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Advertising Transparency Under the EU Digital Services Act: Can Very Large Online Platforms Escape Article 39's Reporting Obligations?

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General Note about the Content

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Abstract

The European Union's Digital Services Act (DSA) regulates online platforms with the aim of creating a safer, more transparent online environment and addressing the risks posed by emerging technologies. Many provisions of the DSA have already proven effective, prompting platforms to improve illegal content reporting mechanisms, increase transparency in content moderation, and restrict targeted advertising to minors. However, one aim of the DSA—mandating heightened advertising transparency from the largest online platforms—has drawn significant scrutiny. Article 39 requires Very Large Online Platforms (VLOPs)—platforms with at least 45 million monthly users in the European Union—to publish information about the content of advertisements posted on their platforms, the identities of advertisers, and a breakdown of users targeted and reached on their platforms in each Member State. VLOPs argue that these disclosure requirements will (1) cause irreparable harm by exposing confidential marketing strategies and trade secrets, and (2) infringe upon both VLOPs' and advertisers' rights under the Charter of Fundamental Rights of the European Union (the Charter), including the rights to data protection and to conduct a business. The potential harms of Article 39 raise a critical question for VLOPs: Is there a way to avoid Article 39's reporting obligations? This paper addresses that question in two parts. First, it reviews relevant case law and explains why VLOPs' irreparable harm and Charter-based arguments have failed. Second, it evaluates several alternative strategies VLOPs might attempt to avoid Article 39 and concludes that such strategies are unlikely to succeed.

Table of Contents

I. Introduction

Large online platforms revolutionized advertising in recent years. Specifically, several "big-name" large online platforms, such as Amazon, Google, and Meta, among others, championed new artificial intelligence systems that shifted traditional, manual advertising methods to more efficient, algorithmic models that improve advertising outcomes by analyzing consumer preferences in real-time.[1] But without proper guardrails, these new advertising models can snowball into a consumer risk nightmare. Amazon, for example, was sued by the FTC in 2023 for improperly using an algorithm to inflate product prices.[2] And victims of misleading AI-generated ads criticized social media platforms like Facebook and Instagram for failing to vet malicious advertisers.[3]

The European Union was among the first to address these risks by implementing the Digital Services Act (DSA), a regulation poised to combat AI advertising risks (among other consumer risks) from online platforms.[4] The DSA's advertising regulations require all online platforms to provide users with certain information about the advertisements they see and disclose the parameters used by their systems to selectively display ads to consumers.[5] For "Very Large Online Platforms" (VLOPs)—platforms used by greater than or equal to 45 million individuals in the EU

[1] Ihor Dervishov, *The Rise of AI in Social Media Advertising: How it Transforming Advertising*, M1-PROJECT (Jan. 30, 2026), https://www.m1-project.com/blog/rise-of-ai-in-social-media-advertising; Robert Derow et al., *How AI Is Reshaping Advertising for the First Time in a Decade*, BCG (Jan. 19, 2026), https://www.bcg.com/x/the-multiplier/how-ai-is-reshaping-modern-advertising.
[2] Haleluya Hadero, *Amazon Used an Algorithm to Essentially Raise Prices on Other Sites, the FTC Says*, THE ASSOCIATED PRESS (Nov. 2, 2023), https://apnews.com/article/amazon-ftc-lawsuit-antitrust-lina-khan-d40f5437bac57f7f4a3ab5a49650f98d.
[3] *See* Alice Cullinane & Rebecca Woods, *Meta Accused of Letting AI Sellers 'Run Rampant'*, BBC (Nov. 28, 2025), https://www.bbc.com/news/articles/c4gpz90d4q0o.
[4] *See* Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1 pmbl. recital 1. [hereinafter *Digital Services Act*].
[5] *Id.* arts. 26, 27.

a month—Article 39 of the DSA imposes extra reporting requirements.[6] Specifically, Article 39 requires VLOPs to publish a repository that discloses: (1) the content of advertisements the VLOP displays; (2) the identities of individuals who paid for or requested the VLOP advertisements; (3) how long advertisements were posted on the VLOP; and (4) a breakdown of which users each advertisement targeted and reached for each member state.[7]

While the DSA seemingly had a positive impact on advertising transparency so far—prompting several VLOPs to stop using targeted ads for underage users and increase transparency of their advertising targeting mechanisms[8]—VLOPs argue that the additional reporting obligations of Article 39 go too far and risk exposing their trade secrets.[9] Exposing a VLOP's sensitive business information (such as its advertising strategies or the identity and marketing strategies of its advertisers) could cause significant harm, as this might reduce the VLOP's market share and push its advertisers to flee the platform in favor of smaller platforms with no reporting obligations.[10]

Faced with the onerous and inevitably harmful obligations imposed by Article 39, VLOPs are left with an important question: Is there a way to escape the DSA's Article 39 reporting requirements? This paper will answer this question in two parts. Part II of the paper reviews case law where VLOPs attempted to challenge or invalidate Article 39, and Part III considers whether there are any other approaches available for VLOPs to challenge or escape Article 39 not yet addressed in case law.

