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

17 July 2024 (*)

(Digital services – Regulation (EU) 2022/1925 – Designation of gatekeepers – Online social networking service – Article 3(1), (2) and (5) of Regulation 2022/1925 – Requirements – Presumptions – Rebuttal of the presumptions – Rights of the defence – Equal treatment)

In Case T-1077/23,

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

applicant,

v

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

defendant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of A. Kornezov (Rapporteur), President, G. De Baere, D. Petrlík, K. Kecsmár and S. Kingston, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the written part of the procedure, in particular:

– the request for an expedited procedure submitted by the applicant on 16 November 2023, and the abridged version of the application initiating the proceedings, in which it withdrew certain pleas in law, in the event that the request for an expedited procedure should be granted,

– the decision of the General Court of 8 December 2023 granting the request for an expedited procedure,

– the order of 9 February 2024, *Bytedance* v *Commission* (T-1077/23 R, not published, EU:T:2024:94), dismissing the application for interim measures,

– the written questions put by the Court to the parties and their answers to those questions, which were lodged at the Court Registry on 16 February 2024,

further to the hearing on 29 April 2024,

gives the following

Judgment

1 By its action based on Article 263 TFEU, the applicant, Bytedance Ltd, seeks annulment of Commission Decision C(2023) 6102 final of 5 September 2023 designating ByteDance as a gatekeeper in accordance with Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1; 'the DMA') ('the contested decision').

I. **Background to the dispute**

2 The applicant, which was established in China in 2012 and incorporated under the law of the Cayman Islands, operates, together with the companies which it controls directly or indirectly (together, 'ByteDance'), inter alia, the digital platform TikTok.

3 The digital platform TikTok, which was launched in the European Union, in its current version, in August 2018, allows its users to search for, view and distribute videos, as well as to interact, communicate and share content with other users.

4 On 3 July 2023, the applicant submitted a notification to the European Commission, in accordance with the first subparagraph of Article 3(3) of the DMA ('the notification'), in which it maintained, first of all, that TikTok was a video-sharing platform within the meaning of point 2(d) and point 8 of Article 2 of the DMA; next, that the threshold laid down in Article 3(2)(c) of the DMA had not been met, so that ByteDance could not be presumed to satisfy the requirements of Article 3(1) of the DMA for designation as a gatekeeper; lastly, that the presumptions laid down in Article 3(2) of the DMA for the purpose of designating an undertaking as a gatekeeper were, in any event, rebutted on the basis of the arguments and evidence which it had submitted under the first subparagraph of Article 3(5) of the DMA.

5 By letter of 26 July 2023, the Commission informed the applicant of its preliminary views concerning, first, ByteDance's designation as a gatekeeper, in accordance with Article 3(4) of the DMA, and, second, TikTok's classification as an online social networking service capable of constituting an important gateway for business users to reach end users (an 'important gateway'), for the purposes of Article 3(1)(b) of the DMA (the 'preliminary views').

6 By letter of 2 August 2023, the applicant replied to the preliminary views.

7 On 5 September 2023, the Commission adopted the contested decision.

8 In the contested decision, the Commission found, first, that TikTok was an online social networking service within the meaning of point 7 of Article 2 of the DMA and, consequently, a core platform service ('CPS') within the meaning of point 2(c) of Article 2 of the DMA.

9 Secondly, the Commission noted that ByteDance met the thresholds laid down in Article 3(2) of the DMA, so far as concerns TikTok, so that it could be presumed that the requirements of Article 3(1) of the DMA, relating to the designation of a gatekeeper, were met.

10 Thirdly, the Commission considered that the arguments presented by the applicant, in accordance with the first subparagraph of Article 3(5) of the DMA, to rebut the presumptions laid down in Article 3(2) of the DMA, were not sufficiently substantiated so as manifestly to call into question those presumptions. Consequently, and in accordance with the second subparagraph of Article 3(5) of the DMA, it rejected those arguments without opening a market investigation pursuant to Article 17(3) of the DMA.

11 Articles 1 and 2 of the operative part of the contested decision are worded as follows:

‘*Article 1*

ByteDance is designated as a gatekeeper pursuant to Article 3 of [the DMA].

Article 2

The following [CPS] of ByteDance is an [important gateway] within the meaning of Article 3(1)(b) of [the DMA]:

(a) ByteDance’s online social networking service TikTok.’

II. **Forms of order sought**

12 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

13 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. **Law**

14 In support of the action, the applicant raises three pleas in law alleging (i) infringement of Article 3(1) and (5) of the DMA, (ii) infringement of the rights of the defence and (iii) infringement of the principle of equal treatment.

A. **The first plea in law, alleging infringement of Article 3(1) and (5) of the DMA**

15 The first plea is divided into five parts, the first, alleging that the Commission applied an incorrect legal standard when assessing the arguments presented to rebut the presumptions laid down in Article 3(2) of the DMA; the second, third and fourth parts, alleging that the Commission infringed Article 3(1) and (5) of the DMA by rejecting the arguments presented to rebut the presumption that ByteDance had a significant impact on the internal market, the presumption that TikTok was an important gateway and the presumption that ByteDance enjoyed an entrenched and durable position, respectively; and the fifth part, alleging that the Commission infringed Article 3(1) and (5) of the DMA by failing to carry out a holistic assessment of the evidence submitted.

16 Before examining the various parts of the first plea, it is appropriate to recall, first, the legislative history and content of the DMA and, second, the relevant undisputed aspects of the contested decision.

1. ***The legislative history and content of the DMA***

17 Nowadays digital services, and online platforms in particular, play an increasingly important role in the economy, by enabling businesses to reach users throughout the Union, by facilitating cross-border trade and by opening entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union, as is apparent, in essence, from recital 1 of the DMA.

18 However, as the EU legislature emphasised in recital 2 of the DMA, certain digital services, called CPSs, often have characteristics, such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multisidedness of those services, a significant degree of dependence both of business users and of end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data-driven advantages which, combined with unfair practices on the part of the undertakings providing the CPSs, can have the effect of substantially undermining the contestability of the CPSs, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their business users and end users. This may lead, in turn, to rapid and potentially far-reaching decreases in business users' and end users' choice, and therefore can confer on the provider of those services the position of a so-called gatekeeper.

