectly, to the issue with which the action is concerned (judgment of 16 March 2023, *Commission* v *Calhau Correia de Paiva*, C-511/21 P, EU:C:2023:208, paragraph 45 and the case-law cited).

82 Thus, in an action for annulment brought against individual decisions, the Court has accepted that the provisions of an act of general application that constitute the basis of those decisions or that have a direct legal connection with such decisions may legitimately form the subject matter of an objection of illegality (judgment of 16 March 2023, *Commission* v *Calhau Correia de Paiva*, C-511/21 P, EU:C:2023:208, paragraph 46 and the case-law cited).

83 A direct legal connection may arise, inter alia, from the fact that the provision the illegality of which is pleaded forms part of the reasoning of a contested decision, including if it is not referred to in the formal statement of reasons for that decision (see, to that effect, judgment of 16 March 2023, *Commission* v *Calhau Correia de Paiva*, C-511/21 P, EU:C:2023:208, paragraph 52).

84 By contrast, the Court has held that an objection of illegality covering an act of general application in respect of which the individual decision being challenged does not constitute an implementing measure is inadmissible (judgment of 16 March 2023, *Commission* v *Calhau Correia de Paiva*, C-511/21 P, EU:C:2023:208, paragraph 47 and the case-law cited).

85 In the present case, it is common ground that Article 39 of Regulation 2022/2065 does not constitute the legal basis of the decision at issue.

86 Nevertheless, it follows from the case-law cited in paragraph 82 of the present order that a plea of illegality may be raised against any provision of an act of general application which has a direct legal connection with the decision at issue, even if that provision does not constitute the legal basis of that decision.

87 In the present case, Amazon submits that there is a sufficiently direct legal connection between Article 39 of Regulation 2022/2065 and the decision at issue, on the ground that that article applies to Amazon Store because of the adoption of that decision, a circumstance from which it infers, in essence, that that article and that decision form part of a single legal regime the legality of which Amazon seeks to call into question.

88 It cannot be ruled out a priori that a connection of that nature may be regarded, as the Commission submits, as being insufficiently direct to justify the admissibility of the plea of illegality raised by Amazon, having regard, in particular, to the fact that it is neither alleged nor demonstrated that it would imply that Article 39 of Regulation 2022/2065 may be linked to the reasons underlying the decision at issue or to the very grounds of that decision.

89 However, it does not appear that the Court has already determined whether such a connection can be classified as a 'direct legal connection' within the meaning of the case-law cited in paragraph 82 of the present order.

90 Furthermore, it is apparent from the case-law of the Court that, in order to ensure effective judicial protection, Article 277 TFEU must be interpreted in such a way as to avoid artificially separating the different aspects of one legal regime (see, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 76).

91 In that context, the assessment, for the purposes of applying Article 277 TFEU, of the nature of the legal connection between Article 39 of Regulation 2022/2065 and the decision at issue appears to constitute a complex point of law the solution to which is not immediately obvious and therefore calls for a detailed examination.

92 In the second place, if the admissibility of the third plea in law were to be accepted, the examination of that plea would mean that the court adjudicating on the substance would determine whether Article 39 of Regulation 2022/2065 complies with the principle of equal treatment and with Articles 7, 16 and 17 of the Charter.

93 In order to assess the arguments made by Amazon as regards the condition relating to the establishment of a prima facie case, it is necessary from the outset to examine that plea in so far as it relates to an alleged infringement of Articles 7 and 16 of the Charter.

94 Article 7 of the Charter provides that everyone has the right to respect for his or her private and family life, home and communications.

95 Article 16 of the Charter, for its part, provides that the freedom to conduct a business in accordance with EU law and national laws and practices is recognised.

96 It is apparent from Article 39(1) and (2) of Regulation 2022/2065 that the application of those provisions to Amazon would require it to make publicly available a repository containing various items of information relating to advertisements presented on very large online platforms. That information includes, in particular, the content of the advertisement, the person on whose behalf the advertisement is presented, the period during which the advertisement was presented, the main parameters used for targeting certain recipients, commercial communications published on very large online platforms or the total number of recipients of the service reached.