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[6] Digital Services Act arts. 33(1), 39.
[7] *Id.* art. 39.
[8] *See The Impact of the Digital Services Act on Digital Platforms*, EUROPEAN COMMISSION (Mar. 10, 2026), https://digital-strategy.ec.europa.eu/en/policies/dsa-impact-platforms.
[9] Laura Knoke et al., *DSA Decoded #4: Advertising Under the DSA* (May 14, 2025), FRESHFIELDS, https://technologyquotient.freshfields.com/post/102kb13/dsa-decoded-4-advertising-under-the-dsa.
[10] *See* Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶¶ 14, 35, 48 (Feb. 25, 2025).

II. VLOP Applications for Interim Relief from Article 39 Were Unsuccessful in Prior Case Law

Several VLOPs brought cases attempting to invalidate or escape the reporting obligations of Article 39 of the DSA. In their attempts to invalidate Article 39, VLOPs tried a mix of two approaches. Under a first "Charter challenge" approach, VLOPs argued that the European Court of Justice (ECJ) should invalidate Article 39 of the DSA because it conflicts with the Charter of Fundamental Rights of the European Union (the Charter).[11] The Charter codifies a set of fundamental rights that Member States and EU institutions (such as the ECJ) must respect.[12] VLOPs argued that the reporting obligations of Article 39 of the DSA violate Articles 7, 8, 16, and 17 of the Charter,[13] which respectively assert that everyone has the right to: (1) respect for their private and family life[14]; (2) the protection of their personal data[15]; (3) conduct a business as long as they follow EU and national laws[16]; and (4) own or use their property.[17]

Under a second approach, VLOPs also (or alternatively) argued that the reporting obligations of Article 39 would cause them and their advertisers irreparable harm, as the ECJ has the power to grant interim measures or suspend an act (such as the DSA) when an applicant demonstrates that the act poses irreparable harm to the applicant, and the applicant's need for relief

[11] Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1, pmbl. [hereinafter *Charter*]; Juan Rodriguez & André Garcia do Fôjo, *Amazon's EU DSA Ruling: Online Platforms, Business Secrets & Interim Measures*, BLOOMBERG LAW (Nov. 2023), https://www.bloomberglaw.com/external/document/X6R031VS000000/international-data-privacy-compliance-professional-perspective-a; Mark Ellis et al., *EU Courts Again Refuse Interim Measures to Suspend DSA Obligations*, A&L GOODBODY, https://www.algoodbody.com/files/uploads/news_insights_pub/EU_General_Courts_refuse_interim_measures_to_suspend_DSA_obligations_%282%29.pdf.
[12] Charter pmbl.
[13] *WebGroup*, Case C-620/24, ¶ 41; Ellis, *supra* note 11.
[14] Charter art. 7.
[15] *Id.* art. 8.
[16] *Id.* art. 16.
[17] *Id.* art. 17.

from the act outweighs the EU's interest in implementing the act.[18] VLOPs argued that the reporting requirements of Article 39 cause irreparable harm because they force VLOPs to expose their and their advertisers' marketing strategies, along with the identities of their advertisers.[19] This disclosure puts advertisers at risk of abuse and may cause advertisers who do not want to be identified to flee to non-VLOP platforms not subject to Article 39's reporting requirements, which would harm VLOPs' market shares.[20] As set forth above, most VLOPs challenging Article 39 took a mix of both Charter-challenge and irreparable harm approaches.[21] Three cases outline the effectiveness of these approaches in more detail.

A. European Commission v. Amazon Services Europe Sàrl

In the first case, *European Commission v. Amazon Services Europe Sàrl*, the ECJ addressed whether Amazon, a VLOP specializing in e-commerce, was required to comply with Article 39 of the DSA.[22] Amazon brought a Charter-based challenge, claiming that making a publicly available repository as required by Article 39 of the DSA violates Article 7 of the Charter (because the repository forces Amazon to disclose private business secrets) and Articles 16 and 17 of the Charter, because the repository "hampers Amazon's commercial activity" and prevents it from conducting its business.[23] Amazon also argued that making the publicly available repository required by Article 39 would: (1) irreparably harm Amazon's advertising activities by exposing Amazon and Amazon's advertising partners' "most effective strategies and technologies" to