19 In that regard, the EU legislature observed that market processes were often incapable of ensuring fair economic outcomes with regard to CPSs and that existing EU law did not satisfactorily address the potential negative effects associated with some of the characteristics of CPSs. In particular, although Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, the fact remains that the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and anticompetitive behaviour, enforcement of those provisions occurs only *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis. Moreover, the EU legislature found that existing EU law did not address, or did not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms (see, to that effect, recital 5 of the DMA). It also noted that the DMA pursued an objective that is complementary to, but different from, that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by the DMA on competition on a given market (see, to that effect, recital 11 of the DMA).

20 In addition, the EU legislature noted that a number of regulatory solutions had already been adopted at national level or proposed to address unfair practices and the contestability of digital services, or at least with regard to some of them, and that this had created divergent regulatory solutions which resulted in the fragmentation of the internal market, thus raising the risk of increased compliance costs due to different sets of national regulatory requirements (see, to that effect, recital 6 of the DMA).

21 It is in that context that the EU legislature decided to adopt the DMA, in order, inter alia, to contribute to the proper functioning of the internal market by laying down rules to ensure the contestability and fairness of markets in the digital sector in general, and for business users and end users of CPSs provided by gatekeepers in particular (see, to that effect, Article 1(1) and recital 7 of the DMA).

22 The objective of ensuring the contestability of markets in the digital sector relates, as is apparent from recitals 32 and 33 of the DMA, to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and

services. The objective of ensuring fairness of those markets is to prevent an imbalance between the rights and the obligations of business users where the gatekeeper obtains a disproportionate advantage, bearing in mind that, due to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their CPSs or services provided together with, or in support of, their CPSs.

23 To that end, Article 3(1) of the DMA provides that an undertaking is designated as a gatekeeper where it meets the following three cumulative requirements:

(a) it has a significant impact on the internal market;

(b) it provides a CPS which is an important gateway; and

(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

24 Under Article 3(2) of the DMA, an undertaking is presumed to satisfy the respective requirements in paragraph 1:

(a) as regards paragraph 1, point (a), where it achieves an annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years ('Union turnover threshold') or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year ('global market value threshold'), and it provides the same CPS in at least three Member States;

(b) as regards paragraph 1, point (b), where it provides a CPS that in the last financial year has at least 45 million monthly active end users established or located in the Union ('end users') and at least 10 000 yearly active business users established in the Union ('business users'), identified and calculated in accordance with the methodology and indicators set out in the annex;

(c) as regards paragraph 1, point (c), where the thresholds in point (b) of this paragraph were met in each of the last three financial years.

25 The first subparagraph of Article 3(5) of the DMA provides that the undertaking providing CPSs may present, with its notification under the first subparagraph of Article 3(3) of the DMA, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in paragraph 2, due to the circumstances in which the relevant CPS operates, it does not satisfy the requirements listed in paragraph 1.

26 In accordance with the second and third subparagraphs of Article 3(5) of the DMA, where the Commission considers that the arguments submitted pursuant to the first subparagraph by the undertaking providing CPSs are not sufficiently substantiated because they do not manifestly call into question the presumptions set out in paragraph 2 of that article, it may reject those arguments within the time limit referred to in paragraph 4 thereof, without opening a market investigation pursuant to Article 17(3) of the DMA.

27 By contrast, where the undertaking providing CPSs does present such sufficiently substantiated arguments manifestly calling into question the presumptions laid down in Article 3(2) of the DMA, the Commission may, within the same time limit, open a market investigation pursuant to Article 17(3) of the DMA.

28 Lastly, it should be noted that the DMA provides for a targeted set of legal obligations that undertakings which have been designated as gatekeepers must comply with in respect of each of the CPSs listed in the relevant designation decision. Those obligations concern certain practices that are considered to undermine contestability or to be unfair, or both, when taking into account the features of the digital sector and which have a particularly negative direct impact on business users and end users (see, to that effect, recital 31 of the DMA).

2. ***The undisputed aspects of the contested decision***

29 In the first place, the applicant does not contest, in the present dispute, that TikTok is an online social networking service within the meaning of point 2(c) and point 7 of Article 2 of the DMA, and not a video-sharing platform service, within the meaning of point 2(d) and point 8 of Article 2 of the DMA, as found in the contested decision.

30 In the second place, the applicant does not dispute that the thresholds laid down in Article 3(2)(a) to (c) of the DMA were met and that, consequently, ByteDance was presumed to satisfy the respective requirements of Article 3(1) of the DMA for the purpose of its designation as a gatekeeper.

31 In particular, first, the applicant does not dispute the finding in the contested decision that ByteDance's global market value, estimated at EUR [>75] (1) billion in the last financial year, exceeded the global market value threshold laid down in Article 3(2)(a) of the DMA, or that TikTok was available in all EU Member States and that, therefore, the requirement that the CPS at issue must be provided in at least three Member States, laid down in that provision, was also met, with the result that ByteDance could be deemed to have a significant impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

32 Secondly, the applicant does not contest that the thresholds laid down in Article 3(2)(b) of the DMA, of at least 45 million end users and at least 10 000 business users, were also reached, so that TikTok could be presumed to be an important gateway within the meaning of Article 3(1)(b) of the DMA. Indeed, it is apparent from the contested decision that, in 2022, TikTok had 125 million end users and [>10 000] business users.

33 Thirdly, the applicant also does not dispute that the thresholds referred to in Article 3(2)(b) of the DMA were reached in each of the last three financial years and that, consequently, ByteDance could be presumed, in accordance with Article 3(2)(c) of the DMA, to enjoy an entrenched and durable position, in its operations, or that it was foreseeable that it would enjoy such a position in the near future, within the meaning of Article 3(1)(c) of the DMA. It is indeed apparent from the contested decision that the number of TikTok end users was [>45] million in 2020, [>45] million in 2021 and 125 million in 2022 and, according to a conservative calculation method, the number of TikTok business users was at least [>10 000] in 2020, [>10 000] in 2021 and [>10 000] in 2022; those figures therefore exceed the thresholds laid down in Article 3(2)(b) of the DMA.

34 By contrast, the parties disagree as to whether the Commission was entitled to consider, without committing any error, that the arguments presented by the applicant, in accordance with the first subparagraph of Article 3(5) of the DMA, were not sufficiently substantiated so as manifestly to call into question the presumptions laid down in Article 3(2) of the DMA as regards TikTok.

