Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

3 September 2025*

(Digital services – Regulation (EU) 2022/2065 – Designation of a very large online platform – Plea of illegality – Article 33(1) and (4) of Regulation 2022/2065 – Legal certainty – Equal treatment – Proportionality – Obligation to state reasons)

In Case T-348/23,

**Zalando SE**, established in Berlin (Germany), represented by R. Briske, K. Ewald, L. Schneider and J. Trouet, lawyers,

applicant,

supported by

**Bundesverband E-Commerce und Versandhandel Deutschland eV (bevh)**, established in Berlin, represented by R. van der Hout and V. Lemonnier, lawyers,

intervener,

v

**European Commission**, represented by L. Armati, L. Wildpanner and P.-J. Loewenthal, acting as Agents,

defendant,

supported by

**European Parliament**, represented by U. Rösslein, M. Menegatti and G. Bartram, acting as Agents,

by

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

and by

* Language of the case: German.

**European Information Society Institute o.z. (EISi)**, established at Košice (Slovakia), represented by M. Husovec, lawyer,

interveners,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of K. Kowalik-Bańczyk (Rapporteur), President, E. Buttigieg, G. Hesse, I. Dimitrakopoulos and B. Ricziová, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure,

further to the hearing on 6 March 2025,

gives the following

## Judgment

1 By its action under Article 263 TFEU, the applicant, Zalando SE, seeks annulment of Commission Decision C(2023) 2727 final of 25 April 2023 designating Zalando 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 ('the contested decision').

## Background to the dispute

2 The applicant operates an online shop accessible in particular on the website 'www.zalando.de' and at the corresponding URL addresses bearing top-level domain names in other countries. That shop sells fashion and beauty products. Customers of that shop can purchase products which are either sold directly by the applicant, as part of a sales service known as 'Zalando Retail', or are sold by third-party sellers participating in the 'Partner Programm'.

3 On 17 February 2023, the applicant published, pursuant to Article 24(2) of Regulation (EU) No 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), two numbers on its website 'www.zalando.de', corresponding to the average monthly number of active recipients in the European Union ('the AMAR') of the Zalando platform. First, it indicated that the AMAR of that platform, taken as a whole (namely, including Zalando Retail and the Partner Programm), was 83.341 million. Secondly, it indicated that, in so far as the gross value of the products marketed under the Partner Programm corresponded to 37% of the gross value of all the products marketed on that platform, the AMAR of that platform corresponded to 37% of 83.341 million and therefore amounted to 30.836 million.

4 On 22 February 2023, first, the European Commission communicated to the applicant its preliminary conclusions that the Zalando platform met the conditions for designation as a very large online platform under Article 33(4) of Regulation 2022/2065. More specifically, it considered that account should be taken of all the active recipients of that platform, and not just

of the proportion of the latter corresponding to the proportion of the gross value of sales generated under the Partner Programm. It concluded that the AMAR exceeded the threshold of 45 million referred to in Article 33(1) of that regulation.

5 Secondly, the Commission has informed the Federal Republic of Germany, under Article 33(4) of Regulation 2022/2065, of its intention to designate the Zalando platform as a very large online platform.

6 On 27 February 2023, the Federal Republic of Germany informed the Commission that it had no comments to make.

7 On 1 March 2023, the applicant submitted its observations on the Commission's preliminary conclusions. It pointed out that the Commission should take account of the addressees of the Zalando platform only in so far as that platform constituted an 'online platform' within the meaning of Article 3(i) of Regulation 2022/2065. It noted, in that regard, that the Zalando platform constituted an online platform only as far as the Partner Programm was concerned. It therefore considered that the Commission should only take into account the proportion of addressees corresponding to the proportion of the gross value of sales generated by third-party sellers in the context of the Partner Programm. It concluded that the AMAR of the Zalando platform was 30.836 million and was therefore below the threshold of 45 million referred to in Article 33(1) of that regulation.

8 In the contested decision, the Commission took the view that it was apparent, in particular, from recital 77 and Article 3(b) and (p) of Regulation 2022/2065 that the concept of 'active recipient of an online platform' included all recipients actually using the platform in question, in particular by being exposed to information disseminated on it, and that it was not limited to those who carried out transactions on it. In that respect, it noted that the products marketed directly by the applicant were displayed alongside those marketed by third-party sellers, without it being possible to distinguish between them on the interface. It thus noted that the products marketed by the third-party sellers and by the applicant could be presented on the same web pages and that when the third-party sellers and the applicant marketed the same product, but in different sizes or colours, the identity of the seller did not appear until the recipient of the service chose the size or colour of that product.

9 Consequently, the Commission found that it was not possible to identify, among the recipients of the service, those who were exposed only to information relating to the applicant's products and those who were exposed only to information relating to the products of third-party sellers. It deduced that the applicant had therefore had to calculate the figure of 30.836 million from the figure of 83.341 million and rely on the criterion relating to the proportion of the value of sales generated by third-party sellers. However, it considered that that criterion was not appropriate in so far as it led to the exclusion of recipients of the service who, although they had been exposed to information from third-party sellers, had not ultimately purchased any products or had only purchased products marketed directly by the applicant. It thus noted that the AMAR of the Zalando platform was 83.341 million and not 30.836 million, so that that platform had to be designated as a very large online platform within the meaning of Article 33(1) of Regulation 2022/2065.

## Forms of order sought

10 The applicant and Bundesverband E-Commerce und Versandhandel Deutschland eV (bevh) claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

11 The Commission and the European Parliament contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

12 The Council of the European Union and the European Information Society Institute o.z. (EISi) contend that the Court should dismiss the action.

## Law

13 In support of its action, the applicant raises, in essence, three pleas in law, the first alleging infringement of Article 2(1) and (2), Article 3(g) and (i) and Article 33(1) and (4) of Regulation 2022/2065, the second alleging that Article 33(1) and (4), read in conjunction with Article 24(2) of that regulation, are unlawful, and the third alleging infringement of Article 296 TFEU.

### *The first plea in law, alleging infringement of Article 2(1) and (2), Article 3(g) and (i) and Article 33(1) and (4) of Regulation 2022/2065*

14 In its first plea in law, the applicant claims that the Commission infringed Article 2(1) and (2), Article 3(g) and (i) and Article 33(1) and (4) of Regulation 2022/2065 by wrongly considering that the Zalando platform was a very large online platform. That plea consists of two parts. In the first part, the applicant claims that that platform does not constitute an online platform, a hosting service or an intermediary service. In the second part, it claims that the AMAR of that platform was less than 45 million.

#### *The first part of the first plea in law, alleging that the Zalando platform does not constitute an online platform, a hosting service or an intermediary service*

15 In the first part of the first plea, the applicant, supported by bevh, claims that its Zalando Retail service does not constitute an intermediary service within the meaning of Article 3(g) of Regulation 2022/2065 or, a fortiori, a hosting service or an online platform within the meaning of Article 3(g) and (i) of that regulation. It adds that the sale of products by third-party sellers under the Partner Programm does not fall within the concepts of ‘intermediary service’, ‘hosting service’ or ‘online platform’ either, since it systematically checks and, where necessary, modifies the description and images of the products supplied by those third-party sellers. It concludes that the Commission wrongly designated the Zalando platform as a very large online platform.

16 The Commission, supported by EISi, disputes the applicant’s arguments.

17 Article 2(1) of Regulation 2022/2065 provides that that regulation applies to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment.

18 Article 2(2) of Regulation 2022/2065 provides that that regulation does not apply to any service that is not an intermediary service or to any requirements imposed in respect of services which are not intermediary services, irrespective of whether the service is provided through the use of an intermediary service.

19 Article 3(g) of Regulation 2022/2065 provides that intermediary services correspond to certain information society services, namely certain services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service. That article specifies that intermediary services include, in particular, hosting services consisting of storing information provided by such a recipient at his or her request.

20 Under Article 3(i) of Regulation 2022/2065, an online platform is a hosting service which, at the request of a recipient of the service, stores and disseminates information to the public. However, it is specified that a hosting service is not an online platform where the activity of storing and disseminating information to the public constitutes only 'a minor and purely ancillary feature of another service or minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of [that] Regulation'.