97 Since that information, taken together, provides detailed particulars on all of Amazon's online advertising activities, including its relations with its customers or the precise details of the commercial communications campaigns conducted, it cannot a priori be ruled out that the obligations imposed by Article 39 of Regulation 2022/2065 may be regarded, as Amazon submits, as limiting the rights that Amazon derives from Articles 7 and 16 of the Charter, without it being necessary, in order to reach such a preliminary conclusion, for Amazon to put forward additional arguments intended to establish the confidential nature of that information.

98 Admittedly, the situation would be different if it were to be considered that, as the Commission submits, the information which Article 39 of Regulation 2022/2065 requires Amazon to disclose is, in reality, already available to the public, irrespective of the application of that article.

99 In that regard, it does indeed seem that some of that information must be disclosed under other provisions of EU law.

100 In particular, first of all, disclosure of the identity of the person on whose behalf the advertisement is presented appears to be required under Article 6(b) of Directive 2000/31 and Article 26(1)(b) of Regulation 2022/2065. Next, the Commission appears a priori justified in asserting that the main parameters used for the targeting of certain recipients must be disclosed under Article 15(1)(b) and (h) of Regulation 2016/679, Article 5(1) of Regulation 2019/1150 and Article 26(1)(d) of Regulation 2022/2065. Lastly, it cannot be ruled out that the publication of a commercial communication on a very large online platform without informing the consumer concerned may be classified as an unfair commercial practice, under Article 5(5) of, and point 11 of Annex I to, Directive 2005/29.

101 For all that, it is not apparent from the Commission's line of argument or, more broadly, from the file available to the Vice-President of the Court of Justice that all the information referred to in Article 39(2) of Regulation 2022/2065, and in particular the period during which the advertising is disseminated or the total number of recipients of the service reached, must be disclosed irrespective of the application of that Article 39. It must also be stated that the Commission is maintaining only that most of that information is covered by such disclosure obligations and that it does not therefore claim that that is the case for all of that information.

102 Moreover, the equivalent nature, for the purposes of the application of Articles 7 and 16 of the Charter, of disclosure of information to the user concerned alone or to the public as a whole is a largely new and somewhat complex issue.

103 In addition, although the Commission submits that information similar to that referred to in Article 39(2) of Regulation 2022/2065 can be obtained, as far as Amazon is concerned, from commercial offers, it does not adduce any evidence in support of that assertion.

104 As regards the claim that such information could be collected on the basis of advertising metrics and data analyses offered on the market, it does not suffice, in the absence of further details as to the information concerned, to demonstrate that Amazon would not be required, under Article 39 of that regulation, to make publicly available information which is currently confidential.

105 Furthermore, the Commission's argument that Amazon was required to demonstrate that disclosure of the information at issue is liable to cause it serious harm and that the interests liable to be harmed by that disclosure are objectively worthy of protection is an interpretation of the relevant provisions of the Charter that is not apparent, at first sight, either from the wording of those provisions or from the case-law of the Court. The merits of such an argument must therefore be assessed by the court adjudicating on the substance of the case.

106 In those circumstances, the judge hearing the application for interim measures cannot find that it has been established, with sufficient evidence, that the information which Article 39 of Regulation 2022/2065 requires Amazon to disclose is not confidential and, consequently, that the application of that Article 39 to Amazon would not result in a limitation of the rights that it may derive from Articles 7 and 16 of the Charter.

107 Such a limitation of those rights would, however, be such as to establish the illegality of Article 39 of Regulation 2022/2065 only if that limitation did not comply with the conditions set in Article 52(1) of the Charter.

108 That provision provides that limitations may be imposed on the exercise of rights such as those set forth in Articles 7 and 16 of the Charter as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

109 The assessment to be carried out in order to determine whether those conditions are satisfied in the present case, however, involves taking into account various factors, such as the degree of contribution of the publication of all the information referred to in Article 39(2) of Regulation 2022/2065 to the attainment of the objectives pursued by the EU legislature, the degree of seriousness of the limitation of the rights provided for in Articles 7 and 16 of the Charter or indeed the possible existence of alternative solutions that are less prejudicial to those rights.

