ORDER OF THE PRESIDENT OF THE GENERAL COURT

9 February 2024 (*)

(Interim relief – Digital services – Regulation (EU) 2022/1925 – Designation of gatekeepers – Application for suspension of operation of a measure – No urgency)

In Case T-1077/23 R,

Bytedance Ltd, established in George Town (Cayman Islands), represented by E. Batchelor, N. Baeten and M. Frese, lawyers,

applicant,

v

European Commission, represented by O. Gariazzo, M. Mataija, I. Rogalski and C. Sjödin, acting as Agents,

defendant,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

1 By its application based on Articles 278 and 279 TFEU, the applicant, Bytedance Ltd, seeks suspension of operation of Commission Decision C(2023) 6102 final of 5 September 2023 designating Bytedance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1) ('the contested decision').

Background to the dispute and forms of order sought by the parties

2 The applicant is a non-operating holding company established in China in 2012 which, through local subsidiaries, provides the entertainment platform TikTok.

3 On 5 September 2023, by the contested decision, the European Commission designated the applicant as a gatekeeper within the meaning of Article 3(1) of Regulation 2022/1925. To that end, the Commission considered, first, that the applicant met the quantitative thresholds laid down in Article 3(2) of Regulation 2022/1925 and, second, that it had not demonstrated, in accordance with Article 3(5) of that regulation, the existence of circumstances due to which the conditions laid down in Article 3(1) are not satisfied.

4 By application lodged at the Court Registry on 16 November 2023, the applicant brought an action for the annulment of the contested decision.

5 By separate document, lodged at the Court Registry on 20 November 2023, the applicant made the present application for interim measures, in which it claims that the President of the General Court should:

– order that the operation of the contested decision be suspended until the Court rules in the main proceedings, in so far as that decision imposes on it:

– obligations under Articles 5 and 6 of Regulation 2022/1925 in respect of new features, products or services that it may offer or, at the very least, any obligation under Article 5(2) of that regulation affecting the [*confidential*], (1)

– the obligation under Article 15 of Regulation 2022/1925 to submit to the Commission an independently audited description of any techniques for profiling of consumers applied by TikTok and, at the very least, the obligation to disclose publicly any of those techniques, in accordance with Article 15(3) of that regulation;

– if a decision on the application for interim measures cannot be taken before 6 March 2024, order, pursuant to Article 157(2) of the Rules of Procedure of the General Court, suspension of the operation of the contested decision, with immediate effect until a ruling is given on the present application for interim measures, in so far as the contested decision imposes on it (i) obligations under Articles 5 and 6 of Regulation 2022/1925 in respect of new features, products or services that it may offer or, at the very least, any obligation under Article 5(2) of that regulation affecting the [*confidential*], and (ii) the obligation under Article 15 of Regulation 2022/1925 to submit to the Commission an independently audited description of any techniques for profiling of consumers applied by TikTok and, at the very least, the obligation to disclose publicly any of those techniques, in accordance with Article 15(3) of that regulation;

– order the Commission to pay the costs.

6 In its observations on the application for interim measures, which were lodged at the Court Registry on 12 December 2023, the Commission contends that the President of the General Court should:

– dismiss the application for interim measures;

– order the applicant to pay the costs.

Law

General considerations

7 It is apparent from reading Articles 278 and 279 TFEU together with Article 256(1) TFEU that the judge hearing an application for interim measures may, if he or she considers that the circumstances so require, order that the operation of a measure challenged before the General Court be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure. Nevertheless, Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged before the General Court or prescribe any interim measures (order of 19 July 2016, *Belgium* v *Commission*, T-131/16 R, EU:T:2016:427, paragraph 12).

8 The first sentence of Article 156(4) of the Rules of Procedure provides that applications for interim measures are to 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’.

9 The judge hearing an application for interim measures may order suspension of operation of an act and 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 harm to the applicant’s interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. The judge hearing an application for interim measures is also to undertake, when necessary, a weighing of the competing interests (see order of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 21 and the case-law cited).

10 In the context of that overall examination, the judge hearing the application for interim measures enjoys a broad discretion and is free to determine, having regard to the particular circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (see order of 19 July 2012, *Akhras* v *Council*, C-110/12 P(R), not published, EU:C:2012:507, paragraph 23 and the case-law cited).

