CJEU: first pronouncement on the application of the DMA

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On 9 February 2024, the Court of Justice of the European Union published an order in a case opposing Bytedance to the European Commission.

On 5 September 2023, the European Commission designated Bytedance, which provides the entertainment platform TikTok through local subsidiaries, as a gatekeeper under Article 3 of the Digital Markets Act (DMA). The Commission based its decision in particular on the fact that the applicant met the quantitative thresholds and that it had not demonstrated the existence of circumstances which would render the conditions for the designation of a gatekeeper not met.

Following the designation, Bytedance brought an action for annulment of the Commission's decision and applied for interim measures. It seeks in particular the suspension of the operation of the Commission's decision pending the Court's ruling in so far as the contested decision imposes on Bytedance:

• obligations relating to new features, products or services which it may offer (in respect of Article 5 and 6 DMA) and at the very least obligations under Article 5(2) DMA)

• an obligation to submit to the Commission an independently audited description of techniques for the profiling of consumers applied by TikTok (Article 15 DMA) and, at the very least, to disclose publicly any of those techniques (Article 15(3) DMA)

To order suspension of operation of an act and other interim measures, the order must be justified prima facie, in fact and in law, and be urgent in that, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and take effect before a decision is reached in the main action.

In order to meet these criteria, Bytedance alleged an irreparable breach of confidentiality. According to the applicant, it would have to disclose detailed confidential information regarding its commercial strategy and publish detailed information concerning the way in which it profiles TikTok users, which would otherwise not be in the public domain. Disclosing this information would "significantly harm its business" and "provide rivals with the opportunity […] to learn how TikTok engages in the profiling on consumers", thereby weakening its

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competitive position. However, the Commission considered that, in any event, the complainant had failed to prove that its claim satisfied the requirement of a prima facie case and had not shown that there was a risk of disclosure of confidential information. The Commission also noted that Article 15(1) of the DMA only requires that information be communicated to the Commission and, indirectly, to the European Data Protection Board. The Commission further noted that the same is true for Article 15(3) DMA, as it merely requires the gatekeeper to publish "an overview", prepared by the gatekeeper itself, which may also "take account of the need to respect its business secrets". The Commission therefore considered that the applicant had failed to demonstrate that the alleged serious and irreparable harm is probable or imminent.

In order to demonstrate that the condition of urgency was met, Bytedance also relied on alleged irreversible market changes due to the barriers to entry and expansion imposed by the Digital Markets Act. According to the applicant, Articles 5 and 6 DMA would prevent it from using its TikTok platform, preventing it for example to use TikTok's data insights to offer new products and services, and to encourage its users to focus on its products. Bytedance further reported that the exact impact of Article 5(2) could not be quantified but that recent developments and TikTok's experience showed that the impact was likely to be particularly significant. In this respect, the Commission emphasised that the alleged harm is purely hypothetical. While the applicant assumed that it would be required to request and obtain consent of users in order to be able to rely on their data, it did not specify the circumstances in which Article 5(2) would apply and therefore whether the data would fall within the category of "personal data". Moreover, the Commission recalled that this provision does not prohibit the combination and cross-use of the end user's personal data, but merely makes those actions subject to the prior consent of the user. Finally, it added that the harm to which the applicant refered to is purely financial. The interim measures sought in this regard are justified where, in the absence of such measures, the applicant would be placed in a position which would jeopardise its financial viability before the final judgment, or where its market share would be substantially affected in the light, inter alia, of the size and turnover of its undertaking and, where relevant, the characteristics of the group to which it belongs. The Commission considered that the applicant failed to assert, let alone establish, the serious and irreparable nature of the financial harm which it may suffer.

The Commission considered that Bytedance failed to prove that the condition relating to urgency was satisfied, without it being necessary to rule on whether there is a prima facie case or to carry out a weighing of interests.

The General Court therefore ordered that the application for interim measures be dismissed.

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Order of the President of the General Court, 9 February 2024, Case T-1077/23

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