110 Therefore, even if the EU legislature were to be recognised as enjoying a broad discretion in that regard, the question whether it exceeded the limits of that discretion by adopting Article 39 of Regulation 2022/2065 constitutes, in the absence of clear precedents, a major legal disagreement the resolution of which is not immediately obvious.

111 In the light of the foregoing, it cannot be held, following the summary examination which the judge hearing the application for interim measures is required to carry out and without ruling on the merits of the third plea in law relied on by Amazon, which is a matter solely for the court adjudicating on the substance of the case, that that plea must be regarded, at first sight, as lacking in seriousness.

112 It follows that the condition relating to the establishment of a prima facie case is satisfied in the light of the arguments based on the plea of illegality of Article 39 of Regulation 2022/2065.

Urgency

Arguments

113 With a view to establishing that the condition relating to urgency is satisfied, Amazon submits that making the repository required by Article 39 of Regulation 2022/2065 publicly available would cause it serious and irreparable damage.

114 First of all, making that repository publicly available would require Amazon to disclose confidential information about Amazon and its advertisers. In particular, that repository would indicate the targeting parameters that Amazon can provide and the number of customers that can be reached using those parameters. Once that information has been disclosed, Amazon's competitors would retain knowledge of the most effective strategies and technologies. In addition, disclosure of that information would harm Amazon's advertising partners by revealing their strategies. Amazon's advertising activities would thus be seriously and irretrievably damaged.

115 Next, making the repository required by Article 39 of Regulation 2022/2065 publicly available would irreversibly reduce Amazon's market share both for its general retail activities and for its advertising activities. Making that repository publicly available would turn third-party sellers away from Amazon Store and make them more reluctant to advertise on it. In addition, the competitors of operators advertising on Amazon Store would be able to copy and replicate the most effective advertising strategies. In the long term, making that repository publicly available risks affecting the experience of consumers by reducing advertising and removing sellers from the Amazon Store platform.

116 Lastly, the damage suffered by Amazon is not merely pecuniary and cannot be quantified solely in financial terms. The deterioration of its competitive position could thus lead to the emergence of a negative feedback loop. Furthermore, it is probably impossible to calculate precisely the specific effect of making the repository required by Article 39 of Regulation 2022/2065 publicly available, in particular in so far as making it publicly available would involve the disclosure of confidential information.

117 The Commission maintains that Amazon has not demonstrated that the condition relating to urgency was satisfied in the present case.

118 Amazon is limited to putting forward – in most cases in the conditional – unsubstantiated and unrelated claims. In addition, Amazon has not provided information establishing that the damage it alleges is foreseeable with a sufficient degree of probability. Furthermore, the fact that Amazon has difficulty in proving the merits of an application seeking compensation for its loss is not such as to establish that that loss is unquantifiable.

119 Furthermore, Amazon has not demonstrated that the condition relating to the establishment of a prima facie case is satisfied as regards the confidential nature of the information that it has to include in the repository required by Article 39 of Regulation 2022/2065. It is only where that condition is satisfied, however, that the judge hearing the application for interim measures must assume, for the purposes of assessing the condition relating to urgency, that certain information is confidential. In any event, that information is not confidential.

Assessment

120 It is apparent from the Court's case-law that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court. It is for the purpose of attaining that objective that urgency must be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party seeking the interim relief. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering such damage. While it is true that, in order to establish the existence of serious and irreparable damage, it is not necessary for the occurrence and imminence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability, the party seeking interim measures is nevertheless required to prove the facts forming the basis of its claim that serious and irreparable damage is likely (order of the Vice-President of the Court of Justice of 16 July 2021, *Symrise* v *ECHA*, C-282/21 P(R), EU:C:2021:631, paragraph 40).