[18] Case C-511/24, Aylo Freesites LTD v. Eur. Comm'n, ECLI:EU:C:2024:719, ¶¶ 16-18, 26, 33 (Sep. 6, 2024).
[19] Ellis, *supra* note 11.
[20] *See id.*; Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶ 48 (Feb. 25, 2025).
[21] *See* Ellis, *supra* note 11.
[22] Case C-639/23, Eur. Comm'n v. Amazon Serv. Eur. Sàrl, ECLI:EU:C:2024:277, ¶ 1 (Mar. 27, 2024).
[23] *See id.* ¶¶ 68-69.

competitors, and (2) "irreversibly reduce Amazon's market share" because the reporting requirements would make third-party sellers reluctant to advertise with Amazon.[24]

For Amazon's Charter-based challenge, the Court acknowledged that, while Article 39 of the DSA may violate Articles 7 and 16 of the Charter, such a violation is only impermissible if Article 39 of the DSA also violates Article 52(1) of the Charter.[25] Article 52(1) of the Charter states that articles of the Charter may be limited, "as long as the limitations . . . meet objectives of general interest recognised by the European Union."[26] The Court concluded that the DSA does not overly limit the Charter because the DSA meets the EU's objectives by ensuring "a safe, predictable and trusted online environment in which the fundamental rights enshrined in the Charter are duly protected."[27]

Turning to Amazon's irreparable harm arguments, the Court held that Amazon's harm was not significant enough to outweigh the interests of the DSA because "Amazon's revenue from its advertising activities represents only 7% of its overall revenue."[28] Also, Amazon did not demonstrate that it "would cease operations if interim measures were not granted," and it did not provide sufficient evidence that it would be unable to regain market share.[29] For example, the Court noted that, although Amazon provided an expert opinion that asserted it would be difficult for Amazon to regain the sellers it loses due to Article 39, the expert opinion "merely mention[ed] hypotheses, without assessing their likelihood of occurring."[30] Also, the expert opinion "[did] not

[24] *Amazon*, Case C-639/23, ¶¶ 114-15.
[25] *Id.* ¶¶ 106-08.
[26] *Id.*
[27] *Id.* ¶ 155.
[28] *See id.* ¶¶ 154-55.
[29] *Id.* ¶¶ 152-53.
[30] *Id.* ¶¶ 123-24.

contain any evidence or reference capable of establishing that the realisation of [the expert's] hypotheses [was] actually likely."[31]

B. Aylo Freesites LTD v. European Commission

In another case, *Aylo Freesites LTD v. European Commission*, the ECJ again addressed whether a company must comply with Article 39's reporting requirements.[32] In this case, Aylo, which operates an adult content online platform called Pornhub, challenged the General Court's classification of Pornhub as a VLOP.[33] Aylo took a different approach to Amazon.

Unlike Amazon, Aylo did not heavily rely on arguments challenging the Charter in its case in front of the ECJ.[34] While Aylo did assert that the DSA's Article 39 reporting obligations would cause irreparable harm to Aylo's business operations, it focused on a new argument: Article 39 would cause irreparable harm to Aylo's advertisers.[35] Specifically, Aylo claimed that the public repository required by Article 39—mandating disclosure of the person or entity on whose behalf an advertisement is presented on a VLOP, among other information[36]—would harm its advertisers because it would allow anti-pornography groups to identify, dox, and harass Aylo's advertisers.[37]

For example, publishing the contact information of an OnlyFans (an adult content subscription service) content creator that advertises their channels on Pornhub puts the OnlyFans creator at risk of doxing.[38] But the Court dismissed this argument because of a technicality: Aylo did not raise this argument in its original action to annul the General Court's decision to classify Pornhub as a VLOP, and the ECJ cannot consider new arguments raised in petitions.[39] And

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[31] *Amazon*, Case C-639/23, ¶ 124.
[32] Case C-511/24, Aylo Freesites LTD v. Eur. Comm'n, ECLI:EU:C:2024:719, ¶¶ 1, 3, 6 (Sep. 6, 2024).
[33] *Id.*
[34] *See id.* ¶ 16.
[35] *See id.* ¶¶ 31-33, 12-13, 16.
[36] Digital Services Act art. 39.
[37] *Aylo Freesites*, Case C-511/24, ¶¶ 26, 38.
[38] *Id.*
[39] *Id.* ¶¶ 15, 31-32.

although Aylo properly raised its first irreparable harm argument (that Aylo's business would be irreparably harmed because its advertisers might discontinue advertising on Pornhub), this was not enough for the Court.[40] The Court held (similarly to how it did in Amazon) that Aylo did not provide sufficient evidence of irreparable harm to Aylo's business.[41]