21 It follows that, as stated in recital 13 of Regulation 2022/2065, an online platform within the meaning of that regulation constitutes only a 'subcategory' within the broader category of hosting services, which themselves constitute only a subcategory of intermediary services. Recital 13 of that regulation also specifies that an online platform may be a social network or an online platform enabling consumers to conclude distance contracts with traders (a 'marketplace').

22 Article 33(1) of Regulation 2022/2065 provides that the obligations set out in Section 5 of Chapter III of that regulation apply to online platforms which have an AMAR of 45 million or more and which are designated as very large online platforms under Article 33(4) of Regulation 2022/2065.

23 According to Article 33(4) of Regulation 2022/2065, the Commission is to adopt a decision designating an online platform as a very large online platform where its AMAR is equal to or greater than the number referred to in Article 33(1) of that regulation. It adds that the Commission is to take that decision on the basis of the data communicated by the provider of the online platform concerned, pursuant in particular to Article 24(2) of that regulation, or any other information available to the Commission.

24 Furthermore, Article 3(b) of Regulation 2022/2065 specifies that a recipient of the service is a natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible.

25 In those circumstances, it should be noted that it follows from Regulation 2022/2065 that, in order to designate the Zalando platform as a very large online platform under Article 33(4) of that regulation, the Commission had first to establish that that platform constituted an online

platform within the meaning of Article 3(i) of that regulation and therefore that it constituted a hosting service included among the intermediary services referred to in Article 3(g) of that regulation.

26 In that regard, it is common ground between the parties that the direct sale of products by the applicant in the context of the Zalando Retail service is not a hosting service included among the intermediary services referred to in Regulation 2022/2065, since that service does not store information provided by a recipient of the service, but only information originating from the applicant itself.

27 By contrast, it must be noted that, in the context of the Partner Programm, the applicant uses information from third-party sellers to market their products. In the application, it explains that those sellers provide it with images of the products concerned and that they themselves write the description of those products. The fact that it subsequently verifies that those images and descriptions comply with its commercial requirements and modifies or supplements them accordingly merely implies that it is likely, first, to modify the way in which the information from third-party sellers is presented and, secondly, to disseminate its own information in addition to that from third-party sellers. However, such a circumstance does not call into question the fact that that information comes, at least in part, from those sellers.

28 In the first place, contrary to what the applicant maintains, it is not apparent from Regulation 2022/2065 or even from 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), as amended by that regulation, that the storage and dissemination of information, within the meaning of Article 3(i) of that regulation, exclude the storage and dissemination of information the presentation of which has been modified or supplemented by the provider of the online platform.

29 In that regard, it follows from the very term 'information' used in Regulation 2022/2065 that it refers in particular to photographs supplied by third-party sellers of their products and to the information contained in the descriptions of those products, and not merely to the text of those descriptions as drafted by those sellers. It should also be noted, as Advocate General Saugmandsgaard Øe stated in his Opinion in Joined Cases *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2020:586, footnote 134), that the concept of 'information' must be understood in a broad sense in relation to hosting services within the meaning of Directive 2000/31. Accordingly, it is possible for the applicant to communicate information from third-party sellers while amending the wording of their texts in order to bring them into line with its commercial requirements, the objective of which is limited to 'guaranteeing a unique shopping experience that stands out from those that may be available from competitors'.

30 In addition, it should be noted that data relating to offers of products marketed by third-party sellers constitute 'information', as the Court of Justice has already held with regard to Directive 2000/31 in the judgment of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraphs 110 and 111). As the Commission points out, such a finding is apparent in particular from the definition of 'illegal content' set out in Regulation 2022/2065. More specifically, it follows from Article 3(h) of that regulation, as interpreted in the light of recital 12 thereof, that the concept of 'illegal content' covers information relating to the sale of products or the provision of services which are unlawful, whether that involves in particular the sale of non-conforming or counterfeit products or the sale of products or the provision of services in breach of consumer

protection law. Consequently, the mere listing of a product for the purpose of marketing it is likely to constitute illegal content, particularly where that product is unlawful, and must therefore be regarded as constituting information within the meaning of that regulation. It follows that offers of products by third-party sellers under the Partner Programm must be regarded as information provided by recipients of the service within the meaning of Article 3(i) of that regulation.

31 In the second place, contrary to what the applicant maintains, it is not apparent from recital 18 and Articles 7 and 8 of Regulation 2022/2065, which relate to the liability of providers of intermediary services, that the EU legislature intended to exclude from the concept of 'providers of online platforms' those who carry out checks on information originating from recipients of the service before it is disseminated.

32 Recital 18 of Regulation 2022/2065 states that an intermediary service provider which 'plays an active role of such a kind as to give it knowledge of, or control over' information provided by the recipient of the services should not benefit from the exemptions from liability provided for by that regulation. In that respect, Article 6 of that regulation, entitled 'Hosting', provides for an exemption from liability where the service provider has no actual knowledge of the illegal activity or the illegal content. However, Article 7 of that regulation specifies that intermediary service providers are not deemed to be ineligible for that exemption from liability 'solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content'.

33 Furthermore, Article 8 of Regulation 2022/2065 provides that 'no general obligation to monitor the information which providers of intermediary services transmit or store … shall be imposed on those providers.'

34 Thus, although Regulation 2022/2065 does not require providers of online platforms to monitor the information which they store, it nevertheless expressly envisages the possibility that those providers may, on their own initiative, monitor that information in order to determine their liability. Consequently, that regulation cannot be interpreted as excluding the fact that such providers may carry out such checks.

35 In addition, it should be noted that recital 41 of Regulation 2022/2065 states that 'the due diligence obligations are independent from the question of liability of providers of intermediary services which need therefore to be assessed separately'. Accordingly, the provisions relating to the liability of intermediary service providers, of which Articles 7 and 8 of that regulation form part, cannot be used to determine whether the applicant should be subject to the due diligence obligations provided for in Chapter III of that regulation, including those imposed on providers of very large online platforms under Article 33(1) of the regulation in question. Consequently, the provisions relating to the liability of intermediary service providers cannot be used to determine whether the Zalando platform should be designated as a very large online platform.

36 In the third place, contrary to what the applicant maintains, the Court of Justice's case-law relating to the exemptions from liability from which the providers of hosting services referred to in Article 14 of Directive 2000/31 could benefit does not make it possible to define the concept of 'intermediary service' within the meaning of Article 3(g) of Regulation 2022/2065.

37 Article 14 of Directive 2000/31 provides that a hosting service provider may not be liable for information stored at the request of a recipient of the service, in particular where it has no actual knowledge of the 'illegal activity or information'.

38 In the judgment of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraphs 112 and 113), the Court of Justice held that, for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it was 'essential that the provider be an "intermediary service provider" within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive'. It thus ruled that an internet service provider was not such an intermediary provider when, instead of limiting itself to the neutral provision of that service by means of purely technical and automatic processing of the data supplied by its customers, it played an active role such as to confer on it knowledge or control of those data.

39 However, first, the Court of Justice stated that, in interpreting Article 14 of Directive 2000/31, it had taken account of its context and the objectives of that directive (judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 111). It thus noted that Section 4 of Chapter II of that directive, of which Article 14 forms part, was entitled 'Liability of intermediary service providers' and was intended to restrict the cases in which, in accordance with the national law applicable in the matter, the liability of intermediary service providers could be incurred (judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 107). Consequently, by limiting the concept of 'intermediary service provider', the Court of Justice also intended to limit the scope of the exemptions from liability from which the providers of the services at issue could benefit.

40 Secondly, the Court of Justice referred to a previous judgment of 23 March 2010, *Google France and Google* (C-236/08 to C-238/08, EU:C:2010:159, paragraphs 112 to 116) in order to define the concept of 'intermediary service provider' within the meaning of Section 4 of Chapter II of Directive 2000/31. It follows from that judgment that the interpretation of that concept is based on recital 42 of that directive, according to which 'the exemptions from liability established [in particular in Article 14 of that directive] cover only cases where the activity of the information society service provider is limited to the technical process of operating', it being specified that 'this activity is of a mere technical, automatic and passive nature'.