35 It is in the light of those considerations that the various parts of the first plea must be examined.

3. ***The legal standard applied by the Commission when assessing the arguments presented to rebut the presumptions (first plea, first part)***

36 The applicant claims in essence that, in the contested decision, the Commission applied the wrong legal standard in its assessment of the arguments and evidence which it had submitted, in accordance with the first subparagraph of Article 3(5) of the DMA, to rebut the presumptions laid down in Article 3(2) of the DMA. By its first complaint, it criticises the Commission for having rejected certain 'qualitative' arguments and evidence and, by its second complaint, for having imposed too high a standard of proof, consisting in requiring 'convincing' evidence.

(a) ***The type of argument and evidence that may be submitted to rebut the presumptions laid down in Article 3(2) of the DMA***

(1) *Arguments of the parties*

37 The applicant claims, as it stated at the hearing, that the Commission was wrong to reject, in recital 161 of the contested decision, certain 'qualitative' arguments and evidence which it had submitted to rebut the presumptions laid down in Article 3(2) of the DMA. In its view, the interpretation of recital 23 of the DMA, on which the Commission relied in order to reject those arguments and that evidence and according to which any evidence not referred to in that recital is to be discarded, is inconsistent with both the wording of that recital and the first subparagraph of Article 3(5) of the DMA, under which designation as a gatekeeper must meet the requirements set out in paragraph 1 of that article, taking into account the 'circumstances in which the relevant [CPS] operates'. The recital in question excludes only justifications based on economic grounds, seeking to enter into market definition or to demonstrate efficiencies. By contrast, it does not exclude 'qualitative' evidence which directly relates to the rebuttal of the aforementioned presumptions by virtue of which the quantitative thresholds are indicative of gatekeeper status. It would be a tautology to take into account only quantitative evidence in order to rebut the thresholds – which are also quantitative – on which those presumptions are based.

38 The Commission agrees with the applicant that recital 23 of the DMA cannot be interpreted as excluding 'qualitative' arguments and evidence, provided that they directly relate to the quantitative thresholds on which the presumptions laid down in Article 3(2) of the DMA are based, and that the elements which can be taken into account, listed in that recital, are taken into account by way of example. However, it claims that, in the contested decision, it did not reject as irrelevant the 'qualitative' arguments or evidence submitted by the applicant, but examined them, just as it did the 'quantitative' arguments and evidence submitted by the applicant, to the extent that they directly related to those presumptions. According to the Commission, the applicant's so-called 'additional' arguments were the only arguments excluded on the ground that they did not directly relate to the quantitative thresholds on which those presumptions are based, as is apparent from recital 161 of the contested decision.

(2) *Findings of the Court*

39 As a preliminary point, it should be noted that, by the expression '"qualitative" arguments and evidence', the applicant refers, in the context of the first complaint, to the arguments and evidence which it submitted during the administrative procedure in rebuttal of the presumptions laid down in Article 3(2) of the DMA which were not expressed in figures.

40 In that regard, it must be pointed out that it may be difficult, if not impossible, to distinguish between 'quantitative' and 'qualitative' arguments or evidence. An argument of a 'qualitative'

nature is often supported by figures. Therefore, it may appear artificial to separate one from the other and to accept the relevance of the quantitative element alone where it is in fact intended to support an argument of a qualitative nature.

41 That being said, it should be noted that the requirements for designation as a gatekeeper, laid down in Article 3(1) of the DMA, are not expressed in figures. Thus, in order to be designated as such, the undertaking in question must have a significant impact on the internal market, provide a CPS which is an important gateway and enjoy an entrenched and durable position, in its operations, or it must be foreseeable that it will enjoy such a position in the near future.

42 It is true that the thresholds, laid down in Article 3(2) of the DMA, from which it can be presumed that the requirements set out in paragraph 1 of that article have been met, are essentially quantitative in nature.

43 However, those presumptions are rebuttable. The first and second subparagraphs of Article 3(5) of the DMA allow the undertaking concerned to present sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the quantitative thresholds laid down in paragraph 2 of that article and, due to the circumstances in which the relevant CPS operates, it does not satisfy the requirements listed in paragraph 1 of that article. Where those arguments are not sufficiently substantiated, because they do not manifestly call into question those presumptions, the Commission may reject them without opening a market investigation pursuant to Article 17(3) of the DMA.

44 Accordingly, there is nothing in the wording of Article 3(5) of the DMA that allows the Commission to discard, from the outset, arguments or evidence submitted by an undertaking as irrelevant on the ground that they are not expressed in figures.

45 In that regard, recital 23 of the DMA states, inter alia, that ‘in its assessment of the evidence and arguments produced [under the first subparagraph of Article 3(5) of the DMA], the Commission should take into account only those elements which directly relate to the quantitative criteria, namely the impact of the undertaking providing [CPSs] on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the undertaking’s [CPS] considering the overall scale of activities of the respective [CPS]; and the number of years for which the thresholds have been met’. Moreover, according to that recital, ‘any justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing [CPSs] should be discarded, as it is not relevant to the designation as a gatekeeper’.

46 It follows from recital 23 of the DMA that the only categories of arguments or evidence which the EU legislature decided to exclude explicitly as irrelevant are those deriving from a justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies.

47 It is also apparent from recital 23 of the DMA that there is a requirement that, in order to be taken into account, the arguments and the evidence must ‘directly relate to the quantitative criteria’, bearing in mind that the term ‘quantitative criteria’ refers to the quantitative thresholds laid down in Article 3(2) of the DMA. That requirement does not mean, however, that an argument or evidence should be discarded a priori as irrelevant merely because it is not expressed in figures. Such an argument or evidence may, depending on the circumstances, directly relate to those quantitative

thresholds, with the result that it must be taken into consideration when assessing the arguments and evidence submitted to rebut the presumptions laid down in that provision. Conversely, an argument or evidence of a quantitative nature can, depending on the circumstances, not relate directly to those quantitative thresholds; accordingly, it should not be taken into consideration in that assessment.

48 It follows that recital 23 of the DMA does not a priori discard as irrelevant arguments or evidence which is not expressed in figures, provided that they directly relate to one or more of the presumptions laid down in Article 3(2) of the DMA, which take the form of quantitative thresholds.