121 As regards, in the first place, Amazon's claim that making the repository required by Article 39 of Regulation 2022/2065 publicly available will lead to a decline in its market share and, therefore, cause it serious and irreparable harm, it should be recalled that, where the party applying for interim relief claims loss of its market share, it must demonstrate that obstacles of a structural or legal nature will prevent it from regaining a significant proportion of that market share in the event that its action in the main proceedings is ultimately upheld (see, to that effect, order of the Vice-President of the Court of Justice of 2 February 2024, *Mylan Ireland* v *Commission*, C-604/23 P(R), EU:C:2024:117, paragraph 84 and the case-law cited).

122 Although Amazon does maintain that the loss of market share following the provision of that repository will be irreversible, it does not however refer, in its application for interim measures, to any specific obstacles that would prevent it from regaining that market share if it were subsequently no longer required to maintain that repository online, because of the annulment of the decision at issue.

123 It is true that Amazon also refers, in that regard, to certain points of an expert opinion annexed to its application for interim measures, from which it is apparent that it could be difficult for Amazon to ensure the return, to its platform, of sellers who had left it, since they could have become accustomed to using another platform and might wish to maintain the links they would have acquired with their customers on that latter platform.

124 However, first, that expert opinion merely mentions hypotheses, without assessing their likelihood of occurring. Second, that expert opinion does not contain any evidence or reference capable of establishing that the realisation of those hypotheses is actually likely.

125 Amazon cannot therefore be considered to have established the existence of obstacles of a structural or legal nature preventing it, in the event of annulment of the decision at issue, from regaining a significant proportion of any market share lost following the making publicly available of the repository required by Article 39 of Regulation 2022/2065. It follows that it has not shown, in any event, that the market losses resulting from the repository's being made available would cause it irreparable damage.

126 As regards, in the second place, the arguments based on the disclosure of confidential information, it is apparent from the case-law of the Court that when, first, the applicant for interim measures alleges that the information whose publication he, she or it wishes provisionally to prevent constitutes business secrets and, second, that allegation satisfies the condition that there is a prima facie case, that the judge hearing an application for interim measures is in principle required, when examining the condition of urgency, to start from the premiss that the information constitutes business secrets (see, to that effect, order of the Vice-President of the Court of Justice of 12 June 2018, *Nexans France and Nexans* v *Commission*, C-65/18 P(R), EU:C:2018:426, paragraph 21).

127 Since it is apparent from paragraphs 96 to 105 of the present order that Amazon's claim that at least some of the information referred to in Article 39(2) of Regulation 2022/2065 is confidential satisfies the condition that there is a prima facie case, it must be presumed, for the purposes of assessing the condition relating to urgency, that applying that provision will lead to the disclosure of confidential information.

128 The Commission's argument that the information at issue is not confidential therefore cannot lead the Court to hold that the latter condition is not satisfied.

129 In that context, although Amazon submits that the damage resulting from making publicly available the repository required by Article 39 of Regulation 2022/2065 cannot be quantified only in financial terms, it has not, however, demonstrated how making that repository available would cause it non-material damage.

130 By contrast, Amazon clearly claims pecuniary damage as a result of the repository being made available, resulting both from the reluctance of third-party sellers to publish advertisements on Amazon Store, which could eventually lead to some of those sellers leaving that platform, and from Amazon's competitors acquiring knowledge of strategies that could be implemented to improve their competitive position.

131 In the light of the variety of the precise commercial information which is meant to appear in the repository required by Article 39 of Regulation 2022/2065, the interest of advertisers in being able to implement advertising practices which cannot be easily reproduced by their competitors and the advantage that Amazon's competitors might derive from full access to such commercial information, the damage resulting from making that repository publicly available must be regarded as being of the serious nature required for the grant of interim measures (see, by analogy, order of the Vice-President of the Court of Justice of 10 September 2013, *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 47).

132 As regards the irreparable nature of that damage, it should be borne in mind that, admittedly, damage of a financial nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he, she or it suffered the damage. That is however not the case, and such damage can then be deemed to be irreparable, if it cannot be quantified (order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 92 and the case-law cited).