11 Having regard to the material in the case file, the President of the General Court considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties.

12 In the circumstances of the present case, and without there being any need to rule on the admissibility of the present application for interim measures, it is appropriate to examine first whether the condition relating to urgency is satisfied.

The condition of urgency

13 In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded by the Court. To attain that objective, urgency must generally be assessed in the light of the need for an interim order to avoid serious and irreparable harm to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable harm (see order of 14 January 2016, *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 27 and the case-law cited).

14 It is in the light of those criteria that it is necessary to examine whether the applicant has succeeded in demonstrating urgency.

15 In the present case, in order to demonstrate the serious and irreparable nature of the alleged harm, the applicant claims that, in the absence of interim measures, it will be required to comply with the obligations under Regulation 2022/1925, laid down in Articles 5, 6, 8, 11, 14, 15 and 28 thereof, within six months of designation, that is to say, as from 6 March 2024.

16 The applicant sets out its arguments with regard to the obligations laid down in Article 15 and Article 5 of that regulation.

The alleged irreparable breach of confidentiality

17 The applicant submits that its designation as a gatekeeper will cause it serious and irreparable harm since Article 15 of Regulation 2022/1925 will require it, so far as concerns its product TikTok, to disclose detailed confidential information regarding its commercial strategy. It will have to publish detailed information concerning the way in which it profiles TikTok users. That information goes to the heart of TikTok's business in the European Union and would cause it significant competitive harm compared with a number of competitors which are not gatekeepers and none of which are required to disclose similar information.

18 In particular, the immediate implementation of Article 15 of Regulation 2022/1925 risks causing the disclosure of highly strategic information concerning TikTok's user profiling practices, which is not otherwise in the public domain, and that disclosure would enable TikTok's competitors and other third parties to obtain insight into TikTok's business strategies in a way that would significantly harm its business.

19 Any disclosure of confidential information provides rivals with the opportunity, whether or not they are gatekeepers, to learn how TikTok engages in the profiling of consumers in a way that gives them an unfair competitive advantage. If TikTok's rivals obtain insight into its strategy and techniques, TikTok's competitive position will be weakened and the incumbent operators' ecosystems will be strengthened. In addition, the disclosure of TikTok's trust and safety models may give rise to abuse by third parties and affect user confidence, thereby causing further irreversible competitive harm.

20 The Commission disputes the applicant's arguments.

21 As a preliminary point, it is appropriate to recall the wording of Article 15, entitled 'Obligation of an audit', of Regulation 2022/1925:

'1. Within 6 months after its designation pursuant to Article 3, a gatekeeper shall submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services listed in the designation decision pursuant to Article 3(9). The Commission shall transmit that audited description to the European Data Protection Board.

2. The Commission may adopt an implementing act referred to in Article 46(1), point (g), to develop the methodology and procedure of the audit.

3. The gatekeeper shall make publicly available an overview of the audited description referred to in paragraph 1. In doing so, the gatekeeper shall be entitled to take account of the need to respect its business secrets. The gatekeeper shall update that description and that overview at least annually.'

22 As regards the applicant's arguments, in the first place, it should be observed that the applicant merely claims that the information at issue must be regarded as confidential for the purposes of establishing urgency, without, however, having demonstrated that such a claim satisfies the condition of a prima facie case. It is insufficient, for the purposes of being granted interim measures, to have claimed that the information which is to be disclosed is confidential where such a claim does not satisfy the condition relating to a prima facie case (order of 12 June 2018, *Nexans France and Nexans* v *Commission*, C-65/18 P(R), EU:C:2018:426, paragraphs 21 and 22).

23 In the second place, so far as concerns the alleged irremediable breach of confidentiality resulting from the application of Article 15(1) of Regulation 2022/1925, the fact remains that the applicant has not demonstrated that there is a risk of disclosure of confidential information to its competitors or to third parties. In fact, as the Commission points out, Article 15(1) of Regulation 2022/1925 does not require any publication. That provision only requires that information be communicated to the Commission and, indirectly, to the European Data Protection Board (EDPB).