49 It should also be noted that the list of elements that may be taken into account, referred to in recital 23 of the DMA, is not exhaustive.

50 Even though the expression 'namely' precedes the list at issue, some of the elements in that list are further clarified by means of examples ('such as'). Moreover, the only element referred to in recital 23 of the DMA in relation to the rebuttal of the presumption laid down in Article 3(2)(c) of the DMA is the 'number of years for which the thresholds [concerning the number of business users and end users] have been met'. That element overlaps, in essence, with the threshold on which that presumption is based. Thus, if that element were to be the only permissible element for rebutting that presumption, that presumption would then de facto become irrebuttable, which would be contrary to Article 3(5) of the DMA. In addition, that article does not provide an exhaustive list of elements which may be produced for that purpose either, but merely refers to the 'circumstances in which the relevant [CPS] operates'.

51 Consequently, Article 3(5) of the DMA, read in the light of recital 23 thereof, must be interpreted as allowing the undertaking concerned to submit, in order to rebut the presumptions laid down in Article 3(2) of the DMA, arguments and evidence, whether or not they are expressed in figures, provided that they relate directly to one or more of those presumptions.

52 In the present case, and as it stated at the hearing, the applicant criticises the Commission for having rejected, in recital 161 of the contested decision, its 'additional' arguments, on the ground that they did not directly relate to the quantitative thresholds laid down in Article 3(2) of the DMA.

53 For its part, the Commission confirmed that it had considered, in the contested decision, that all the arguments and evidence submitted by the applicant to rebut the presumptions laid down in Article 3(2) of the DMA, including those of a 'qualitative' nature, directly related to those presumptions, even though it rejected them on other grounds, with the exception of the applicant's 'additional' arguments, which it had rejected, in recital 161 of the contested decision, on the ground that they did not relate directly to those presumptions.

54 In that regard, it must be noted that the Commission examined the applicant's 'additional' arguments only after having assessed the arguments and evidence submitted by the applicant to rebut each of the presumptions laid down in Article 3(2) of the DMA.

55 In those circumstances, it is necessary to examine whether the Commission could, without erring, reject the 'additional' arguments presented by the applicant, on the ground that they did not relate directly to those presumptions, in the same order as they are dealt with in the contested decision. That question will therefore be examined following the assessment of the applicant's arguments relating to the presumptions laid down in Article 3(2)(a), (b) and (c) of that regulation.

56 It follows that the outcome of the first complaint of the first part of the first plea depends on the merits of the applicant's arguments relating to recital 161 of the contested decision, which are examined in paragraphs 321 to 328 below.

(b) ***The standard of proof required to call into question the presumptions laid down in Article 3(2) of the DMA***

(1) *Arguments of the parties*

57 The applicant criticises the Commission for having required, in recital 126 of the contested decision, a higher standard of proof than that required by Article 3(5) of the DMA, by taking the view that, in order to rebut the presumption laid down in Article 3(2)(b) of the DMA, the applicant had to produce 'convincing' evidence. In other decisions in that field, the Commission has made a distinction between, on the one hand, arguments that manifestly call into question the presumptions laid down in Article 3(2) of the DMA and which justify the opening of a market investigation, and, on the other hand, arguments which 'clearly and comprehensively' demonstrate that the requirements set out in Article 3(1) of the DMA are not met. Lastly, it observes that the existence of 'doubts' or 'prima facie' evidence as to whether the undertaking concerned meets those requirements should be sufficient to open a market investigation pursuant to Article 17(3) of the DMA.

58 The Commission disputes the applicant's arguments. It contends that the assertion, in recital 126 of the contested decision, that the undertaking concerned must produce 'convincing' evidence does not set a higher standard of proof than that provided for in the DMA. According to the Commission, the mere use of the word 'convincing' does not say anything about the standard of proof applied, since, whatever that standard, in order to draw conclusions from an item of evidence, it is necessary for that evidence to be convincing. It adds, in essence, that the distinction to which the applicant refers between the standard of proof required to open a market investigation pursuant to Article 17(3) of the DMA and that required for a finding that the presumptions laid down in Article 3(2) of the DMA have been rebutted is irrelevant in the present case, since the applicant's arguments have not met either standard of proof.

(2) *Findings of the Court*

59 According to recital 23 of the DMA, 'the burden of adducing evidence that the presumption deriving from the fulfilment of the quantitative thresholds [laid down in Article 3(2) of that regulation] should not apply should be borne by [the] undertaking [concerned]'.

60 As regards the standard of proof required to rebut the presumptions laid down in Article 3(2) of the DMA, the first subparagraph of paragraph 5 of that article provides that the undertaking concerned may present sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in paragraph 2 of that article, it does not satisfy the requirements listed in paragraph 1 thereof. In addition, according to the second and third subparagraphs of Article 3(5) of the DMA, where the Commission considers that the arguments presented by the undertaking concerned are not sufficiently substantiated because they do not manifestly call into question those presumptions, it may reject those arguments without opening a market investigation, whereas where that undertaking does present such sufficiently substantiated arguments, manifestly calling into question those presumptions, the Commission may open a market investigation.

61 Accordingly, the standard of proof required to call into question the presumptions laid down in Article 3(2) of the DMA has been determined by the EU legislature itself, by requiring the

undertaking concerned – on which the burden of proof lies – to submit sufficiently substantiated arguments, manifestly calling into question those presumptions.

62 In the present case, the only recital of the contested decision, identified by the applicant, in which the Commission allegedly required a higher standard of proof than that established in Article 3(5) of the DMA, is recital 126 of that decision. It should also be noted that, in that recital, the Commission stated in particular, in its assessment of the arguments presented to rebut the presumption laid down in Article 3(2)(b) of the DMA, that it was incumbent on the undertaking concerned to produce 'convincing evidence' demonstrating that, even if its CPS largely exceeded the thresholds laid down in the latter provision, that CPS was not an important gateway within the meaning of Article 3(1)(b) of the DMA and that, for the reasons set out in recitals 127 to 154 of that decision, the applicant had failed to adduce that evidence.