41 It follows that the Court of Justice's interpretation of the concept of 'intermediary service provider' is limited, as it expressly stated, 'within the meaning intended by the legislature in the context of Section 4 of Chapter II of [Directive 2000/31]' (judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 112) and that that interpretation cannot be used for the purposes of applying Regulation 2022/2065 which, as noted in paragraphs 31 to 35 above, provides for its own liability regime. That is all the more so because Article 89(1) of that regulation deleted Section 4 of Chapter II of Directive 2000/31, which was the subject of the Court of Justice's interpretation.

42 Furthermore, assuming that the applicant intended to argue at the hearing that it followed from recital 19 of Regulation 2022/2065 that the case-law of the Court of Justice relating to Directive 2000/31 should be 'transposed' for the purposes of interpreting that regulation, it should be noted that that recital relates to the differences between three categories of intermediary services, namely those relating to the activities of mere conduit, caching and hosting. Thus, while the EU legislature considered that those three categories of intermediary services should be subject to specific rules, in accordance with the case-law of the Court of Justice, it did not

indicate that the concept of 'intermediary services', which the Court of Justice had defined by referring to recital 42 of Directive 2000/31, should be maintained for the purpose of applying Regulation 2022/2065.

43 In those circumstances, the Zalando platform must be regarded as storing and disseminating information provided by recipients of the service at their request in the context of the Partner Programm.

44 Moreover, it is not alleged that such a storage and distribution activity constitutes only 'a minor and purely ancillary feature of another service or minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service'. On the contrary, the applicant itself states that sales under the Partner Programm account for 37% of the gross value of products marketed on the Zalando platform.

45 In those circumstances, the Zalando platform must be regarded as an online platform within the meaning of Article 3(i) of Regulation 2022/2065 in so far as third-party sellers market products there under the Partner Programm. That is, moreover, what the applicant also stated in its observations on the Commission's preliminary findings, as noted in paragraph 7 above.

46 It follows that the Zalando platform also constitutes an intermediary service and a hosting service within the meaning of Article 3(g)(iii) of Regulation 2022/2065.

47 That finding cannot be called into question by the applicant's other arguments.

48 First, the applicant claims that, in view of the controls which it operates, the information which it receives from third-party sellers in the context of the Partner Programm should be treated in the same way as photographs which it might receive from a photographer whom it has engaged for the purposes of the direct sale of its own products in the context of the Zalando Retail service.

49 However, it is sufficient to note that, in accordance with Article 3(i) and (k) of Regulation 2022/2065, an online platform is a hosting service which stores and disseminates information to the public 'at the request of the recipient of the service who provided the information'. First, as the applicant acknowledged at the hearing, the photographer as described in its example is not a recipient of the Zalando platform, since he or she is not a person who uses that platform within the meaning of Article 3(b) of that regulation. Secondly, the photographs taken by that photographer are not stored and disseminated on that platform at his or her request, but at the initiative of the applicant.

50 Thus, unlike the third-party sellers under the Partner Programm, the photographer in the applicant's example does not use an online platform within the meaning of Article 3(i) of Regulation 2022/2065. It follows that the difference in treatment between photographs taken by a photographer and those supplied by third-party sellers under the Partner Programm results from the very scheme of that regulation and that it is not, therefore, capable of vitiating the contested decision with illegality.

51 Secondly, the applicant submits that it follows from the judgment of 22 December 2022, *Louboutin (Use of an infringing sign on an online marketplace)* (C-148/21 and C-184/21, EU:C:2022:1016) that it 'makes use', under Article 9(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), of the trade marks marketed by third-party sellers under the Partner

Programm. It states, in that regard, that the presentation of the offers is identical in the context of the Zalando Retail service and in the context of the Partner Programm and that it is, consequently, liable for any infringements of trade mark rights resulting from the marketing of the products in the context of the Partner Programm.

52 However, it is sufficient to note that the question whether the applicant makes use of the trade marks marketed by the third-party sellers under the Partner Programm within the meaning of Article 9(2) of Regulation 2017/1001 is irrelevant for the purpose of determining whether or not the Zalando platform constitutes an online platform within the meaning of Article 3(i) of Regulation 2022/2065.

53 It follows that the first part of the first plea in law must be rejected.

*The second part of the first plea in law, alleging that the AMAR of the Zalando platform is less than 45 million*

54 In the second part of the first plea in law, the applicant, supported by bevh, complains that the Commission wrongly took the view that the Zalando platform had an AMAR in excess of 45 million. It states that, in accordance with Article 3(p) of Regulation 2022/2065, the Commission was required to take account only of the active recipients of that platform, namely the recipients of the service who had actually been exposed to information from third-party sellers in the context of the Partner Programm, and not of those who had been exposed to information provided by itself in the context of the Zalando Retail service. It therefore considered that, in the absence of any other means of identifying those active recipients, it was appropriate to determine their number by taking account of the proportion of sales made by third-party sellers and, consequently, to find that the AMAR of that platform amounted to only 30.836 million.

55 The Commission, supported by EISi, disputes the applicant's arguments.

56 Under Article 3(p) of Regulation 2022/2065, an active recipient of an online platform is a recipient of the service that has engaged with an online platform by either requesting the online platform to host information or being exposed to information hosted by the online platform and disseminated through its online interface.

57 Furthermore, it follows from Article 33(1) and (4) of Regulation 2022/2065 that the Commission designates as very large online platforms those online platforms which have an AMAR equal to or greater than 45 million, on the basis, in particular, of the data communicated by the providers of those platforms pursuant to Article 24(2) of that regulation or any other information available to the Commission.

58 Finally, Article 24(2) of Regulation 2022/2065 provides that, by 17 February 2023 at the latest and at least every six months thereafter, providers shall publish for each online platform, in a publicly accessible section of their online interface, information relating to the average monthly number of active recipients of the service in the Union, calculated as an average over the last six months and in accordance with the methodology established in the delegated acts referred to in Article 33(3) of that regulation, where those delegated acts have been adopted.

59 In the present case, first, on 17 February 2023 the applicant published, in a section of its publicly accessible online interface, information relating to the average monthly number of active recipients of the service in the European Union. On the one hand, it stated that the AMAR of the

Zalando platform, taken as a whole (that is to say, including Zalando Retail and the Partner Programm), was 83.341 million. On the other hand, it indicated that, in so far as the gross value of the products marketed as part of the Partner Programm corresponded to 37% of the gross value of all the products marketed on that platform, the AMAR, corresponding to 37% of 83.341 million, was 30.836 million.

60 Secondly, it must be noted, as the Commission has done, that it follows from Article 3(p) of Regulation 2022/2065 that, in order to be classified as an active recipient of an online platform, the recipient of the service must only have been engaged with that platform, in particular by being exposed to the information hosted by the online platform and disseminated via its online interface. Thus, it follows from that provision that the concept of 'active recipient of an online platform' is not limited to persons who have concluded a transaction on the Zalando platform. On the contrary, it includes all persons who have been 'exposed' to the information provided by third-party sellers, including by becoming aware of the name of the products marketed by them, their manufacturer, their description and their photograph.

61 That interpretation of Article 3(p) of Regulation 2022/2065 is further confirmed by recital 77 of that regulation, which states that a recipient may be exposed to information simply by 'viewing it or listening to it' and that 'engagement is not limited to interacting with information by clicking on, commenting, linking, sharing, purchasing or carrying out transactions on an online platform'.

62 In that regard, contrary to the applicant's submission, recital 77 of Regulation 2022/2065 cannot be regarded as irrelevant for the purposes of interpreting Article 3(p) of that regulation. It should be borne in mind that the preamble to an EU act is capable of specifying the content of the provisions of that act and provides elements of interpretation which are capable of clarifying the intention of the author of that act, although it has no binding legal force and cannot be relied on to derogate from the actual provisions of the act concerned or to interpret those provisions in a manner contrary to their wording (see, to that effect, judgment of 21 March 2024, *LEA*, C-10/22, EU:C:2024:254, paragraph 51 and the case-law cited). In the present case, however, it should be noted that that recital merely specifies the content of that article, without derogating from or contradicting it, as the applicant acknowledged at the hearing, since an active recipient may be 'engaged with' and 'exposed to' information, even when he or she does not interact with it.

63 Thirdly, it should be noted that, as the applicant explains, for certain products marketed both by it and by third-party sellers, 'the presentation of the products is always uniform and independent of the identity of the seller in question'. It then states that 'there is only one product details page containing identical information and images' and that the consumer only knows the identity of the seller when he or she selects the specifications of the product in question, such as its size for clothing, for example.