133 However, the uncertainty linked to reparation for harm of a pecuniary nature in a possible action for damages cannot be regarded, in itself, as a circumstance capable of establishing that such a harm is irreparable, for the purposes of the case-law of the Court. At the stage of seeking interim

relief, the possibility of subsequently obtaining compensation for pecuniary damage, if an action for damages is brought following annulment of the contested measure, is necessarily uncertain. Interlocutory proceedings are not intended to act as a substitute for an action for damages in order to remove that uncertainty, since their purpose is only to guarantee the full effectiveness of the final future decision that will be made in the main action, in this case an action for annulment, to which the interlocutory proceedings are an adjunct (see, to that effect, order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 93 and the case-law cited).

134 On the other hand, the situation is different where it is already clear, when the assessment is carried out by the judge hearing the application for interim measures, that, in view of its nature and the manner in which it will foreseeably occur, the harm alleged, should it occur, may not be adequately identified or quantified and that, in practice, it will not therefore be possible to make good that harm by bringing an action for damages. That may be the case, inter alia, in a situation involving the publication of specific and confidential commercial information (see, to that effect, order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 94 and the case-law cited).

135 In that regard, it is clear that the harm that is liable to be suffered by Amazon due to the publication of its business secrets would differ, both in nature and in scale, according to whether the persons who acquire knowledge of those business secrets are its customers, its competitors, financial analysts, or indeed members of the general public. It would be impossible to identify the number and status of all those who in fact had knowledge of the published information and thereby assess the consequences that the publication of that information might have on Amazon's commercial and financial interests (see, to that effect, order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 95 and the case-law cited).

136 That uncertainty, which is also present in the present case, is such as to demonstrate that the pecuniary damage alleged is irreparable (see, to that effect, orders of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 96, and of 1 March 2017, *EMA* v *MSD Animal Health Innovation and Intervet international*, C-512/16 P(R), EU:C:2017:149, paragraphs 113 to 118).

137 Accordingly, it must be held that Amazon has demonstrated that the alleged damage has the requisite characteristics. Consequently, the condition relating to urgency is satisfied.

The balancing of interests

Arguments

138 Amazon submits that its interest in obtaining suspension of the operation of the decision at issue outweighs the other interests connected with the immediate enforcement of that decision for three reasons.

139 First of all, refusing to grant interim measures would undermine the effectiveness of a future decision annulling the decision at issue, since Amazon is likely to suffer irreparable damage even before such an annulment decision can be adopted. The information disclosed when the

repository required by Article 39 of Regulation 2022/2065 is made publicly available would thus have permanently lost its confidential nature. Similarly, that annulment decision would not allow third-party sellers who have already left that platform to return to Amazon Store.

140 Next, suspension of the operation of the decision at issue would merely have the effect of maintaining the status quo existing until the adoption of the decision on the substance of the case.

141 Lastly, the other measures provided for by Regulation 2022/2065, which will be applicable even in the event of suspension of operation of the decision at issue, are sufficient to achieve the objectives pursued by the EU legislature. Article 39 of that regulation cannot therefore be regarded as constituting a fundamental rule of that regulation, since the obligations which it lays down are not applicable to the vast majority of intermediary services.

142 The Commission considers that the reasons put forward by Amazon, taken individually or as a whole, are not sufficient for it to be considered that the balance of interests weighs in favour of granting the interim measures sought. First, the occurrence of irreparable damage is not a decisive argument, but a premiss of the balancing of interests by the judge hearing the application for interim measures. Second, suspension of the operation of the decision at issue does not preserve the status quo. On the contrary, granting such a suspension would result in Amazon being subject, for several years, to a different regime from that imposed on other very large online platforms. Third, the EU legislature provided for a specific regime for platforms of that kind of platform precisely because the general obligations laid down in Regulation 2022/2065 are not sufficient to ward off the systemic societal risks posed by those platforms, as is illustrated by a number of recent examples. There is an urgent need to ensure the application of that specific regime in order to deal with those risks, as is shown in particular by Article 93(2) of that regulation.