63 In that regard, first, it must be noted that the Commission assessed the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA in Section 5.1.3.2.2 of the contested decision. It noted, in recital 125 of that decision, that the arguments presented by the applicant pursuant to the first subparagraph of Article 3(5) of the DMA '[were] not sufficiently substantiated to manifestly call into question the presumption set out in Article 3(2)(b) [of the DMA]'. In addition, in its analysis of the various arguments and items of evidence submitted by the applicant, it stated that those arguments and that evidence were not capable of 'manifestly call[ing] into question' that presumption, or were insufficient to do so (see recitals 129, 134 and 143 of that decision).

64 Similarly, in its conclusion concerning the presumptions laid down in Article 3(2) of the DMA, set out in Section 5.1.3.2.5 of the contested decision, the Commission concluded that the arguments presented by the applicant in accordance with the first subparagraph of Article 3(5) of the DMA '[were] not sufficiently substantiated to manifestly call into question the presumptions laid down in Article 3(2) of [the DMA]', with the result that they had to be rejected without opening a market investigation, in accordance with the second subparagraph of Article 3(5) of the DMA.

65 It follows that, when assessing the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA, the Commission asserted that it had applied the standard of proof set out in Article 3(5) of the DMA, described in paragraph 60 above.

66 Thus, the Commission referred to the requirement to adduce 'convincing' evidence to rebut the presumption laid down in Article 3(2)(b) of the DMA only once, in recital 126 of the contested decision, with the result that this is an isolated occurrence. Furthermore, if that reference were to be understood, as the applicant claims, as meaning that the applicant must adduce evidence which rebuts that presumption once and for all, such a requirement would indeed not correspond to the standard of proof required under Article 3(5) of the DMA. However, in the present case, nothing in the contested decision, read in its entirety, suggests that, by the term 'convincing', the Commission intended to require that evidence rebutting that presumption once and for all be produced.

67 In any event, in the context of the third part of the first plea, the Court will examine whether – irrespective of the way in which the Commission described, in recital 126 of the contested decision, the standard of proof required – the standard of proof it actually applied when assessing the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA is consistent with that laid down in Article 3(5) of the DMA.

68 Secondly, it is necessary to reject the applicant's argument based on the fact that, in other decisions in the field, the Commission has drawn a distinction between, on the one hand, arguments

which manifestly call into question the presumptions laid down in Article 3(2) of the DMA and which justify the opening of a market investigation, and, on the other hand, arguments which 'clearly and comprehensively' demonstrate that the requirements set out in Article 3(1) of the DMA are not met, which would allow the Commission to conclude that those presumptions have been rebutted without the need to open a market investigation. The applicant does not claim that, in the contested decision, the Commission rejected its arguments on the ground that they were not capable of 'clearly and comprehensively' demonstrating that those requirements were not met, with the result that its line of argument is ineffective. Furthermore, and in any event, it is appropriate to recall that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings or other CPSs (see, to that effect and by analogy, judgment of 14 September 2022, *SŽ – Tovorni promet* v *Commission*, T-575/20, not published, EU:T:2022:551, paragraph 95 and the case-law cited).

69 Thirdly, the applicant's argument that the standard of proof required of the undertaking concerned under the DMA amounts to demonstrating the existence of 'doubts' or 'prima facie' evidence, which must, in its view, be sufficient to open a market investigation pursuant to Article 17(3) of the DMA, cannot succeed.

70 Such a standard of proof does not correspond to that established in the third subparagraph of Article 3(5) of the DMA, under which a market investigation may be opened where the arguments of the undertaking concerned are sufficiently substantiated so as, exceptionally, manifestly to call into question the presumptions laid down in Article 3(2) of that regulation.

71 It is indisputably apparent from the terms 'exceptionally' and 'manifestly', in Article 3(5) of the DMA, that the standard of proof required of the undertaking concerned is high, in the sense that the arguments presented by that undertaking must be capable of showing, with a high degree of plausibility, that the presumptions laid down in Article 3(2) of the DMA are called into question. The standard of proof put forward by the applicant, namely proof of the existence of mere 'doubts' or 'prima facie' evidence, is hence lower than that required by the DMA.

72 Therefore, subject to the examination of the standard of proof actually applied by the Commission when assessing the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA, the applicant's line of argument concerning the standard of proof required to call into question the presumption laid down in that provision must be rejected.

4. *The rebuttal of the presumption that ByteDance had a significant impact on the internal market (first plea, second part)*

(a) *Arguments of the parties*

73 The applicant claims that, in recitals 120 to 124 of the contested decision, the Commission infringed Article 3(1)(a) and Article 3(5) of the DMA by rejecting its arguments seeking to show that ByteDance did not have a significant impact on the internal market. As it clarified at the hearing, the applicant does not criticise the Commission for having failed to examine certain arguments and certain evidence which it had submitted during the administrative procedure, but for having assessed them superficially and incorrectly in those recitals. In essence, it argues that ByteDance's impact on the internal market was not significant for the purposes of Article 3(1)(a) of the DMA, as demonstrated by the fact that ByteDance's Union turnover was low, that TikTok was [*confidential*] since its launch in the European Union and that ByteDance's global market value was

mainly attributable to its activities in China, with the result that that value is not representative of its impact on the internal market.

74 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 120 to 124 of the contested decision, the content of which is set out below.

(b) ***Contested decision***

75 In recital 120 of the contested decision, the Commission observed that the arguments presented by the applicant with the notification, in accordance with the first subparagraph of Article 3(5) of the DMA, were not sufficiently substantiated so as manifestly to call into question the presumption set out in Article 3(2)(a) of the DMA.

76 First, in recital 121 of the contested decision, the Commission considered, in essence, that the fact that ByteDance's revenue in the European Union was below the Union turnover threshold was irrelevant, since the global market value threshold was met and those two thresholds were alternative thresholds.

77 Secondly, in recital 122 of the contested decision, the Commission noted, inter alia, that the applicant's arguments concerning the origin of ByteDance's advertising turnover in the Union were also irrelevant, since ByteDance met the global market value threshold.

78 Thirdly, in recital 123 of the contested decision, the Commission considered, in essence, that the fact that TikTok had [*confidential*] in the European Union could not, in itself, call into question the presumption laid down in Article 3(2)(a) of the DMA, on the ground that ByteDance had a significant potential to monetise users in the Union in the near future, in view of its global fair market value and the number of TikTok users in the Union, which significantly exceeded the thresholds laid down in Article 3(2)(a) and (b) of the DMA, respectively.