24 In that regard, it should be borne in mind that Article 36(4) of Regulation 2022/1925 prohibits, in principle, the disclosure of information which the Commission, the competent authorities of the Member States, their officials, servants and other persons working under the supervision of those authorities and any natural or legal person, including auditors and experts appointed pursuant to Article 26(2) of that regulation, have acquired or exchanged pursuant to that regulation and of the kind covered by the obligation of professional secrecy.

25 In the third place, the same is true of the alleged irreparable breach of confidentiality pursuant to Article 15(3) of Regulation 2022/1925.

26 In that connection, first, it must be observed that that provision 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’. An overview is necessarily less detailed and contains less specific information than the document it is supposed to summarise. Leaving aside any redaction based on confidentiality, the preparation of a simple ‘overview’ necessarily means that the gatekeeper may summarise the information contained in the audited description, provided that the objectives of the publication referred to in Article 15(3) of Regulation 2022/1925 are met.

27 Secondly, nor can any real risk to confidentiality be inferred from the applicant’s arguments.

28 The protection of business secrets is expressly guaranteed by Article 15(3) of Regulation 2022/1925. While it is true that that provision does not cover confidential information other than business secrets, the fact remains that the Commission explained, in its observations on the application for interim measures, that that information enjoys the same protection, referring in that regard to the final template for reporting pursuant to Article 15 of Regulation 2022/1925. That template, which was updated on 12 December 2023, provides, in Section 6.1 thereof, that the non-confidential overview provided for in Article 15(3) of Regulation 2022/1925 allows the gatekeeper, where appropriate, to summarise and omit information from the description, including in order to take account of the need to protect business secrets or other confidential information. The expression ‘non-confidential overview’ thus indicates that confidential information of any kind may be omitted from the overview.

29 In addition, the applicant’s argument that the implementation of the obligation imposed by Article 15(3) of Regulation 2022/1925 gives the Commission discretion to decide which parts of the overview are confidential is speculative and hypothetical at this stage and it therefore cannot be accepted to demonstrate urgency in the present proceedings for interim measures.

30 In accordance with Article 15(3) of Regulation 2022/1925, it is for the applicant and not the Commission to draw up and publish the non-confidential version of the overview. While the Commission may impose penalties on gatekeepers in the event of failure to comply with their obligations under Regulation 2022/1925, it will have to follow the procedures specifically laid down for that purpose. Any penalties it will impose where appropriate will be amenable to judicial review.

31 Thirdly, the fact remains that the applicant has not demonstrated, to the requisite legal standard, that the alleged risk of disclosure of confidential information would give rise to serious and irreparable harm.

32 As regards the evidence necessary to that end, in accordance with settled case-law, the party requesting the grant of an interim measure must submit to the judge hearing the application for interim measures specific and precise information, supported by detailed documentation, showing the situation relied on and allowing the consequences that would probably ensue, in the absence of the measure requested, to be assessed. That party is thus required to provide, with supporting documents, information capable of producing an accurate and comprehensive picture of the situation which is claimed to justify the grant of that measure (see order of 19 July 2016, *Belgium* v *Commission*, T-131/16 R, EU:T:2016:427, paragraph 23 and the case-law cited).

33 In the present case, the applicant merely relies on abstract references to confidential information without specifying the nature, content, value and relevance thereof from the point of view of competition, having regard in particular to the fact that some of its competitors are subject to the same disclosure obligations. The judge hearing the application for interim measures is therefore not in a position to assess the serious and irreparable nature of the harm which would result from the disclosure of the confidential information to which the applicant refers.

34 Fourthly, the applicant has failed to demonstrate that the alleged serious and irreparable harm is probable or imminent, as required by the case-law (see, to that effect, order of 27 February 2015, *Spain* v *Commission*, T-826/14 R, EU:T:2015:126, paragraph 33 and the case-law cited).

35 As the Commission observes, the applicant makes hypothetical claims which pre-empt the outcome of confidentiality discussions which have not yet taken place. As mentioned in paragraphs 25, 26 and 28 above, the wording of Article 15(3) of Regulation 2022/1925 and the final template for reporting pursuant to Article 15 of Regulation 2022/1925 do not suggest that the Commission's position on the application of Article 15 could undermine the applicant's interests so far as concerns confidentiality. Any breach of confidentiality could arise only as a result of subsequent decisions of the Commission, which may then be subject to autonomous judicial review. It is impossible to anticipate at this stage whether such decisions could cause harm to the applicant or the manner in which that would occur. It must therefore be concluded that the alleged harm is hypothetical.