64 In that regard, although the applicant maintains that, 'in the majority of cases', the information relating to products marketed both by it and by third-party sellers comes from it and not from those sellers, it should be noted that it does not maintain that that is the case systematically.

65 Furthermore, it cannot be ruled out that consumers may become aware of information relating to products marketed exclusively by third-party sellers before ultimately choosing to purchase another product sold directly by the applicant.

66 In those circumstances, it must be observed that the number of active addressees, within the meaning of Article 3(p) of Regulation 2022/2065, cannot be determined on the basis of the proportion of sales generated by third-party sellers under the Partner Programm. Consequently, the applicant and bevh are not entitled to consider that the Zalando platform had an AMAR of 30.836 million and, consequently, that that AMAR was below the threshold of 45 million referred to in Article 33(1) of that regulation.

67 That conclusion is not called into question by the applicant's argument that Article 3(p) of Regulation 2022/2065 provides that, in order to be classified as an active recipient of an online platform, he must actually be exposed to information, and not merely that he or she may have been exposed to it. It is sufficient to note that, in accordance with Article 24(2) of that regulation, it was for the applicant itself to identify the persons who had actually been exposed to that information. In so far as the applicant submits that it was unable to distinguish, from among the 83.341 million persons included for the purposes of calculating the AMAR, those who had actually been exposed to information from third-party sellers from those who had not been exposed to that information, the Commission is entitled to consider that all those persons were deemed to have been actually exposed to that information. It follows that the Commission was also entitled to consider that the AMAR of the Zalando platform amounted to 83.341 million.

68 Moreover, in so far as the applicant considers that the contested decision is in breach of the principle of proportionality on the ground that, according to the reasoning used by the Commission in that decision, the Zalando platform was designated as a very large online platform, even on the assumption that '99.99% of the information' disseminated to the public came from it, it is sufficient to note that it does not allege that that assumption actually corresponds to reality. By contrast, as pointed out in paragraph 44 above, it maintains that sales made under the Partner Programm account for 37% of the gross value of the products marketed on the Zalando platform, which suggests that information from third-party sellers accounts for a significant proportion of the information disseminated on the platform.

69 Moreover, the applicant does not explain why the dissemination of information from third-party sellers, which, in its example, represents only 0.01% of the information disseminated on the Zalando platform, does not constitute a minor or purely ancillary feature of that platform within the meaning of Article 3(i) of Regulation 2022/2065.

70 It follows that the second part of the first plea in law and, consequently, that plea in law in its entirety must be rejected.

***The second plea in law, alleging that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is unlawful***

71 In the second plea in law, the applicant alleges that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is unlawful. That plea in law consists of three parts.

72 By the first part, the applicant claims, in essence, that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of legal certainty.

73 By the second and third parts, the applicant claims that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of equal treatment and the principle of proportionality respectively.

*The first part of the second plea in law, alleging that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of legal certainty*

74 In the first part of the second plea, the applicant, supported by bevh, submits that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of legal certainty on the ground that the concept of 'active recipient of an online platform' is not sufficiently precise and that the designation as a very large online platform is therefore not sufficiently foreseeable.

75 The Commission, supported by the Parliament, the Council and EISi, disputes the applicant's arguments.

76 In that regard, it should be borne in mind that the principle of legal certainty requires, inter alia, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 68, and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 46). That principle must be observed all the more strictly in the case of rules liable to have financial consequences (see judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 52 and the case-law cited), as is the case with Regulation 2022/2065.

77 However, the principle of legal certainty does not require that every rule should remove all doubt as to its interpretation. What matters is rather whether the legal measure in question displays such ambiguity as to make it difficult to resolve with sufficient certainty any doubts as to the scope or meaning of the provision (Opinion of Advocate General Kokott in *FCD and FMB*, C-106/14, EU:C:2015:93, point 55; see also, to that effect, judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 31). Thus, the principle of legal certainty cannot be undermined solely on the ground that the EU courts must have recourse to methods of interpretation other than the literal interpretation of a provision of general application (see, to that effect, judgment of 2 September 2021, *Irish Ferries*, C-570/19, EU:C:2021:664, paragraph 167).

78 Furthermore, according to the case-law of the Court of Justice, the fact that a provision does not prescribe a specific method or procedure does not mean that that provision infringes the principle of legal certainty (see judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraph 43 and the case-law cited). In such circumstances, it is for the authority or operators concerned to choose a reliable method capable of ensuring compliance with the requirement arising from that provision (see, to that effect, judgment of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 33).

– *Preliminary considerations*

79 In the present case, it should be noted, as the Commission does, that the concept of 'active recipient of an online platform' is intended to apply to a wide variety of situations. It follows from Article 3(i) and recital 13 of Regulation 2022/2065 that the concept of 'online platform' includes both social networks and marketplaces. The applicant also acknowledges the existence of a 'wide diversity of online platforms' which 'differ … in the nature of the services they offer'. Accordingly, the concept of 'active recipient of an online platform' must be capable of being adapted to different types of online platforms capable of displaying different types of content, including audio and visual content, in different ways, for example, by using a website or an application, or by making access to that content conditional, or not, on prior registration and the opening of an account.

80 In those circumstances, it must be held that a certain degree of uncertainty as to the meaning and scope of the concept of 'active recipient of an online platform' is inherent in that concept (see, to that effect and by analogy, judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 31).

– *The existence of different methods for calculating the AMAR of online platforms*

81 The applicant and bevh claim that, given the vagueness of the concept of 'active recipient of an online platform', the Commission and the providers of online platforms have, in practice, adopted different methods for calculating the AMAR of those platforms.

82 In the first place, the applicant suggests that providers underestimate the AMAR of their online platforms.

83 Thus, first, the applicant alleges that providers of online platforms did not take account of internet protocol addresses (IP addresses) which, although located in the European Union, were not in a Member State in which those providers were active or in which their products could be delivered. In that regard, it adds that Article 33(1) of Regulation 2022/2065 merely refers to recipients active in the European Union, without specifying whether that means those who have their domicile or habitual residence in the European Union or those who have another 'territorial connection' with the latter.

84 In that regard, on the one hand, it should be noted that the applicant's argument appears to be based on the German-language version of Article 2(1) of Regulation 2022/2065, according to which that regulation applies in particular to intermediary services offered to recipients of the service, such as natural persons, who have their '*Sitz*' (domicile) in the European Union. The other language versions of that provision merely require that those recipients of the service be 'situated' in the European Union, without any further details.

85 According to settled case-law, the wording used in one of the language versions of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions (judgments of 21 March 2024, *Cobult*, C-76/23, EU:C:2024:253, paragraph 25, and of 17 January 2023, *Spain* v *Commission*, C-632/20 P, EU:C:2023:28, paragraph 40).

86 In those circumstances, it must be held that only the place where the recipients of the service in question are located when they are exposed to the information hosted by the online platform is relevant, regardless of the place of their domicile or habitual residence. Thus, contrary to what

the applicant maintained at the hearing, it is not apparent from the various language versions of Article 2(1) of Regulation 2022/2065, taken as a whole, that the EU legislature was required to define the concept of 'domicile' for the purposes of the application of that provision. Moreover, it is apparent from paragraph 41 of the application that the applicant had correctly interpreted that provision in order to calculate the AMAR of the Zalando platform in so far as it had taken account only of the place from which the websites and applications relating to that platform had been consulted.

87 On the other hand, none of the language versions of Article 2(1) of Regulation 2022/2065 makes it possible to exclude recipients of the service on the ground that, although they are situated in the European Union, they are in a Member State in which the provider of the online platform is not active or in which its products cannot be delivered.

88 It follows that, as the Commission points out, the conduct described by the applicant for calculating the AMAR of an online platform infringes Regulation 2022/2065. Consequently, the fact, assuming that it has been established, that certain providers of online platforms have engaged in such conduct does not establish a breach of the principle of legal certainty by reason of the vagueness of the concept of 'active recipient of an online platform' in that regulation.