C. WebGroup Czech Republic v. European Commission

The looming question after *Aylo* and *Amazon* is whether the outcome would be different if, unlike Amazon, a VLOP relied entirely on advertising for revenue, and, unlike Aylo, the VLOP properly established that its advertisers are at serious risk of harm. A third case, *WebGroup Czech Republic v. European Commission*, answers this question in the negative.[42] In this case, WebGroup, which operates an adult content service called XVideos, challenged its reporting obligations under Article 39 of the DSA.[43] WebGroup tried to distinguish itself from Amazon by arguing that, unlike Amazon (whose advertising revenue only comprises 7% of its total revenue),[44] WebGroup's business model "is based exclusively on advertising."[45]

As such, WebGroup argued that Article 39 would irreparably harm WebGroup if its advertisers leave WebGroup's platform to advertise on non-VLOP platforms not subject to reporting requirements.[46] Also, WebGroup correctly raised the advertiser harm arguments Aylo failed to raise, as WebGroup asserted that the reporting requirements of Article 39 of the DSA would violate WebGroup's advertisers' rights under Articles 7 and 8 of the Charter.[47] This is

[40] *Aylo Freesites*, Case C-511/24, ¶ 33.
[41] *Id.*; Case C-639/23, Eur. Comm'n v. Amazon Serv. Eur. Sàrl, ECLI:EU:C:2024:277, ¶¶ 152-55 (Mar. 27, 2024).
[42] *See* Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶¶ 1, 23, 28, 34, 40, 50, 56 (Feb. 25, 2025).
[43] *Id.* ¶¶ 1, 3, 6.
[44] *Amazon*, Case C-639/23, ¶ 154.
[45] *See WebGroup*, Case C-620/24, ¶¶ 12, 27.
[46] *Id.* ¶ 35.
[47] *See id.* ¶ 41.

because making a public repository would allow WebGroup's advertisers to be identified and put the advertisers at risk of being targeted by anti-pornography groups.[48]

In addressing the potential violation of WebGroup's advertisers' Charter rights, the ECJ dismissed the argument because WebGroup's statements that advertisers could be identified from the repository were speculative.[49] Also, the Court noted that, even if it assumes advertisers could be identified from the repository, it would still need to dismiss the advertiser-harm argument because "the purpose of interlocutory proceedings is to avoid serious and irreparable damage to the *applicant's* interests."[50] As such, the Court asserted that it can only consider the applicant's (in this case, WebGroup's) interests in determining whether to implement the interim measures.[51] In sum, while the Court admitted that the reporting requirements of Article 39 of the DSA might include personal data of third-party advertisers that is protected by Articles 7 and 8 of the Charter, the Court is limited to considering how WebGroup (as the applicant for interim relief) would benefit from interim measures from Article 39.[52]

Next, and just as the Court did in *Amazon* and *Aylo*, it held that WebGroup did not provide sufficient evidence that Article 39's reporting obligations would irreparably harm WebGroup.[53] Specifically, the Court noted that WebGroup failed to prove that "it would be exposed to a risk that it would cease operations if interim measures were not granted" through figures or accounts describing the financial outlook of the company.[54] While the ECJ admitted that Article 39 may cause advertisers to turn to smaller platforms not classified as VLOPs, it concluded that this is not

[48] *See WebGroup*, Case C-620/24, ¶¶ 24, 27, 41.
[49] *See id.* ¶ 49.
[50] *See id.* ¶¶ 43, 47 (emphasis added).
[51] *See id.*
[52] *See id.*
[53] *Id.* ¶¶ 19, 48.
[54] *Id.* ¶ 19.

a significant issue, and that this advertiser "fleeing" does not undermine the goals of DSA.[55] On the contrary, the ECJ asserted that the risk of advertisers fleeing to smaller, non-VLOP platforms supports the goals of the DSA, as VLOPs "pose particular risks and require further public and regulatory supervision."[56] As such, the DSA aims to make large VLOP advertisers mindful of their impact.[57]

Overall, existing case law is discouraging for VLOPs hoping to escape the DSA's Article 39 reporting obligations for two reasons. First, the ECJ does not seem convinced that the advertising reporting requirements violate VLOPs' Charter rights. While the ECJ acknowledged that Article 39 might infringe VLOPs' advertisers (and not the VLOPs') Charter rights, the Court does not heavily weigh these arguments when interim relief is requested by a VLOP.[58] Second, without concrete evidence—such as figures, accounting, and evidence-based expert reports—the ECJ seems reluctant to find that VLOPs would suffer serious and irreparable damage from the advertising reporting requirements of Article 39.[59]

III. Alternative Legal Strategies to Avoid or Obtain Interim Relief from Article 39 Are Likely Ineffective

In light of the existing case law, there are three alternative methods available to VLOPs to get interim relief from Article 39 or to skirt Article 39's requirements. VLOPs could try to: (1) present more concrete evidence of irreparable harm when requesting interim relief from Article 39; (2) convince their advertisers to challenge Article 39; or (3) separate their advertising services from the VLOP so advertisers are not subject to VLOP reporting obligations. These three methods are analyzed below.