79 Fourthly, in recital 124 of the contested decision, the Commission rejected as irrelevant the applicant's argument that ByteDance's global fair market value was not indicative of its potential to monetise TikTok users in the Union, since that value stemmed from its Chinese operations, on the ground, first, that Article 3(2)(a) of the DMA refers to the global fair market value of the undertaking concerned as a whole and not in relation to a specific geographic area, and, second, that that provision is aimed at capturing the financial capacity of the undertaking concerned, including its access to financial markets and its ability, for example, to acquire other innovative undertakings providing similar services.

(c) ***Findings of the Court***

80 In the first place, it is necessary to analyse the applicant's argument that, in recital 121 of the contested decision, the Commission wrongly considered that the fact that ByteDance's Union revenue was inferior to the Union turnover threshold was irrelevant for the purpose of demonstrating that ByteDance did not have a significant impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

81 In that regard, it should be borne in mind that, in accordance with Article 3(1)(a) of the DMA, an undertaking may be designated as a gatekeeper only if it has a significant impact on the internal market.

82 It can be presumed from Article 3(2)(a) of the DMA that this is the case where either one of the alternative thresholds is met. The first threshold concerns the annual turnover of the undertaking concerned in the Union, which must be equal to or greater than EUR 7.5 billion in each of the last three financial years. The second threshold relates to its average market capitalisation or its equivalent fair market value, which must amount to at least EUR 75 billion in the last financial year. In both cases, it is necessary for that undertaking to provide the CPS at issue in at least three Member States.

83 In the present case, the applicant does not dispute that ByteDance met the global market value threshold and that, as a result, it was deemed to have a significant impact on the internal market.

84 Nor is it disputed that, by contrast, it did not meet the Union turnover threshold. During that period, ByteDance's Union turnover went from EUR [<7.5 billion] in 2020 to EUR [<7.5 billion] in 2021 and, next, to EUR [<7.5 billion] in 2022, with the result that it remained below that threshold.

85 In that regard, it should be noted at the outset that the fact that the Union turnover threshold was not met during each of the last three financial years is not sufficient, in itself, manifestly to call into question the presumption laid down in Article 3(2)(a) of the DMA since, as has been noted in paragraph 83 above, the other alternative threshold was met in the present case, so that that presumption was applicable. Otherwise, the two thresholds would de facto become cumulative, which would be contrary to the clear wording of that provision.

86 However, the alternative nature of the two thresholds referred to in Article 3(2)(a) of the DMA does not in any way render the first of those thresholds irrelevant for the purposes of examining whether that element, in combination with other sufficiently substantiated arguments, manifestly calls that presumption into question.

87 Indeed, it is apparent from recital 17 of the DMA that a high Union turnover, in conjunction with the number of CPS users concerned in the Union provided for in Article 3(2)(b) of the DMA, reflects a relatively strong ability to monetise those users, while a high global market capitalisation or fair market value, together with the same number of users in the Union, reflects a relatively significant potential to monetise those users in the near future. Market capitalisation can also reflect the expected future position and effect on the internal market of the undertakings concerned, despite a potentially relatively low current turnover.

88 Those two thresholds therefore reflect similar, but distinct, situations. While a high Union turnover tends to show that the undertaking in question already has the ability to monetise its users in the internal market, a high global market capitalisation or fair market value rather tends to indicate that that undertaking has the potential to monetise its users in the internal market in the near future.

89 In addition, the Union turnover of the undertaking in question was specifically chosen by the EU legislature as an indicator of its impact on the internal market, as is apparent from Article 3(2)(a) and recital 17 of the DMA.

90 Accordingly, it cannot be ruled out that the undertaking concerned may demonstrate, on the basis of a number of sufficiently substantiated arguments, including its low Union turnover, that, despite its global market value which exceeds the threshold laid down in Article 3(2)(a) of the DMA, it has only a limited presence on the internal market, so that that market value does not reflect, on account of the circumstances in which the relevant CPS operates, a potential to monetise

its users in the Union in the near future and that, therefore, it does not have a significant impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

91 Moreover, the Commission's assertion, in the last sentence of recital 121 of the contested decision, that the level of ByteDance's Union revenue was not an element related to its impact on the internal market 'beyond revenue or market cap', within the meaning of recital 23 of the DMA, must be rejected. First, the specification 'beyond revenue or market cap', set out in that recital, merely clarifies that, given that those two elements are already taken into account under Article 3(2)(a) of the DMA, the undertaking concerned may produce, in order to rebut the presumption laid down in that provision, other elements, aside from those elements, relating to its impact on that market. Second, as has been noted in paragraph 89 above, Union turnover is clearly referred to in Article 3(2)(a) and recital 17 of the DMA as one of the relevant criteria for assessing the impact of that undertaking on that market.

92 Therefore, the Commission erred in law by rejecting as irrelevant the applicant's argument relating to ByteDance's Union turnover in the last three financial years. The impact of that error on the lawfulness of the contested decision is examined in paragraphs 111 to 117 below.

93 In the second place, the applicant criticises the Commission for having rejected as irrelevant, in recital 122 of the contested decision, its arguments relating, first, to the limited number of business users whose advertising expenditure on TikTok is 'material' and, second, to the limited number of 'affected countries'.

94 In that regard, first, it should be noted that, in recital 122 of the contested decision, the Commission did not take a position on the applicant's argument that a limited number of business users incur 'material' advertising expenditure on TikTok; the reason for the fact that no position was taken is that such an argument had not been presented in the notification in rebuttal to the presumption laid down in Article 3(2)(a) of the DMA. Therefore, the applicant's complaint is based on a misreading of that decision and must, on that ground, be rejected.

95 Secondly, in recital 122 of the contested decision, the Commission took a position on the applicant's argument, raised in the notification in rebuttal to the presumption laid down in Article 3(2)(a) of the DMA, that TikTok earned significant advertising revenue in [*confidential*] Member States only, namely [*confidential*].