89 Secondly, the applicant claims that providers of online platforms take account only of recipients who are active on their websites, but not on their corresponding applications. Moreover, it claims that providers of online platforms, on which both its content, and that of third-party sellers, is accessible, take account only of 'recipients of third-party content', even where those providers present their own content on the same interface. It also claims that providers of online platforms do not take account of active recipients who do not accept the use of cookies. In addition, it suggests that providers of online platforms that can only be used by registered users, but whose content can be accessed by non-registered users, do not take the latter into account. Finally, it argues that online platform providers treat active recipients as bots when they remain inactive for 30 minutes and that, as a result, those providers do not take them into account for the purposes of calculating the AMAR.

90 However, it should be noted that the conduct thus described by the applicant also infringes Regulation 2022/2065, a fact which the applicant moreover acknowledged at the hearing, and that it is therefore not capable of demonstrating that that regulation is insufficiently precise.

91 First, recital 77 of Regulation 2022/2065 states that a recipient of the service 'should, where possible, be counted only once', that the regulation 'does not require providers of online platforms … to perform specific tracking of individuals online' and that those providers may, where they 'are able' to do so, 'discount automated users such as bots or scrapers without further processing of personal data and tracking'. However, it cannot be inferred from that that those providers could, for the purposes of calculating the AMAR, disregard certain active recipients on the ground that some would refuse to use cookies and that bots should not be counted.

92 On the contrary, it follows from recital 77 of Regulation 2022/2065 that providers of online platforms may be led to count bots when they are unable to exclude them without further processing of personal data or tracking and to count the same active recipient several times, even though the aim is, 'where possible', to count active recipients only once. In certain circumstances, therefore, those providers may be led to overestimate the AMAR of their online platform, in accordance with that regulation. By contrast, the latter does not authorise them to underestimate

that number. As is clear from the case-law referred to in paragraph 78 above, it is up to those providers in particular to choose a reliable method that is likely to ensure compliance with the requirement not to underestimate the number in question.

93 The fact, relied on by the applicant, that Article 33(1) of Regulation 2022/2065 mentions the AMAR and not the average monthly number of consultations of the online platform concerned is not such as to call that conclusion into question. That provision, as interpreted in the light of recital 77 of that regulation, does not lead to all of those consultations being counted, although it may lead to an overestimate of the number of active users of the online platform concerned.

94 Secondly, as pointed out in paragraph 60 above, in order to be classified as an active recipient of an online platform within the meaning of Article 3(p) of Regulation 2022/2065, the recipient of the service need only have engaged with that platform, in particular by being exposed to the information hosted by it and disseminated via its online interface.

95 It follows that a provider of an online platform cannot exclude, for the purposes of calculating the AMAR, recipients of the service who, although they have been exposed to the information hosted by that platform, have not registered with it, have not entered into a transaction on it, have remained inactive for a certain period of time, have refused to use cookies or have accessed the platform from an application.

96 In the second place, the applicant claims that providers of online platforms fear that they will count the same active recipient several times if they rely solely on the number of visits to their online platforms. It adds that they assess the number of such duplicates differently. However, such circumstances are not such as to establish a breach of the principle of legal certainty because of the vagueness of the concept of 'active recipient of an online platform' in Regulation 2022/2065.

97 In the third place, the applicant claims that providers do not publish the AMAR of their online platforms, but merely state that that number is less than 45 million, on the ground that Article 24(2) of Regulation 2022/2065 only requires them to publish 'information on the average monthly active recipients', and not the AMAR as such. However, such a circumstance is not such as to establish a breach of the principle of legal certainty because of the vagueness of the concept of 'active recipient of an online platform' in that regulation.

98 In the fourth place, the applicant claims that, for the purposes of calculating the AMAR, providers of online platforms only count recipients of the service who remain on them for a sufficiently long time. It states that the minimum duration varies between 3 and 45 seconds depending on the provider concerned and that the choice of that duration is likely to have a significant impact on the calculation of the AMAR of their online platforms.

99 In that regard, it is admittedly not disputed that the AMAR of an online platform is likely to vary depending on whether a minimum duration of 3 seconds or 45 seconds is adopted during which recipients of the service must remain on that platform in order to be counted as active recipients.

100 However, recital 77 of Regulation 2022/2065 states that the calculation of the AMAR, and therefore of the number of persons exposed to the information hosted by an online platform, may depend on 'the nature of the service and the way recipients of the service interact with it'. Thus, the fact that that regulation does not lay down, in the abstract and for all online platforms, the minimum duration to be used by the providers of those platforms for the purposes of

calculating the AMAR is not sufficient to establish that it does not make it possible to determine the AMAR of a particular online platform, taking into account the specific characteristics of that platform.

101 In addition, it should be noted, like the Commission did, that the applicant does not allege that it was impossible for it to determine, in the present case, the minimum duration at issue in order to calculate the AMAR of the Zalando platform. On the contrary, it is clear from its arguments that it had adopted a minimum duration of 10 seconds, including with regard to the figure of 83.341 million finally adopted by the Commission. Furthermore, it did not put forward any arguments to show that, having regard to the characteristics of that platform, such a duration did not make it possible to consider that a recipient of the service could have been exposed to information from third-party sellers and that that duration had been chosen arbitrarily for the sole purpose of complying with the obligation to publish referred to in Article 24(2) of Regulation 2022/2065.

102 In the fifth place, bevh submits that certain active recipients are not necessarily exposed to the information hosted by the online platform, so that it must be possible for providers of online platforms to make 'adjustments' in order to calculate their AMAR. It also notes that the Commission accepts that the applicant could make such adjustments in the present case, in particular so as not to count the same active recipient several times or not to count 'unintended uses' of the Zalando platform that do not involve actual exposure to the content hosted on it. However, it argues that Regulation 2022/2065 does not list exhaustively the adjustments that would be permitted. It also complains that the EU legislature defined the concept of 'active recipient of an online platform' by referring to the concept of 'exposure', which is also imprecise.

103 In that regard, first, it follows from Article 3(p) of Regulation 2022/2065 that an active recipient of an online platform is either the person who requests that platform to host information or the person who is exposed to that information via the interface of that platform. It follows that, in order to be counted as an active recipient of the Zalando platform, a consumer in the present case necessarily had to have been exposed to the information hosted on that platform at the request of third-party sellers. Thus, contrary to what bevh maintains, it is not possible to identify, among the active addressees, consumers who have not been exposed to that information. Consequently, if it were possible to 'adjust' the number of consultations or the number of recipients of the service in order to determine the number of consumers to be counted as active recipients of that platform, there was no need to adjust the number of active recipients in order to calculate the AMAR of that platform.

104 Secondly, it should be noted that the adjustments relied on by bevh were intended, in reality, to avoid counting the same active recipient several times or counting persons who were involuntarily on the Zalando platform without actually being exposed to information from third-party sellers. Consequently, and contrary to what bevh maintains, it cannot be inferred that the Commission recognised that active recipients might not be exposed to information from third-party sellers. Finally, bevh does not substantiate its claim that the concept of 'exposure' is not sufficiently precise, in particular in the light of the explanations contained in recital 77 of Regulation 2022/2065.

105 In the sixth place, the applicant claims that the Commission itself used different methods to calculate the AMAR of the Zalando platform. Thus, it points out that, by a decision of 27 September 2023, subsequent to the contested decision, the Commission fixed the amount of the supervisory fee which the applicant had to pay under Article 43 of Regulation 2022/2065. It

notes that the Commission then considered that the AMAR of that platform amounted to only 47.5 million, and not 83.341 million as it had indicated in the contested decision. Similarly, the Commission notes a significant discrepancy between the data published by other providers of very large online platforms under Article 24(2) of that regulation and the data used by the Commission for the purpose of calculating the fee.

106 In that regard, first, it should be noted that Article 43 of Regulation 2022/2065 provides, inter alia, that intermediary service providers designated as very large online platforms must pay a supervisory fee to the Commission. The total amount of that fee corresponds, each year, to the estimated costs that the Commission will have to bear in order to carry out the tasks entrusted to it by that regulation.

107 In addition, Article 4(1) and (2) of Commission Delegated Regulation (EU) 2023/1127 of 2 March 2023 supplementing Regulation 2022/2065 with the detailed methodologies and procedures regarding the supervisory fees charged by the Commission on providers of very large online platforms and very large online search engines (OJ 2023 L 149, p. 16), provides that the basic amount of the supervisory fee is to be allocated among the providers of the intermediary services concerned on the basis, inter alia, of their AMAR. That provision also states that the Commission may base itself in particular on the AMAR published under Article 24(2) of that regulation by the provider of the very large online platform in question or on 'any other information' available on 31 August of the year for which the fee is payable.

