GENERAL COURT

Judgment of the General Court of 12 July 2023 — Multiópticas v EUIPO — Nike Innovate (Representation of two black geometrical shapes)

(Case T-487/22) ([1])

(EU trade mark — Opposition proceedings — Application for EU figurative mark representing two black geometrical shapes — Earlier EU and national figurative marks mó — Relative ground for refusal — No damage to reputation — Non-similarity of the signs — Article 8(5) of Regulation (EU) 2017/1001)

(2023/C 314/12)

Language of the case: English

Parties

Applicant: Multiópticas S. Coop. (Madrid, Spain) (represented by: M. López Camba and A. Lyubomirova Geleva, lawyers)

Defendant: European Union Intellectual Property Office (represented by: E. Markakis, acting as Agent)

Other party to the proceedings before the Board of Appeal of EUIPO: Nike Innovate CV (Beaverton, Oregon, United States)

Re:

By its action under Article 263 TFEU, the applicant seeks the annulment of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 2 June 2022 (Case R 1762/2021-4)

Operative part of the judgment

The Court:

1. Dismisses the action;

2. Orders Multiópticas S. Coop. and the European Union Intellectual Property Office (EUIPO) to bear their own costs.

([1]) OJ C 368, 26.9.2022.

Action brought on 27 June 2023 — Zalando v Commission

(Case T-348/23)

(2023/C 314/13)

Language of the case: German

Parties

Applicant: Zalando SE (Berlin, Germany) (represented by: R. Briske, K. Ewald, L. Schneider und J. Trouet, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul the decision of the European Commission of 25 April 2023, C(2023) 2727 final;

— order the defendant to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on the following pleas in law.

1. First plea in law, alleging misapplication of the scope of Regulation (EU) 2022/2065 ([1]) (Digital Services Act; 'the DSA') and an error in law in the application of the DSA

The applicant is of the opinion that the DSA is not applicable to it, as it is already not an intermediary service and consequently neither a hosting service nor an online platform within the meaning of the DSA. It lacks the necessary provision of *third-party* content. The applicant provides its *own* content through the sale of its articles and has also fully adopted the content of its partners through a strict onboarding process.

Even if part of the service qualified as an online platform, it did not reach the threshold of 45 million monthly active users. The defendant disregards the hybrid nature of the service: not all users of the service are automatically exposed to content provided by third parties, but a precise differentiation is required.

The defendant relied on erroneous criteria, such as the alleged non-identifiability of the provider. It fails to recognise that this is not a decisive characteristic, but rather, taking into account EU law evaluations, supports the assumption of the existence of *own* content.

2. Second plea in law, alleging that Article 33(1) and (4) in conjunction with Article 24(2) of the DSA are vague

The specifications for calculating the threshold value are too imprecise and infringe the principle of certainty under EU law. Article 33(1) of the DSA is therefore not a legal basis in conformity with Union law. Recital 77 of the DSA is insufficient for the determinability of the calculation method due to its legal nature and its incomplete content, as too many essential questions are left open. It describes only *who* should be covered, but not *how*. In the end, the criteria could not be sufficiently determined without the adoption of a delegated act. The inadequacy is made clear by a comparison with Regulation (EU) 2022/1925 ([2]) (Digital Markets Act): the latter is partially based on the same threshold, but goes further and even specifies the calculation criteria in a separate annex. However, it also lacks sufficiently concrete calculatory specifications.

3. Third plea in law, alleging infringement of the general principle of equality

The indeterminacy of the calculation method infringes the first sentence of Article 2 TEU and Article 20 of the Charter of Fundamental Rights of the European Union, as this leads to a (de facto) unequal treatment of providers of online platforms. The providers fill the gap, which is created in particular by the fact that tracking of individual users is prohibited, with inconsistent and non-transparent methods. At the same time, the DSA does not provide for a mandatory control of all calculation methods, but only ad-hoc checks. This does not create a fair *level playing field* for competing service providers. Moreover, the DSA infringes the principle of equal treatment by applying a blanket threshold to all online platforms, regardless of the risk-based criteria of the respective services.

4. Fourth plea in law, alleging infringement of the principle of proportionality

The application of the DSA disproportionately interferes with the applicant's fundamental freedoms and rights and thus infringes the principle of proportionality set out in the second subparagraph of Article 5(4) TEU. On the one hand, the blanket threshold is inappropriate, and, on the other hand, the imposition of further obligations on the applicant is no longer necessary, as online trade is already (over-) regulated.

5. Fifth plea in law, alleging infringement of the obligation to state reasons

In its decision, the defendant infringed the obligation to state reasons under Article 296 TFEU, so that it was not comprehensible to the applicant as an addressee. There is no subsumption under the definition of hosting service according to Article 3(g)(iii) of the DSA, although this is decisive for the applicability of Article 33 of the DSA.

(1) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ 2022 L 277, p. 1).

(2) 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).

Action brought on 5 July 2023 — Hypo Vorarlberg Bank v SRB

(Case T-369/23)

(2023/C 314/14)

Language of the case: German

Parties

Applicant: Hypo Vorarlberg Bank AG (Bregenz, Austria) (represented by: G. Eisenberger, A. Brenneis and J. Holzmann, lawyers)

Defendant: Single Resolution Board

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Single Resolution Board of 2 May 2023 on the calculation of the 2023 ex-ante contributions to the Single Resolution Fund (SRB/ES/2023/23) together with annexes, at least in so far as it concerns the applicant, and

— order the Single Resolution Board to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on nine pleas in law.

1. First plea in law, alleging infringement of Article 102 of Directive 2014/59/EU, (1) Articles 69 and 70(2) of Regulation (EU) No 806/2014, (2) Articles 3 and 4(2) of Delegated Regulation (EU) 2015/63 (3) and the principle of proportionality due to an incorrect determination of the target level, as the defendant set an excessive target level contrary to the EU legal framework.