96 In that regard, it is sufficient to note that, before the Court, the applicant does not put forward any specific argument seeking to contest in particular the rejection, in recital 122 of the contested decision, of the relevance of the fact that TikTok earned significant advertising revenue in [*confidential*] Member States only. In any event, it is apparent from the notification that TikTok earned advertising revenue in [*confidential*] the Member States. It has also failed to explain how the fact that most of that revenue was generated in some of the most populated Member States could have any impact whatsoever on the consideration of its impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

97 In the third place, the applicant complains that the Commission, in essence, wrongly considered, in recital 123 of the contested decision, that its argument alleging that ByteDance had been [*confidential*] in the European Union since its launch was not capable of manifestly calling into question the presumption laid down in Article 3(2)(a) of the DMA.

98 In that connection, it should be noted, as the applicant explains in its written submissions, that the current version of the platform TikTok was launched in the European Union in August 2018 and

was thus, at the time of the adoption of the contested decision, at the initial stages of monetisation in the Union. ByteDance was thus, from the launch of TikTok in the Union onwards, still in the process of investing more in that platform in order to attract more users and advertisers, in particular by incentivising creators to produce content for TikTok.

99 Therefore, the fact that ByteDance may have been [*confidential*] in the initial years following its entry into the internal market cannot in itself manifestly call into question the presumption laid down in Article 3(2)(a) of the DMA, given that, as the Commission rightly observed in recital 123 of the contested decision, several other relevant factors, taken together, demonstrated its significant potential to monetise TikTok users in the Union in the near future.

100 Indeed, the extent to which the thresholds laid down in Article 3(2)(a) of the DMA are exceeded and, more specifically, ByteDance's particularly high global fair market value – namely EUR [>75] billion, which far exceeds the EUR 75-billion threshold laid down in that provision – as well as the large number of TikTok end users and business users in the Union – namely 125 million and [>10 000] in 2022, respectively, which also largely exceeded in each of the last three financial years the thresholds, laid down in Article 3(2)(b) of the DMA, of at least 45 million end users and 10 000 business users – demonstrate ByteDance's significant potential to monetise its users in the Union in the near future, despite its [*confidential*] during an initial period following its launch in the Union and, consequently show its significant impact on the internal market.

101 Accordingly, the applicant's arguments directed against recital 123 of the contested decision must be rejected as unfounded.

102 In the fourth place, the applicant complains that the Commission was wrong to reject, in recital 124 of the contested decision, its argument that ByteDance's global fair market value was not an indication of ByteDance's potential to monetise TikTok users in the Union, since that value stemmed mainly from its activities in China, which had no connection with its activities in the internal market.

103 The Commission rejected that argument as irrelevant, on the ground that the global market value threshold applied to the undertaking concerned as a whole, and not to a given geographical area. Moreover, according to the Commission, that argument ran counter to the objective underlying the presumption laid down in Article 3(2)(a) of the DMA, which, as is apparent from recital 17 of the DMA, is aimed at capturing the financial capacity of the undertaking concerned, including its access to financial markets and the resulting ability, for example, to acquire other innovative undertakings providing similar services.

104 In that regard, it should be noted that the market value criterion relates to the global fair market value of the undertaking in question, without any distinction as to the geographical origin of that value. Therefore, the Commission rightly considered that the fact that ByteDance's fair market value was mainly due to its operations in China was irrelevant.

105 First of all, the fact that, as the applicant maintains, ByteDance's global fair market value stems mainly from its activities in China, that its 'Asian businesses' were unavailable in the European Union and that some of those business ventures failed in the Union, has no bearing on ByteDance's ability to use its value generated in China or elsewhere in the world to strengthen its position in the European Union.

106 Next, contrary to what the applicant claims, the Commission was not required to analyse specifically whether ByteDance's 'Asian businesses' faced cultural and regulatory barriers in the

European Union. It was for the applicant, on which the burden of proof lies, to demonstrate that that was the case and that, because of such cultural and regulatory barriers, ByteDance could not benefit, in the internal market, from its global fair market value.

107 However, the applicant has not produced such evidence. On the contrary, it is apparent in particular from recitals 74, 79 and 98 of the contested decision that, since its launch in the European Union, TikTok has experienced very rapid growth, as shown by ByteDance's Union turnover, which rose from EUR [<7.5 billion] in 2020 to EUR [<7.5 billion] in 2022 (that is to say, an increase of approximately [100-2 000]%), and its ever-growing number of end users in the Union, which rose from [>45] million in 2020 to 125 million in 2022 (that is to say, an increase of approximately [50-100]%), and of business users in the Union, which rose, according to a conservative methodology used by the Commission in the contested decision, at the very least from [>10 000] in 2020 to [>10 000] in 2022 (that is to say, an increase of approximately [100-2 000]%). However, the applicant does not explain how the alleged cultural and regulatory barriers can be reconciled with the fact that TikTok has experienced very rapid growth in the European Union since its launch.

108 In that context, the Commission was entitled to consider that ByteDance's global fair market value, together with the significant number of TikTok users in the Union, reflected its financial capacity and its potential to monetise TikTok users in the Union.

109 Lastly, the fact, put forward by the applicant, that the revenue generated by TikTok in the European Union represented less than [0-5]% of ByteDance's global revenue and that, if TikTok's activities in the European Union were valued separately, they would correspond to only a [*confidential*] of ByteDance's global valuation, also cannot call manifestly into question ByteDance's potential to monetise TikTok users in the Union, in the light of the elements referred to in paragraph 107 above.

110 Consequently, the applicant's arguments directed against recital 124 of the contested decision must be rejected.

111 Therefore, it remains to be determined what effect the error committed by the Commission, referred to in paragraph 92 above, has on the lawfulness of the contested decision.

112 In that regard, it should be borne in mind that, according to the case-law, an error in the reasoning of the contested act does not lead to the annulment of that act if, in the particular circumstances of the case, that error could not have had a decisive effect on the outcome (see, to that effect, judgments of 14 May 2002, *Graphischer Maschinenbau* v *Commission*, T-126/99, EU:T:2002:116, paragraph 49 and the case-law cited, and of 10 April 2024, *Columbus Stainless* v *Commission*, T-445/22, not published, EU:T:2024:228, paragraph 104 and the case-law cited). Similarly, the Court has had occasion to hold that, whatever the errors in the contested decision may be, the errors in that decision cannot lead to its annulment if, and in so far as, all the other elements set out in that decision permit the Court to consider it to be established that, in any event, the arguments put forward by the applicant were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(a) of the DMA (see, to that effect and by analogy, judgment of 22 October 2002, *Schneider Electric* v *Commission*, T-310/01, EU:T:2002:254, paragraph 412).