Assessment

143 It is clear that, in most interim proceedings, the decision to grant or to refuse the suspension of operation sought is likely to produce, to a certain extent, certain definitive effects and it is for the court hearing the application for interim relief to weigh up the risks attaching to each of the possible solutions. In practical terms, this involves, in particular, examining whether or not the interest of the applicant for interim measures in obtaining suspension of the operation of the contested act outweighs the interest in that act's immediate implementation. In that examination, it must be determined whether the possible annulment of that act by the judgment on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of its operation would be such as to impede the objectives pursued by the contested act in the event of the action in the main proceedings being dismissed (order of the Vice-President of the Court of Justice of 24 May 2022, *Puigdemont i Casamajó and Others* v *Parliament and Spain*, C-629/21 P(R), EU:C:2022:413, paragraph 248 and the case-law cited).

144 As regards, in the first place, the interest in granting the interim measures sought, it must be pointed out that any decision annulling the decision at issue would not be rendered ineffective if the application for interim measures were dismissed and if, as a result, Amazon were required immediately to make the repository required by Article 39 of Regulation 2022/2065 publicly available.

145 It is true that the information published in that repository pending a decision annulling the decision at issue would, in practice, be definitively deprived of its confidential nature, since it could no longer be withheld from the knowledge of third parties.

146 However, it follows from Article 39(1) of that regulation that that repository must be continuously updated, in so far as it must contain the information referred to in Article 39(2) of that regulation for the entire period during which the provider of the very large online platform concerned presents an advertisement and until one year after the advertisement was presented for the last time on its online interface.

147 It follows that, if the decision at issue is annulled, Amazon will no longer be required to compile the repository required by that Article 39. Accordingly, it will no longer be required to keep online information relating to advertisements presented on Amazon Store or to disclose information relating to developments in its advertising campaigns or new advertising campaigns. That annulment would therefore be such as to ensure that advertisers returned to a more attractive business environment and to enable Amazon to develop new strategies in the management of its advertising activities without its competitors being able to acquaint themselves with them by means of that repository.

148 The annulment of the decision at issue would therefore retain an interest for Amazon and a real effectiveness, even in the absence of the grant of interim measures. Such a situation distinguishes the present case from those in which the Court relied decisively, in its assessment of the balancing of the interests involved, on the fact that the disclosure of information contained in a decision or in a report would definitively render ineffective any annulment of the decision ordering disclosure of that information (see, to that effect, order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 105, and order of the President of the Court of Justice of 1 March 2017, *EMA* v *PTC Therapeutics International*, C-513/16 P(R), EU:C:2017:148, paragraph 136).

149 That being so, as Amazon submits and as is apparent from paragraphs 126 to 137 of the present order, if interim measures are not granted, it is likely that Amazon will suffer serious and irreparable damage before any decision annulling the decision at issue is made.

150 That fact cannot, however, be regarded as being, in itself, decisive, since the very purpose of balancing the interests involved 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 contested decision is such as to justify the refusal to grant the interim measures sought (see, to that effect, order of 12 July 1996, *United Kingdom* v *Commission*, C-180/96 R, EU:C:1996:308, paragraphs 90 to 92; order of the President of the Court of Justice of 11 April 2001, *Commission* v *Cambridge Healthcare Supplies*, C-471/00 P(R), EU:C:2001:218, paragraph 120; and order of the Vice-President of the Court of Justice of 8 April 2014, *Commission* v *ANKO*, C-78/14 P-R, EU:C:2014:239, paragraph 40).

151 For the purposes of that assessment, it should be noted that, although it follows from the examination of the condition relating to urgency that Amazon is in fact likely, if interim measures are not granted, to suffer serious and irreparable pecuniary damage, it is not apparent from the elements put forward by Amazon that the application to Amazon Store of Article 39 of Regulation 2022/2065, pending the decision of the court adjudicating on the substance, would have the effect of jeopardising Amazon's existence or long-term development.