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[55] *WebGroup*, Case C-620/24, ¶ 39.
[56] *See id.* ¶¶ 37-39.
[57] *See id.*
[58] *See id.* ¶¶ 43, 47.
[59] *Id.* ¶ 19.

A. VLOPs Could Present More Concrete Evidence of Irreparable Harm in Requests for Interim Relief from Article 39

In the case law so far, the ECJ held that claimants failed to provide strong evidence of irreparable harm. The Court gave several examples of why the evidence in the case law is insufficient, such as inadequate expert opinions that merely state hypothesis without "without assessing their likelihood of occurring,"[60] lack of figures or accounting,[61] and lack of evidence that the VLOP cannot regain market share from the harm it would suffer from Article 39's reporting obligations.[62] Therefore, the first (and most obvious) action VLOPs can take to reattempt to invalidate Article 39 is to bolster their cases with more concrete evidence of harm that the Court indicated was lacking in prior cases.

But it seems unlikely that the Court would find that the harm suffered by a VLOP under Article 39 outweighs the interests of the EU legislature, consumers, and the DSA. This is because, in the cases above, the Court stressed that the DSA is a "central element of the policy developed by the EU legislature in the digital sector."[63] Also, the Court noted the DSA's consideration that VLOPs "play an important role in the digital environment and that they may give rise to risks for society which differ . . . from those attributable to smaller platforms."[64] The Court concluded that a judge hearing an application for interim relief should not call the DSA's reasoning into question.[65] Therefore, it is unlikely that the Court, even if presented with more concrete evidence of irreparable harm, would find that the harm to VLOPs outweighs the policy objectives of the DSA.

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[60] Case C-639/23, Eur. Comm'n v. Amazon Serv. Eur. Sàrl, ECLI:EU:C:2024:277, ¶ 124 (Mar. 27, 2024).
[61] *WebGroup*, Case C-620/24, ¶ 19.
[62] *Id.* ¶ 48.
[63] *Amazon*, Case C-639/23, ¶ 155.
[64] *Id.* ¶ 159.
[65] *See id.*

B. VLOPs Could Convince Advertisers to Bring Charter-Based Challenges to Article 39

Alternatively, VLOPs may be able to indirectly escape Article 39's reporting obligations if they convince their advertisers to challenge Article 39. While the Court in *WebGroup* acknowledged that Article 39's reporting obligations might significantly harm VLOPs' advertisers (and not the VLOPs) and interfere with their rights under the Charter, the Court could not heavily consider these arguments because WebGroup brought the case.[66] Because of this, the Court was limited to considering how Article 39 would affect WebGroup, and it could not heavily consider how Article 39 could harm WebGroup's business partners.[67]

As such, the ECJ may be able to invalidate or grant interim relief from Article 39 if VLOPs' advertisers assert that the reporting obligations of Article 39 interfere with their Charter rights. VLOP advertisers could argue that Article 39 violates their rights to respect for their private life and the protection of their personal data guaranteed under Articles 7 and 8 of the Charter because the repository required by Article 39 would publish their personal information and put them at risk of doxing.[68] But as noted in *WebGroup*, advertisers must provide strong evidence that the public repository required by Article 39 could result in advertisers being directly or indirectly identified from the repository.[69]

Assuming advertisers can prove they are at risk of being identified,[70] prior case law would support their claim that Article 39 should be invalidated because it violates their Charter rights. In *WM v. Luxembourg Business Registers*, for example, individuals facing disclosure of their personal

[66] *See WebGroup*, Case C-620/24, ¶¶ 43, 47.
[67] *See id.*
[68] Charter arts. 7-8; *see* Case C-511/24, Aylo Freesites LTD v. Eur. Comm'n, ECLI:EU:C:2024:719, ¶ 26 (Sep. 6, 2024); *see also WebGroup*, Case C-620/24, ¶ 41.
[69] *See WebGroup*, Case C-620/24, ¶ 49.
[70] *See id.*

information due to a regulation successfully invalidated parts of the regulation based on arguments that such disclosure violates their rights under Articles 7 and 8 of the Charter.[71] In this case, the Court considered the European Parliament's amendment to an anti-money laundering directive, which, similarly to Article 39 of the DSA, required increased disclosure of certain information to the public.[72] In response to the amendment, Luxembourg established a Register of Beneficial Ownership (RBO), a public registry with information about the ownership of registered entities.[73] Two individuals launched a request for Luxembourg Business Registers (LBR)—the RBO's administrator—to prevent the publishing of their companies' ownership information.[74]