The alleged irreversible market changes owing to the barriers to entry and expansion imposed by Regulation 2022/1925

36 The applicant claims that Articles 5 and 6 of Regulation 2022/1925 will prevent it from using its TikTok platform, which required an investment created at huge cost in a context characterised by incumbency advantages from which the platforms of large technology companies benefit, to innovate and offer new features and new products. The applicant claims, by way of example, that it will not be able to use TikTok's data insights to offer new products and services, nor encourage its users to focus on its products, and that it will have to provide access to its service to all its competitors on equal terms, including already well-established technology operators.

37 In particular, the restrictions in Regulation 2022/1925 regarding the combination and cross-use of personal data, laid down in Article 5(2) of that regulation, may severely limit TikTok's ability to rely on existing insights regarding the users of the entertainment platform TikTok to [*confidential*].

38 According to the applicant, [*confidential*]. The only way in which TikTok can [*confidential*].

39 The restrictions imposed by Article 5(2) of Regulation 2022/1925 on designated gatekeepers so far as concerns the combination and cross-use of user data may severely limit [*confidential*] access to that insight. The potential resulting harm to TikTok as [*confidential*], a sector dominated [*confidential*], is significant and potentially 'existential'.

40 The applicant submits that the exact impact of the application of Article 5(2) of Regulation 2022/1925 on [*confidential*] cannot be quantified. That impact depends on several uncertain factors beyond TikTok's control. However, recent developments and TikTok's experience in markets where [*confidential*] show that that impact is likely to be particularly significant. Overall, the applicant takes the view that any consent requirement as provided for in Article 5(2) of Regulation 2022/1925 in connection with [*confidential*] would reduce by [*confidential*] in the European Union in 2028. At the very least, the restrictions laid down in Article 5(2) of that regulation will delay the development of [*confidential*] in a way that will be impossible to quantify or make up in the long term.

41 According to the applicant, its only launchpad for successful entry into the EU market is the TikTok end-user base and related end-user data. If the indications from the Commission's application to other platforms are accurate, Article 5(2) of Regulation 2022/1925 would preclude TikTok from using the only avenue available to it to compete effectively in that emerging sector and would prevent the market from tipping in favour [*confidential*] while these proceedings follow their course.

42 The Commission disputes the applicant's arguments.

43 As a preliminary point, it should be recalled that Article 5(2) of Regulation 2022/1925 provides:

'The gatekeeper shall not do any of the following:

(a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper;

(b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;

(c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and

(d) sign in end users to other services of the gatekeeper in order to combine personal data,

unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.

Where the consent given for the purposes of the first subparagraph has been refused or withdrawn by the end user, the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year.

This paragraph is without prejudice to the possibility for the gatekeeper to rely on Article 6(1), points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable.'

44 So far as concerns the applicant's arguments, it should be noted, in the first place, that the alleged harm is purely hypothetical for the following reasons.

45 First of all, as the Commission submits in its observations on the application for interim measures, the harm alleged by the applicant is based on the assumption that, as a result of the contested decision, the applicant will be required, pursuant to Article 5(2) of Regulation 2022/1925, to request and obtain the consent of users in order to be able to rely on their data to [*confidential*].

46 However, the applicant does not specify the circumstances in which Article 5(2) of Regulation 2022/1925 is supposed to apply. Thus, the applicant's claims do not make it possible to assess whether the TikTok data on which it intends to rely fall within the category of 'personal data' and whether the use which the applicant intends to make of those data must be classified as 'cross-use' within the meaning of Article 5(2)(c) of that regulation. Similarly, the applicant does not explain whether [*confidential*] must be regarded as another service for the purposes of Article 5(2)(b) or (c) of Regulation 2022/1925 and whether [*confidential*] will be 'provided separately' from the online social networking service TikTok or [*confidential*]. Furthermore, the applicant itself appears to be aware of that lack of precision, since it refers in its written pleadings to a 'potential' consent requirement as provided for in Article 5(2) of Regulation 2022/1925 in relation to [*confidential*].