152 First of all, it is not claimed, let alone demonstrated, that Amazon would be exposed to a risk that it would cease operations if interim measures were not granted.

153 Next, it is apparent from paragraphs 121 to 125 of the present order that Amazon has not established the existence of a significant and lasting risk of loss of market share if Article 39 of Regulation 2022/2065 were applicable to Amazon Store during the period between the date of the examination of its application for interim measures and that of the decision on the substance of the case.

154 Lastly, it is apparent from the application for interim measures that Amazon's revenue from its advertising activities represents only 7% of its overall revenue. Accordingly, the limitation of the possibilities of developing advertising strategies that could result from the application of Article 39 of Regulation 2022/2065 would have direct effects only on a limited part of Amazon's activities, given that it has not been established that the indirect effects of such a limitation on Amazon's other activities are significant.

155 As regards, in the second place, the interest in the immediate application of the decision at issue, it must be emphasised that Regulation 2022/2065 is a central element of the policy developed by the EU legislature in the digital sector. In the context of that policy, that regulation pursues objectives of great importance, since it seeks, as is apparent from recital 155 thereof, to contribute to the proper functioning of the internal market and to ensure a safe, predictable and trusted online environment in which the fundamental rights enshrined in the Charter are duly protected.

156 It is true that the Commission has not claimed, let alone demonstrated, that the grant of interim measures having the effect of excluding the application to Amazon Store of Article 39 of Regulation 2022/2065 until judgment has been given on the substance of the case would be such as to impede definitively the achievement of those objectives.

157 It should nevertheless be noted that not applying certain obligations laid down by that regulation will lead to a delay, potentially for several years, in the full achievement of those objectives. Not applying those obligations will therefore give rise to a risk of potentially allowing an online environment which threatens the fundamental rights provided for in the Charter to persist and develop.

158 That finding cannot be called into question by Amazon's argument that such a risk would be avoided as a result of the application to Amazon Store of the obligations imposed by that regulation on all intermediary services.

159 It is apparent from recitals 75 and 76 of Regulation 2022/2065 that the EU legislature considered, following an assessment which it is not for the judge hearing the application for interim measures to call into question, that very large online platforms play an important role in the digital environment and that they may give rise to risks for society which differ, in terms of their scale and impact, from those attributable to smaller platforms.

160 In particular, it is apparent from recital 95 of that regulation that the EU legislature considered that the advertising systems used by very large online platforms pose particular risks and require further public and regulatory supervision.

161 It cannot therefore be held, without going beyond the jurisdiction of the judge hearing the application for interim measures by ruling out assessments of the EU legislature which have not been shown to be incorrect, that the application to Amazon Store only of the obligations imposed by Regulation 2022/2065 on all intermediary services would be capable of satisfactorily compensating for the application to that platform of the obligations arising from Article 39 of that regulation.

162 The EU legislature attached particular importance to applying that regulation as quickly as possible to very large online platforms. It is thus apparent from Article 92 and Article 93(2) of that regulation that, although it is applicable only from 17 February 2024, it may be applied in advance to very large online platforms.

163 It should also be noted that, contrary to what Amazon contends, the grant of the interim measures sought would not lead solely to preserving the status quo. Suspension of the operation of the decision at issue would have no effect either on the application of the general obligations laid down in Regulation 2022/2065 to all intermediary services or on the application of the obligations specific to very large online platforms to platforms other than Amazon which have been designated as such by the Commission, under Article 33(4) of that regulation. It follows that such a suspension of operation would be liable to alter the competitive situation in the digital sector in a manner which has not been provided for by the EU legislature, by making Amazon subject to a regime different from that applicable to other players in that sector which have, in view of the criteria defined by that legislature, characteristics comparable to that company.

164 In the light of all those factors, it must be held that the interests defended by the EU legislature prevail, in the present case, over Amazon's material interests, with the result that the balancing of interests weighs in favour of dismissing the application for interim measures.