When LBR refused the request, the individuals challenged the rejection in court, arguing that the new reporting requirements of the anti-money laundering directive violate their rights under Articles 7 and 8 of the Charter.[75] While the ECJ acknowledged that the RBO database fulfills anti-money laundering objectives, it concluded that making the database available to the public seriously interferes with Articles 7 and 8 of the Charter because it puts individuals facing disclosure of their personal data, wealth status, and investments at risk of abuse.[76] Therefore, the Court invalidated certain provisions of the anti-money laundering directive.[77]

Thus, under this case, VLOP advertisers at risk of having their personal information published by VLOPs hosting their advertisements could launch a request with the Digital Services

[71] Joined Cases C-37/20 & C-601/20, WM v. Lux. Bus. Reg., ECLI:EU:C:2022:912, ¶¶ 1-2, 39-44 (Nov. 22, 2022).
[72] *Id.* ¶¶ 1, 36-37.
[73] Alexis Kerr, *EU's Judicial Consideration of Corporate Transparency Sides with Protecting Privacy: Implications for BC's Lota*, NORTON ROSE FULBRIGHT (Dec. 12, 2022), https://www.nortonrosefulbright.com/en/knowledge/publications/4855a4e7/eus-judicial-consideration-of-corporate-transparency-sides-with-protecting-privacy.
[74] *WM*, Joined Cases C-37/20 & C-601/20, ¶¶ 1-2, 19, 32.
[75] *Id.* ¶¶ 2, 20, 25, 28.
[76] *Id.* ¶¶ 58, 67, 86, 40-44.
[77] *Id.* ¶ 92.

Coordinator (DSC) within their member state (who is "responsible for all matters relating to supervision and enforcement of [the DSA] in that Member State") to prevent the publishing of their information.[78] If the DSC refuses the request, VLOP advertisers could challenge the refusal in court (just like the claimants in *WM v. Luxembourg Business Registers*).[79] Once the advertisers' appeals reach the ECJ, it is possible that the ECJ might then invalidate Article 39 as it invalidated the anti-money laundering amendments in *WM*, which would allow all advertisers and VLOPs to escape Article 39's reporting obligations.[80]

However, because the court in *WM* focused on whether an individual is put at risk of "abuse,"[81] it is possible that the ECJ will only provide some select advertisers with interim relief from Article 39 (instead of invalidating Article 39). Specifically, the Court might limit relief only to advertisers promoting services on adult content platforms like Aylo or WebGroup, as those advertisers face a true risk of harassment or doxing from anti-pornography groups.[82] Advertisers promoting services on less controversial VLOPs like Amazon might not fall into this exception.

C. VLOPs Could Separate Advertising Services to Make Those Services Fall Outside the VLOP Structure

Finally, VLOPs could attempt to escape Article 39's reporting obligations by reorganizing their business structure and separating their advertising services into a separate entity (that amounts to fewer than 45 million users and is not subject to VLOP reporting obligations)[83] from the VLOP. In doing so, VLOPs could argue that advertising is no longer directly part of the VLOP, and that they therefore do not need to report advertisers' information in compliance with Article 39. This

[78] Digital Services Act art. 49(2).
[79] *See WM*, Joined Cases C-37/20 & C-601/20, ¶ 2.
[80] *See id.* ¶ 92.
[81] *See id.* ¶ 43.
[82] *See* Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶ 24 (Feb. 25, 2025); Case C-511/24, Aylo Freesites LTD v. Eur. Comm'n, ECLI:EU:C:2024:719, ¶¶ 26, 38 (Sep. 6, 2024).
[83] Digital Services Act art. 33(1).

method has not yet been tested in case law with the DSA for advertising. However, some ongoing cases indicate that this kind of separation is not possible, or will not be effective, under the DSA.[84] For example, the EU's investigation into Grok's (an AI chatbot offered on X) nonconsensual deepfakes scandal on X only focuses on Grok's availability on X, and not on Grok's separate app or website (which do not qualify as a VLOP).[85] It does not look like X can claim that it is not liable for Grok because Grok is a separate service from X.[86]