108 Accordingly, it should be noted that Article 4 of Regulation 2023/1127 expressly provides for the possibility for the Commission to rely on other sources of information, such as data from third-party undertakings, and thus to use a different AMAR, for the purposes of calculating the basic amount of the supervisory fee, from that published by the applicant on 17 February 2023 under Article 24(2) of that regulation, for the purposes of designating the Zalando platform as a very large online platform. In that regard, it follows from paragraph 67 above that the Commission was justified in retaining, in the contested decision, the AMAR of 83.341 million which had been published by the applicant under that latter provision.

109 Secondly, it is true that the Commission stated, in the decision of 27 September 2023 and in its communication to the applicant prior to that decision and referred to in Article 6(3) of Regulation 2023/1127, that it had preferred to rely on data from third-party undertakings rather than on data from the applicant in order to determine the AMAR of the Zalando platform. It stated that the choice of relying on data from third-party undertakings was justified in order to be able to adopt a common method of calculation for all 19 intermediary services subject to the supervisory fee in 2023 and thus distribute the amount fairly among the providers of those services, in accordance with the principle of equal treatment. At that point, the AMAR of the Zalando platform was reduced to 47.5 million.

110 However, it should be noted that the Commission also acknowledged that the data from third-party undertakings were merely estimates which, by their nature, were less reliable than the data from the platforms themselves, which is not disputed by the applicant. Irrespective of the legality of the decision of 27 September 2023, which is not the subject of the present action, the fact that the Commission relied on the most reliable data to determine the AMAR in the contested decision is not such as to establish that the concept of 'active recipient of an online platform' is not sufficiently precise for the purposes of the principle of legal certainty. It follows

that such a fact is not such as to call into question the legality of the latter decision, particularly as the Commission also adopted an AMAR of more than 45 million in the decision of 27 September 2023.

111 Consequently, the applicant and bevh must be held not to be entitled to maintain that the existence of different methods for calculating the AMAR of platforms is such as to establish that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of legal certainty.

– *The applicant's and bevh's other arguments*

112 In the first place, the applicant points out that Article 33(3) of Regulation 2022/2065 provides that 'the Commission may adopt delegated acts … to supplement the provisions of [that] regulation by laying down the methodology for calculating the [AMAR] for the purposes of [Article 33(1)] and Article 24(2) [of that regulation], ensuring that the methodology takes account of market and technological developments.'

113 However, it should be borne in mind that it is not necessary for a legislative act itself to provide details of a technical nature, since it is open to the EU legislature to have recourse to a general legal framework which is, if necessary, to be made more precise at a later date (judgment of 4 October 2024, *Lithuania and Others* v *Parliament and Council (Mobility package)*, C-541/20 to C-555/20, EU:C:2024:818, paragraph 160). Moreover, as is clear from paragraph 78 above, in the absence of such details, it may be for the operators concerned to choose a reliable method capable of ensuring compliance with the requirements arising from that legislative act.

114 Consequently, contrary to the applicant's submission, the fact that Regulation 2022/2065 provides for the possibility for the Commission to adopt a delegated act cannot suffice to establish that, in the absence of such a delegated act, the ambiguity of that regulation would be such that its application would infringe the principle of legal certainty.

115 Furthermore, in so far as bevh pleads the illegality of Article 33(3) of Regulation 2022/2065 on the ground that that provision provides, in breach of Article 290(1) TFEU, for the adoption of a delegated act which does not confine itself to supplementing or amending non-essential elements of that regulation, it is sufficient to point out that only those provisions of an act of general application which form the basis of the contested individual decision or which have a direct legal link with that decision may validly be the subject of a plea of illegality, but that a plea of illegality directed against an act of general application of which that decision does not constitute an implementing measure is inadmissible (see 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, paragraphs 69 and 70 and the case-law cited).

116 It must be held that Article 33(3) of Regulation 2022/2065 has no direct legal link with the contested decision. Since the Commission did not adopt a delegated act, as permitted by that provision, it was unable to apply the method which would have appeared in that act for the purposes of calculating the AMAR of the Zalando platform. Consequently, such a plea of illegality must be dismissed as inadmissible, irrespective of the lateness alleged by the Commission.

117 In the second place, the applicant notes that 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) includes an annex intended to specify the method of identifying and calculating 'active end users'. However, that circumstance is irrelevant for the purpose of determining whether Regulation 2022/2065 defines with sufficient precision the concept of 'active recipient of an online platform' in the light of the principle of legal certainty.

118 In those circumstances, it must be held that neither the applicant nor bevh has provided any information enabling it to consider that the details set out in Regulation 2022/2065 were insufficient to determine, taking account of all the circumstances of the case and in particular the specific features of the platform at issue, the number of persons who have been exposed to the information hosted and disseminated by that platform and to calculate an average over six months.

119 It follows that the applicant and bevh have no basis for claiming that Article 33(1) and (4) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of legal certainty.

120 Consequently, the first part of the second plea in law must be rejected.

*The second part of the second plea in law, alleging that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of equal treatment*

121 In the second part of the second plea in law, the applicant, supported by bevh, takes the view that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of equal treatment on the ground that it treats comparable online platforms differently and different online platforms in the same way.

122 The Commission, supported by the Parliament, the Council and EISi, disputes the applicant's arguments.

123 The principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'), requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 23 November 2023, *Seven.One Entertainment Group*, C-260/22, EU:C:2023:900, paragraph 45 and the case-law cited). According to settled case-law, in order to be able to determine whether or not there is such a breach of that principle, it is necessary, in particular, to refer to the subject matter and aim pursued by the provision alleged to have been in breach of it (see judgment of 6 September 2018, *Piessevaux* v *Council*, C-454/17 P, not published, EU:C:2018:680, paragraph 79 and the case-law cited).

124 Moreover, in an area in which the EU legislature has a broad discretion, there is a breach of the principle of equal treatment only where the legislature makes a distinction which is arbitrary or manifestly inappropriate in relation to the objective pursued by the rules in question (see, to that effect, judgments of 14 July 2022, *Commission* v *VW and Others*, C-116/21 P to C-118/21 P, C-138/21 P and C-139/21 P, EU:C:2022:557, paragraph 127, and of 9 March 2023, *Grossetête* v *Parliament*, C-714/21 P, not published, EU:C:2023:187, paragraph 48).

125 In the present case, in the first place, the applicant claims that the insufficiently precise nature of the concept of 'active recipient of an online platform' leads online platform providers and the Commission to determine the AMAR differently depending on the online platform concerned.

126 However, on the one hand, as is apparent from paragraphs 118 and 119 above, neither the applicant nor bevh has established that the details contained in Regulation 2022/2065 were insufficient to be able to determine the AMAR of an online platform. On the other hand, the applicant has not identified any online platform, comparable to the Zalando platform, which has not been designated by the Commission as a very large online platform because of the alleged ambiguity of that regulation.

127 In the second place, the applicant claims that online platform providers may never be obliged to provide information about the AMAR of their online platforms to the Commission or to the digital services coordinator of the Member State of establishment under Article 24(3) of Regulation 2022/2065 if they do not request it. The Court found that providers of online platforms enjoy a competitive advantage when their online platforms are not designated as very large online platforms. It concludes that such providers could benefit from such an advantage if they intentionally or unintentionally underestimate the number of active recipients or if they fail to comply with their obligation to publish information relating to the AMAR under Article 24(2) of that regulation. In that regard, it points out that, while the EU legislature has provided for the possibility for the Commission to impose fines on providers whose online platforms have not yet been designated as very large online platforms because of an infringement of that regulation, it has not provided for a 'compensatory payment' to offset the 'competitive disadvantage' suffered by providers whose platforms have already been designated as very large online platforms.

128 However, it should be noted that Article 24(2) of Regulation 2022/2065 requires providers to publish, for each of their online platforms, information relating to the average monthly number of active recipients of those platforms, no later than 17 February 2023 and at least every six months thereafter.