47 Next, it should be noted, as the Commission does, that Article 5(2) of Regulation 2022/1925 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. The applicant appears to assume that all or a significant proportion of TikTok's end users will refuse to give consent to the use of data for the purposes [*confidential*]. However, that assumption is not supported by any evidence concerning the likely behaviour of users. There is nothing to prevent the applicant from taking appropriate measures to inform TikTok's end users of the possible advantages that they might draw from the cross-use or combined use of their data with a view to enhance [*confidential*] or TikTok.

48 Finally, the harm alleged by the applicant is based on the assumption that the applicant's inability to use the data of TikTok users for [*confidential*]. However, that is merely a forecast. Moreover, [*confidential*] may face obstacles other than regulatory constraints. It is apparent from the public information relied on by the Commission that, in the States where [*confidential*], despite the applicant not being subject in those States to obligations similar to those set out in Article 5(2) of Regulation 2022/1925.

49 In the second place, it should be noted that the harm to which the applicant refers is only of a financial nature since it consists essentially of [*confidential*] due to a weakening of its market position.

50 It is well-established case-law that harm of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he or she suffered the harm. Contrary to what the applicant claims, any such harm could be remedied by an action for compensation being brought on the basis of Articles 268 and 340 TFEU (see orders of 28 November 2013, *EMA* v *InterMune UK and Others*, C-390/13 P(R), EU:C:2013:795, paragraph 48 and the case-law cited, and of 28 April 2009, *United*

Phosphorus v *Commission*, T-95/09 R, not published, EU:T:2009:124, paragraph 33 and the case-law cited).

51 However, where the harm referred to is of a financial nature, the interim measures sought are justified where, in the absence of those measures, the party applying for those measures would be in a position that would imperil its financial viability before final judgment is given in the main action, or where its market share would be affected substantially 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 (see order of 12 June 2014, *Commission* v *Rusal Armenal*, C-21/14 P-R, EU:C:2014:1749, paragraph 46 and the case-law cited).

52 In addition, it must be pointed out that, according to settled case-law, harm of a financial nature may be considered to be serious and irreparable if the harm, even when it occurs, cannot be quantified (see order of 28 November 2013, *EMA* v *InterMune UK and Others*, C-390/13 P(R), EU:C:2013:795, paragraph 49 and the case-law cited).

53 In the present case, the applicant has failed to assert, let alone establish, the serious and irreparable nature of the financial harm which it may suffer. It provides practically no figures, from accounts or otherwise. Nor does the applicant demonstrate that it is not possible to make up any delay in [*confidential*] at a later stage.

54 On the contrary, the applicant merely asserts, without substantiating its claims, that the market will tip, during the course of the present proceedings [*confidential*]. However, it should be noted that both [*confidential*]. Furthermore, the applicant has not shown that [*confidential*], would be likely to pre-empt and occupy irreversibly all [*confidential*] before the Court has ruled on the substance of the case. It should be noted in that regard that the court adjudicating on the substance granted the applicant's request that it be given the benefit of an expedited procedure.

55 The applicant also claims that harm resulting from the application of Article 5(2) of Regulation 2022/1925 is irreparable since it is impossible to quantify.

56 Aside from the fact that it tends to confirm the hypothetical nature of the alleged harm, it is difficult to reconcile that assertion with the estimate of harm produced by the applicant [*confidential*]. It follows that the alleged harm, even if it were established, could be the subject of an action for damages which the applicant may bring if it were to succeed in the main proceedings.

57 Lastly, as the Commission submits in its observations on the application for interim measures, in so far as the harm alleged by the applicant is pecuniary in nature, the applicant could have submitted, in accordance with Article 9(1) of Regulation 2022/1925, a request for suspension of the obligations set out in Article 5(2)(b) and (c) of that regulation by demonstrating that compliance with those obligations would jeopardise, due to exceptional circumstances beyond its control, the economic viability of its operations in the European Union. However, as the Commission has confirmed, it has not, to date, received any request to that effect since the contested decision was notified to the applicant.

58 It follows from all of the foregoing that the application for interim measures must be dismissed since the applicant has failed to prove that the condition relating to urgency is satisfied, without it being necessary to rule on whether there is a prima facie case or to carry out a weighing of interests.

59 Under Article 158(5) of the Rules of Procedure, the costs are to be reserved.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 9 February 2024.

V. Di Bucci	M. van der Woude
Registrar	President

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* Language of the case: English.

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1 Confidential information redacted.