Also, because the DSA was enacted to expand on the E-commerce directive (ECD),[87] an earlier regulation about online services (so the DSA could address emerging risks and challenges associated with online platforms),[88] cases based on the ECD where companies claimed that advertising services offered on their platforms were separate from the platform may be instructive. Cases related to the ECD's safe harbor provisions—exempting online platforms from certain kinds of liability—may be especially informative because the DSA largely preserves the ECD's safe harbor exceptions.[89]

For example, Article 14 of the ECD grants immunity for providers' storage of user content as long as they are unaware of the illegality of the content and promptly remove the content once they learn it is illegal.[90] Providers are not immune from posted content if a user of the service is acting under the authority or the control of the provider.[91] Article 6 of the DSA preserves this safe

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[84] *See* Kelvin Chan, *European Union Opens Investigation Into Musk's AI Chatbot Grok Over Sexual Deepfakes*, THE ASSOCIATED PRESS (Jan. 26, 2026), https://apnews.com/article/elon-musk-x-grok-ai-deepfakes-sexual-c1a3039e5aaeb4dd517d995b8b301537.
[85] *Id.*
[86] *See id.*
[87] *See* 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'), 2000 O.J. (L 178) 1 [hereinafter *Directive on Electronic Commerce*].
[88] Digital Services Act pmbl. recital 1.
[89] *See* Directive on Electronic Commerce arts. 12-15; Digital Services Act arts. 4-6, 8.
[90] *See* Directive on Electronic Commerce art. 14.
[91] *Id.*

harbor exception.[92] Therefore, prior cases based on the ECD—wherein a platform tried to argue that they were not responsible for advertising content posted on their platform because they were entitled to safe harbor under Article 14 of the ECD—may be useful for determining whether a VLOP could separate itself from and disclaim responsibility for advertisers on its platform under the DSA's identical safe harbor provisions.

Prior case law suggests that this kind of VLOP/advertiser separation under the DSA's safe harbors is not possible. In *Google France SARL v. Louis Vuitton Malletier*, for example, Louis Vuitton sued Google, claiming that AdWords' (an advertising service Google hosted on its platform) advertising practices led users searching for Louis Vuitton's trademarked terms to sponsored links advertising fake Louis Vuitton products.[93] Google argued that it was entitled to safe harbor under Article 14 of the ECD.[94] In evaluating this argument, the Court considered whether Google played a passive role in providing services for AdWords and lacked knowledge or control over the AdWords' advertisements, such that it would be entitled to safe harbor.[95]

While the ECJ left it up to member states to decide whether Google played a passive role in hosting AdWords' services, it suggested that taking a more active role in hosting advertising services, such as assisting advertisers with advertisement wording, display, and keyword selection, might indicate that the provider is no longer neutral (and is therefore liable for advertisements hosted on the platform).[96] As such, this case suggests that VLOPs that exercise a degree of control over advertisements offered on their platforms (for example, by optimizing the ads, making the search terms, deciding how to present the advertisements, etc.) cannot claim that advertisements

[92] *See* Digital Services Act art. 6.
[93] *See* Joined Cases C-236/08, C-237/08, & C-238/08, Google France SARL v. Louis Vuitton Malletier SA, ECLI:EU:C:2010:159, ¶¶ 23-30, 108 (Mar. 23, 2010).
[94] *See Id.* ¶¶ 108-09.
[95] *Id.* ¶¶ 23, 113-15, 120.
[96] *Id.* ¶¶ 114-20.

are separate from the VLOP and do not need to be reported under Article 39.[97] Because many VLOPs developed AI algorithms that facilitate more targeted advertising (for example, by using algorithmic models to evaluate user preferences in real time)[98] they likely cannot claim they are merely a "neutral" or "passive" host of a separate advertising platform.[99]

And from a practical standpoint, it is unlikely that the ECJ would allow VLOPs to make separation or safe harbor claims for advertising services. If it did, then every VLOP would claim advertising is a separate, non-VLOP service that it has no responsibility for. This would eliminate the need for the DSA. As such, existing case law on the safe harbors of the ECD and the objectives of the DSA indicate that VLOPs that host advertisements on their platforms likely cannot disclaim responsibility for those advertisements.