129 First, the fact, even if it were established, that providers of online platforms have infringed Article 24(2) of Regulation 2022/2065 is not such as to establish that Article 33(1) of that regulation is in breach of the principle of equal treatment. Furthermore, the applicant does not explain why the fine provided for in Article 74 of that regulation, which the Commission is liable to impose in the event of such an infringement, is insufficient to compensate for the alleged 'competitive disadvantage' suffered by the other providers who, having complied with Article 24(2) of the regulation, have seen their platforms designated as very large online platforms.

130 Secondly, while it is true that, under Article 24(3) of Regulation 2022/2065, the Commission may require providers of online platforms to provide it with information in addition to that referred to in Article 24(2) of that regulation, the mere fact that that provision confers on the Commission a margin of discretion in that regard does not mean that the Commission will necessarily exercise its discretion in breach of the principle of equal treatment.

131 In the third place, the applicant points out that Article 33(1) of Regulation 2022/2065 takes account only of the AMAR for the purposes of designation as very large online platforms and not of the nature of the online platforms concerned or the risks to society which they may give rise to. It argues that, unlike social networks, marketplaces should not be subject to the additional obligations imposed on very large online platforms under that provision. Moreover, it considers that the Zalando platform, on which only third-party sellers selected by it can market products, is

less dangerous than platforms on which sellers are anonymous or are not subject to a selection process. Moreover, it notes that no counterfeit products have so far been offered on the Zalando platform.

132 In that regard, it should be noted that Article 34(1) of Regulation 2022/2065 contains a list of systemic risks which may be caused by very large online platforms.

133 More specifically, on the one hand, Article 34(1)(a) of Regulation 2022/2065 provides that systemic risks include the dissemination of illegal content via very large online platforms. In accordance with Article 3(h) of that regulation, these are more specifically risks relating to the dissemination of 'any information that, in itself or in relation to an activity, including the sale of products …, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law'.

134 On the other hand, Article 34(1)(b) of Regulation 2022/2065 states that systemic risks include 'any actual or foreseeable negative effects for the exercise of fundamental rights, in particular … to a high-level of consumer protection enshrined in Article 38 of the Charter'.

135 First, the applicant does not dispute that marketplaces, in particular those on which sellers have not been subject to a selection process, are capable of facilitating the marketing of dangerous or illegal products. Furthermore, the fact that marketplace providers such as the applicant have, to date, carefully selected the sellers operating on their marketplaces is not such as to rule out the possibility that those marketplaces may, in future, permit the marketing of such products to a significant part of the EU population, provided that their AMAR remains equal to or greater than 45 million.

136 In those circumstances, it must be held that marketplaces as a whole are likely to disseminate content which is unlawful in relation to the sale of products and to have an adverse effect on the fundamental right to a high level of consumer protection enshrined in Article 38 of the Charter.

137 It follows that the EU legislature did not commit a manifest error of assessment in considering that marketplaces were likely to give rise to systemic risks within the meaning of Article 34(1) of Regulation 2022/2065. Moreover, contrary to bevh's submission, the fact, assuming that it is established, that that provision also refers to risks which are not likely to be generated by marketplaces is not such as to establish that the latter do not generate any of the risks referred to in that provision.

138 Secondly, it should be noted that the fact, relied on by the applicant, that certain online platforms, including social networks, are likely to give rise to more risks for society than marketplaces is not such as to establish that the obligations imposed on the latter are manifestly inadequate to achieve the objectives of Regulation 2022/2065.

139 In particular, it should be noted that the applicant does not put forward any arguments to show that the additional obligations imposed by Article 33(1) of Regulation 2022/2065 on providers of marketplaces designated as very large online platforms, and which are set out in Articles 34 to 43 of that regulation, are manifestly inadequate to reduce the systemic risks generated by those marketplaces.

140 Admittedly, bevh argues that Articles 34 to 43 of Regulation 2022/2065 do not increase consumer protection. However, that argument must be dismissed as unfounded. As is clear from paragraphs 132 to 134 above, the additional obligations laid down by those provisions do not relate solely to consumer protection but also pursue other objectives, including that of combating the dissemination of illegal content. Thus, bevh's argument is not capable of establishing that those obligations would be manifestly inadequate to reduce at least some of the systemic risks generated by marketplaces.

141 In addition, it should be noted, in any event, that bevh has not adduced any evidence to suggest that Articles 34 to 43 of Regulation 2022/2065 do not contribute to consumer protection. It does not substantiate its claim that Articles 34 to 37 of that regulation are insufficiently precise to protect consumers. Nor does it explain why Article 38 of that regulation, which provides for the possibility for consumers to choose a recommendation system that is not based on profiling, is not such as to protect them. While bevh argues that Articles 39 to 42 of that regulation contribute to the understanding of systemic risks and therefore do not protect consumers 'directly', it does not rule out the possibility that they may, at the very least, enable consumers to be protected 'indirectly' in so far as understanding those risks may be a preliminary stage in preventing them. Finally, Article 43 of the regulation in question, in so far as it enables the Commission to have the resources necessary for the purpose of implementing that regulation, is necessarily such as to protect consumers.

142 Thirdly, assuming that the applicant intends to criticise the EU legislature for not having adopted 'qualitative' criteria for the purposes of designating very large online platforms, it should be noted that the Commission had indicated, in the impact assessment annexed to the proposal for a regulation, that it had envisaged criteria other than the AMAR criterion alone, including 'qualitative' criteria taking account of the societal and economic effect of the online platform in question. However, the Commission pointed out that taking account of such qualitative criteria would require a case-by-case approach likely to give rise to legal uncertainty and a long and costly process for designating very large online platforms.

143 The applicant does not dispute that the Commission's taking into account of the nature of online platforms and the risks to which they may give rise for the purposes of their designation as very large online platforms would make such a process long and costly. In those circumstances, it is sufficient to find that the 'qualitative' criteria relied on by the applicant were such as to delay the implementation of the obligations referred to in Article 33(1) of Regulation 2022/2065 and to deprive the Commission of some of the resources necessary to carry out the tasks entrusted to it by that regulation. Consequently, it must be considered that such criteria do not make it possible to achieve those objectives as effectively as the AMAR criterion.

144 In those circumstances, it should be noted that the AMAR criterion for the purposes of designation as a very large online platform does not appear manifestly inadequate for achieving the objectives of Regulation 2022/2065.

145 That conclusion is not called into question by the fact, relied on by bevh, that, during a meeting of a group of experts in electronic commerce held on 14 June 2018, representatives of several Member States stated, 'in general terms', that 'large platforms [were] rather active and willing to collaborate' with the authorities regarding the distribution of illegal content online and that the representative of one Member State indicated that 'small hosting service providers' were, conversely, 'generally' not willing to collaborate with the authorities.

146 That is because, first, the comments made by the representatives of the Member States who attended the meeting on 14 June 2018 related to hosting services in general, and not specifically to marketplaces. Secondly, the fact that some businesses wish to collaborate more with the authorities to combat the dissemination of illegal content cannot be such as to prevent the EU legislature from subjecting them to obligations to manage the risks associated with the dissemination of such content under the principle of equal treatment. That is all the more the case where, because of the high AMAR of their online platforms, the latter are likely to expose a significant part of the EU population to such content.

147 In those circumstances, it must be held that the applicant and bevh have no basis for claiming that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of equal treatment.

148 Consequently, the second part of the second plea in law must be rejected.

*The third part of the second plea in law, alleging that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of proportionality*

149 In the third part of the second plea in law, the applicant, supported by bevh, claims that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of proportionality.

150 The Commission, supported by the Parliament, the Council and EISi, disputes the applicant's arguments.

151 In that regard, it should be noted that the principle of proportionality, which forms part of the general principles of EU law, requires that acts of the EU institutions should not exceed the limits of what is appropriate and necessary to achieve the legitimate objectives pursued by the legislation in question, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55 and the case-law cited).

152 However, as regards judicial review of the conditions for the implementation of the principle of proportionality, having regard to the wide discretion enjoyed by the EU legislature in areas in which its action involves political, economic and social choices, only the manifest inappropriateness of a measure adopted in those areas, in relation to the objective which the competent institution intends to pursue, is capable of affecting the legality of such a measure. What must be ascertained is, therefore, not whether the measure adopted by the EU legislature was the only one or the best one possible but whether it was manifestly inappropriate (see, to that effect, judgments of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 52, and of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 56).