165 Consequently, the application for interim measures is dismissed in so far as it seeks suspension of the operation of the decision at issue, in so far as that decision requires Amazon to compile and make publicly available the repository required by Article 39 of Regulation 2022/2065.

The request made in the alternative by Amazon

Arguments

166 Amazon requests the Court, in the event that the appeal is upheld, to grant it, in order to comply with the obligation to compile and make publicly available the repository required by Article 39 of Regulation 2022/2065, a period of 28 days from the date of the judgment closing the appeal proceedings. It maintains that such a period is necessary, from a technical point of view, in order to comply with that obligation.

Assessment

167 First of all, the request made by Amazon in the alternative cannot be regarded as being capable of being made under Article 174 of the Rules of Procedure of the Court of Justice, in so far as that provision provides that the form of order sought in the response is to seek to have the appeal allowed or dismissed, in whole or in part.

168 Next, since it follows from Article 170(1) of those rules of procedure that the appellant may not supplement the form of order sought at first instance, such a prerogative cannot be conferred either, in the absence of a specific provision to that effect, on the respondent.

169 By its form of order sought at first instance, Amazon had in no way requested a time limit from the General Court in the event of dismissal of its application for interim measures.

170 Accordingly, even if the request made by Amazon in the alternative were to be understood as having been made with a view to supplementing the form of order sought at first instance, it would have to be dismissed in so far as it constitutes a new form of order (see, by analogy, order of the Vice-President of the Court of Justice of 20 March 2023, *Xpand Consortium and Others* v *Commission*, C-739/22 P(R), EU:C:2023:228, paragraph 20).

171 Lastly, nor can that new form of order sought be viewed as an application for interim measures brought under Article 160 of the Rules of Procedure of the Court of Justice, since Article 160(4) of those rules makes the admissibility of such an application subject to submission by separate document (see, by analogy, order of the Vice-President of the Court of Justice of 20 March 2023, *Xpand Consortium and Others* v *Commission*, C-739/22 P(R), EU:C:2023:228, paragraph 21).

172 It follows that the request made by Amazon in the alternative must be rejected as inadmissible.

Costs

173 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

174 As regards the costs relating to the appeal proceedings, first, under Article 138(1) of those rules, which applies to appeals by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for Amazon to be ordered to pay the costs relating to the appeal proceedings and Amazon has been unsuccessful, Amazon must be ordered to bear its own costs relating to the appeal proceedings and to pay those incurred by the Commission relating to those proceedings.

175 Second, under Article 140(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Parliament and the Council must bear their own costs relating to the appeal proceedings.

176 As regards the costs relating to the interlocutory proceedings at first instance, it is appropriate to decide, in accordance with Article 137 of the Rules of Procedure of the Court, applicable to appeal proceedings by virtue of Article 184(1) of those rules, that the costs of the Commission and of Amazon are to be reserved.

On those grounds, the Vice-President of the Court hereby orders:

1. **Point 1 of the operative part of the order of the President of the General Court of the European Union of 27 September 2023, *Amazon Services Europe* v *Commission* (T-367/23 R, EU:T:2023:589), is set aside**.

2. **The appeal is dismissed as to the remainder.**

3. **The application for interim measures is dismissed in so far it seeks suspension of the operation of Commission Decision C(2023) 2746 final of 25 April 2023 designating Amazon Store as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), to the extent that that decision requires Amazon Store to compile and make publicly available the repository required by Article 39 of that regulation.**

4. **The request made by Amazon Services Europe Sàrl seeking that, in the event that the appeal is upheld, it be granted a period of 28 days in order to comply with the obligation to compile an advertisement repository is rejected.**

5. **Amazon Services Europe shall bear its own costs relating to the appeal proceedings and pay the costs incurred by the European Commission relating to those proceedings.**

6. **The European Parliament and the Council of the European Union shall bear their own costs relating to the appeal proceedings.**

7. **The costs relating to the interlocutory proceedings at first instance are reserved.**

Luxembourg, 27 March 2024.

A. Calot Escobar
Registrar

L. Bay Larsen
Vice-President