IV. Conclusion

Overall, existing case law is discouraging for VLOPs hoping to escape or obtain interim relief from Article 39's reporting obligations, as the ECJ set a high, if not impossible, bar for applicants to reach to prove that Article 39 interferes with their Charter rights or would cause irreparable harm to their business. In the case law outlined in Part II above, the ECJ suggested that, at a minimum, VLOPs hoping to obtain interim relief from Article 39 must set forth robust evidence—such as figures, accounting, evidence-based expert reports—that their company will suffer irreparable harm if they publish the advertising information required in Article 39.[100]

For harm to be "irreparable," advertising cannot merely make up a small portion of the revenue for the business.[101] And while the Court acknowledged that Article 39's reporting

[97] *See Google France*, Joined Cases C-236/08, C-237/08, & C-238/08, ¶¶ 114-20.
[98] Dervishov, *supra* note 1.
[99] *See Google France*, Joined Cases C-236/08, C-237/08, & C-238/08, ¶¶ 113-14, 120.
[100] Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶¶ 19, 48 (Feb. 25, 2025); Case C-639/23, Eur. Comm'n v. Amazon Serv. Eur. Sàrl, ECLI:EU:C:2024:277, ¶ 124 (Mar. 27, 2024).
[101] *See Amazon*, Case C-639/23, ¶ 154.

obligations would cause serious pecuniary damage to VLOPs—for example, by causing advertisers to turn to non-VLOP platforms and VLOPs to lose market share[102]—applicants must go a step further and prove that they would have to "cease operations if interim measures [are] not granted."[103] Also, applicants must demonstrate that, as a result of the harm they face from Article 39, they would be unable to regain market share.[104]

Of course, the ECJ's decision to not immediately dismiss VLOP challenges to Article 39 based on lack of evidence, and its acknowledgment that the "application of [a]rticles . . . of the Charter" to the DSA is a "largely new and somewhat complex issue" that may prove that Article 39 of the DSA is illegal might suggest that the Court is open to hearing more challenges to Article 39.[105] But it is more likely that the ECJ merely opened its gates for the first few challenges to Article 39 to send a message: it will be nearly impossible for VLOPs directly challenging Article 39 to obtain interim relief from it or invalidate it.

As outlined in Part III above, VLOPs have several alternative strategies they could attempt to avoid Article 39's reporting obligations. For example, they could present more concrete evidence of irreparable harm, convince their advertisers to challenge Article 39, or try to separate their advertising services from the VLOP platform. However, an analysis of these alternative strategies revealed that VLOPs would likely be unsuccessful in invalidating Article 39. Even if VLOPs or their advertisers can obtain interim relief from Article 39, that interim relief will likely be limited to specific circumstances.

The ECJ's repeated emphasis on the importance of the DSA suggests that, even if VLOPs present the ECJ with more concrete evidence of harm, the ECJ might still find that the EU's

[102] *See WebGroup*, Case C-620/24, ¶¶ 39, 48.
[103] *Amazon*, Case C-639/23, ¶¶ 151-52.
[104] *Id.* ¶ 121.
[105] *See id.* ¶¶ 102, 107.

objectives in implementing the DSA outweigh the harms to VLOPs.[106] Furthermore, because of the importance of the DSA, the ECJ will be sure to avoid allowing VLOPs to separate themselves from advertisers. If the Court sanctions such DSA "loopholes," this would eliminate the need for the DSA altogether.

Even if the ECJ is swayed by an advertiser's (and not a VLOP's) challenge to Article 39, the ECJ may still cite the DSA's objectives as a reason to largely cabin any interim relief from Article 39. For example, the ECJ might limit interim relief for advertisers (which indirectly allows the VLOPs required to post the advertisers' information interim relief from Article 39) to circumstances where advertisers face a true risk of harassment if their information is publicized.[107] Therefore, while the ECJ might allow advertisers and VLOP platforms specializing in adult content to obtain interim relief from Article 39 because publishing adult content advertiser information puts the advertisers at risk of abuse, the ECJ might be less inclined to grant an advertiser that advertises products on a non-controversial VLOP the same relief.

In sum, while the Court acknowledges that VLOPs may face significant harm from the reporting obligations of Article 39, it suggests that the benefits of the DSA—such as mandating more content moderation, advertising transparency, and user control over which targeted content they prefer to interact with—outweigh these harms.[108] As such, while several alternative legal strategies may offer limited promise for VLOPs looking to escape Article 39's reporting obligations, VLOPs are likely better off directing their resources towards becoming compliant with the DSA.

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[106] *See Amazon*, Case C-639/23, ¶¶ 155, 159; Case C-620/24, WebGroup Czech v. Eur. Comm'n, ECLI:EU:C:2025:136, ¶ 39 (Feb. 25, 2025); Case C-511/24, Aylo Freesites LTD v. Eur. Comm'n, ECLI:EU:C:2024:719, ¶ 45 (Sep. 6, 2024).
[107] *See* Joined Cases C-37/20 & C-601/20, WM v. Lux. Bus. Reg., ECLI:EU:C:2022:912, ¶¶ 20, 34, 42-43 (Nov. 22, 2022).
[108] *See Amazon*, Case C-639/23, ¶¶ 151-52; EUROPEAN COMMISSION, *supra* note 8.