153 In the present case, first, the applicant considers, in essence, that the AMAR is not an appropriate criterion for identifying the most dangerous online platforms.

154 However, it follows from paragraphs 135 to 137 above that marketplaces may be used to facilitate the marketing of dangerous or illegal products to a significant part of the EU population provided that their AMAR remains equal to or greater than 45 million.

155 The applicant admittedly claims, in that regard, that it is apparent from the transparency reports published under Articles 15, 24 and 42 of Regulation 2022/2065 that the Zalando platform was the subject of a significantly lower number of notifications under Article 16 of that regulation concerning potentially illegal content than the Amazon Store platform was the subject of during certain months of 2023. It notes that, unlike the Amazon Store platform, information from recipients of the service is checked before being made available to the public on the Zalando platform.

156 However, as is apparent from paragraph 135 above, the fact, even assuming that it is established, that the applicant has, until now, effectively controlled the information before it is disseminated to the public on its platform is not such as to exclude the possibility that, in the future, that platform may expose a significant part of the EU population to illegal content, provided that its AMAR remains equal to or greater than 45 million. Consequently, the AMAR criterion does not appear to be manifestly inappropriate for achieving the objectives of Regulation 2022/2065.

157 Furthermore, bevh submits that the EU legislature could have adopted 'qualitative' criteria, as it did in other areas of EU law, including product conformity or cybersecurity, or adopted a simple presumption system, as it did in Regulation 2022/1925. However, as is clear from paragraph 152 above, the mere fact that the EU legislature could have adopted other criteria is irrelevant for the purpose of determining whether the AMAR criterion, finally adopted by the latter, was manifestly inappropriate for achieving the objectives of Regulation 2022/2065. In addition, it follows from paragraphs 142 and 143 above that the 'qualitative' criteria, such as those relied on by bevh, did not, in any event, make it possible to achieve those objectives as effectively as the AMAR criterion.

158 Secondly, the applicant claims that online platforms and sellers active in the field of online commerce were subject to obligations, prior to the entry into force of Regulation 2022/2065, which already made it possible to achieve the objectives set by that regulation. It concludes that the obligations imposed by that regulation are unnecessary.

159 However, it should be noted that the applicant does not substantiate its argument. Moreover, as is apparent from paragraph 152 above, the question is not whether the law applicable before the entry into force of Regulation 2022/2065 was sufficient to achieve the objectives of that regulation, but whether the new obligations laid down by that regulation, in accordance with Article 33(1) thereof, would be manifestly inappropriate or less effective in achieving those objectives. It follows that such an argument is not, in any event, capable of establishing a breach of the principle of proportionality.

160 Thirdly, the applicant considers that it is disproportionate to take account of all the recipients of the service in order to determine the AMAR of an online platform, including, as in the present case, where those recipients have not actually been exposed to information from third-party sellers.

161 In that regard, it should be noted that, as is apparent from paragraph 67 above, it was open to the applicant to determine the AMAR of the Zalando platform by excluding the recipients of the service who had not actually been exposed to information from third-party sellers, in accordance with Regulation 2022/2065. However, it should be borne in mind that, for the reasons set out in

paragraphs 63 to 66 above, the figure of 30.836 million which it relies on does not correspond to the number of active recipients who had actually been exposed to information from third-party sellers.

162 Moreover, in so far as bevh argues that the obligations laid down in Articles 34 to 37 of Regulation 2022/2065 'go beyond the regulations concerning the "off-line environment"', it is sufficient to note that it does not explain why such a comparison with 'physical' shops would make it possible to establish that the AMAR criterion is in breach of the principle of proportionality.

163 In those circumstances, it must be held that the applicant and bevh have no basis for claiming that Article 33(1) of Regulation 2022/2065, read in conjunction with Article 24(2) of that regulation, is in breach of the principle of proportionality.

164 Furthermore, assuming that the applicant intends to deduce from the breach of the principle of proportionality an infringement of the freedom to conduct a business, the free movement of goods and the freedom to provide services, it is sufficient to state that the existence of such an infringement cannot be established since it has not established the breach of that principle. Finally, in so far as bevh also intends to rely on an infringement of the freedom to conduct a business, it is sufficient to note that its complaint is not accompanied by sufficient details to assess its merits.

165 Consequently, the third part of the second plea in law must be rejected and, consequently, that plea in law must be rejected in its entirety, without there being any need to rule on its admissibility, which is contested by the Commission.

### *The third plea in law, alleging infringement of Article 296 TFEU*

166 In the third plea in law, the applicant, supported by bevh, complains that the Commission infringed Article 296 TFEU and, consequently, failed to observe an essential procedural requirement on the ground that the contested decision was not sufficiently reasoned. More specifically, first, it complains that the Commission failed to explain why it considered that the Zalando platform was a service covered by Article 3(g)(iii) and (i) of Regulation 2022/2065. Secondly, it claims that the Commission did not explain why it had taken account of 'pure direct sales recipients'.

167 The Commission disputes the applicant's arguments.

168 In that regard, it should be borne in mind that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. Thus, the requirement to state reasons depends on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, inasmuch as the question of whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval*

*and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; of 22 June 2004, *Portugal* v *Commission*, C-42/01, EU:C:2004:379, paragraph 66; and of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79).

169 In the present case, first, it should be noted, following the Commission, that the latter had indicated, in the first recital of the contested decision, that the Zalando platform stored and disseminated information to the public at the request of recipients of the service.

170 Furthermore, it should be noted that, in the contested decision, the Commission referred to the context in which that decision was adopted. It is apparent from that context that the applicant had understood, prior to the adoption of that decision, the reason why the Zalando platform constituted an online platform.

171 On the one hand, in recital 2 of the contested decision, the Commission stated that the applicant had published information relating to the average monthly active recipients of the Zalando platform under Article 24(2) of Regulation 2022/2065, thereby confirming that it recognised that that platform constituted an online platform covered by that provision.

172 On the other hand, the Commission stated, in essence, in recital 5 of the contested decision, that the applicant acknowledged, in its observations on the Commission's preliminary conclusions, that the Zalando platform constituted an online platform within the meaning of Article 3(i) of Regulation 2022/2065, as far as the Partner Programm was concerned. The Commission thus noted that, in that regard, the applicant merely contested the fact that recipients of the service were taken into account in the context of the Zalando Retail service for the purposes of designation as a very large online platform.

173 In those circumstances, it must be held that, having regard to the context in which the contested decision was adopted, as recalled in that decision, the Commission made sufficiently clear and unequivocal the reason why it considered that the Zalando platform constituted an online platform within the meaning of Article 3(i) of Regulation 2022/2065 and, consequently, a hosting service within the meaning of Article 3(g)(iii) of that regulation.

174 Secondly, it follows from paragraphs 8 and 9 above that the Commission explained in the contested decision that recipients of the service who purchased products under the Zalando Retail service might have been previously exposed to information from third-party sellers under the Partner Programm. It thus made sufficiently clear and unequivocal the reason why the AMAR of the Zalando platform could not be determined on the basis of the value of the sales generated by those third-party sellers.

175 It follows that the applicant and bevh are not entitled to claim that the contested decision is vitiated by a failure to state reasons under Article 296 TFEU or, consequently, that the Commission failed to observe an essential procedural requirement.

176 In those circumstances, the third plea in law must be rejected and, consequently, the action must be dismissed in its entirety.

## Costs

177 Under Article 134(1) of the Rules of Procedure of the General Court, 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 applicant has been unsuccessful, it must be ordered to pay the Commission's costs in accordance with the form of order sought by the Commission.

178 In addition, according to Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Parliament and the Council shall therefore bear their own costs.

179 Likewise, pursuant to Article 138(3) of the Rules of Procedure, EISi and bevh shall bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Zalando SE to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders the European Parliament, the Council of the European Union, the European Information Society Institute o.z. (EISi) and Bundesverband E-Commerce und Versandhandel Deutschland eV (bevh) to bear their own costs.**

Kowalik-Bańczyk Buttigieg Hesse

Dimitrakopoulos Ricziová

Delivered in open court in Luxembourg on 3 September 2025.

[Signatures]