113 It is therefore necessary to examine whether the error committed by the Commission, referred to in paragraph 92 above, in that it rejected as irrelevant ByteDance's Union turnover, may have had a decisive effect, in the particular circumstances of the present case, on the Commission's

rejection of the arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(a) of the DMA.

114 In that regard, first, it must be stated that the error committed by the Commission, referred to in paragraph 92 above, vitiates only recital 121 of the contested decision. By contrast, the applicant has not shown that the other recitals of that decision, on the basis of which the Commission rejected all the other arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(a) of the DMA, are vitiated by errors, as is apparent from paragraphs 93 to 110 above.

115 Secondly, as has been pointed out in paragraph 85 above, the fact that the Union turnover threshold was not met in each of the last three financial years is not sufficient, in itself, manifestly to call into question the presumption laid down in Article 3(2)(a) of the DMA. Yet, none of the other elements put forward by the applicant has succeeded.

116 Thirdly, all the other elements contained in the contested decision and taken into account by the Commission in order to conclude that ByteDance had significant potential to monetise its users in the Union in the near future remain valid, notwithstanding its Union turnover which, although it did not reach the threshold laid down in Article 3(2)(a) of the DMA, has nonetheless not ceased increasing, as set out in paragraphs 84 and 107 above (see also recital 98 of the contested decision), which the applicant does not dispute. Indeed, it is apparent from recitals 121, 123 and 124 of that decision that ByteDance's fair market value was 'significantly above' the EUR 75-billion threshold, that the number of end users and business users in the Union continued to increase in the last three financial years, far exceeding the thresholds laid down in Article 3(2)(b) of the DMA (see paragraph 107 above) and that, in view of those circumstances, the Commission concluded that the applicant's arguments were not capable of disproving ByteDance's significant potential to monetise its users in the Union in the near future.

117 In those circumstances, the error committed by the Commission, referred to in paragraph 92 above, could not have had a decisive effect on the Commission's finding that the arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(a) of the DMA were not sufficiently substantiated so as manifestly to call that presumption into question and, therefore, has no bearing on the lawfulness of the contested decision.

118 Accordingly, the second part of the first plea must be rejected as unfounded.

5. *The rebuttal of the presumption that TikTok was an important gateway (first plea, third part)*

119 The applicant claims that, in recitals 125 to 154 of the contested decision, the Commission infringed Article 3(1)(b) and Article 3(5) of the DMA by rejecting its arguments seeking to demonstrate that TikTok was not an important gateway.

120 The present part of the plea is divided into four complaints alleging, in essence, that (i) unlike other undertakings operating in the digital sector, ByteDance does not have an ecosystem and does not benefit from significant network effects, (ii) a significant proportion of TikTok users 'multi-home', that is to say that they use, in addition to TikTok, one or more other platforms, so that there are no significant lock-in effects, (iii) the scale of TikTok is smaller than that of some other online social networking services, such as Facebook and Instagram, and (iv) the level of engagement of advertisers and business users registered with the platform TikTok is minimal. In its view, those factors demonstrate that TikTok was not an important gateway within the meaning of Article 3(1)(b) of the DMA.

(a) ***The alleged lack of an ecosystem and of significant network effects***

(1) *Arguments of the parties*

121 The applicant claims, in essence, that, unlike other undertakings operating in the digital sector, ByteDance does not have an ecosystem and does not benefit from significant network effects, which, in its view, calls into question the presumption that TikTok is an important gateway. In recitals 127 to 133 of the contested decision, the Commission wrongly rejected its arguments.

122 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 127 to 133 of the contested decision, the content of which is set out below.

(2) *Contested decision*

123 In recitals 127 to 129 of the contested decision, the Commission noted that the applicant's argument that, unlike other undertakings such as Meta and Alphabet, ByteDance did not have an ecosystem, concerned the ability of those undertakings to sell online advertising thanks to their ecosystems, and it rejected that argument as irrelevant on the ground that the CPS at issue was an online social networking service and not an online advertising service, a distinction being drawn between those two CPS categories in the DMA.

124 In any event, the Commission considered that the applicant's line of argument was incapable of manifestly calling into question the presumption laid down in Article 3(2)(b) of the DMA for the following reasons.

125 First, in recitals 130 and 131 of the contested decision, the Commission observed that there was nothing in the DMA to suggest that the existence of an ecosystem was an absolute prerequisite for a CPS to be regarded as an important gateway and stated that the concept of 'ecosystem' comprised various business models so that each ecosystem had to be assessed on a case-by-case basis. In addition, it noted that there could be more than one gatekeeper in a specific CPS category and there was nothing in the DMA to suggest that the mere fact that certain gatekeepers were capable of monetising a service better than other gatekeepers meant that the latter would no longer be an important gateway in that CPS category.

126 Secondly, in recital 132 of the contested decision, the Commission found that ByteDance operated its own ecosystem, consisting of highly popular video-editing services, enterprise software, advertising, news, and healthcare applications, bearing in mind that, according to the Commission, some of the services provided by ByteDance, such as its video-editing application CapCut, were very successful in the European Union.

127 Thirdly, and in any event, the Commission noted, in recital 133 of the contested decision, that the number of TikTok end users had increased from [>45] million in 2020 to 125 million in 2022, and that TikTok had already reached half the size of Facebook and Instagram, despite not having an ecosystem the size of Meta's.

(3) *Findings of the Court*

128 The DMA does not comprise a definition of the term 'ecosystem'. Nevertheless, the meaning of that concept can be inferred from recitals 3, 32 and 64 of the DMA, from which it is apparent, in essence, that a digital platform ecosystem may consist of one or more CPSs and other services connected to them, for example by means of technological links or interoperability; this is liable to

exacerbate entry barriers for competitors of those undertakings and increase the cost of switching providers for end users, making it more difficult for existing or new market operators to compete with those undertakings or contest their position.

129 Consequently, a digital ‘ecosystem’ exists where several categories of suppliers, customers and consumers are brought together and interact within a platform, and where the products or services comprising that ecosystem may overlap with, or be connected to, each other in terms of their horizontal or vertical complementarity.

130 It is apparent from recital 3 of the DMA that one of the characteristics of certain gatekeepers is precisely the fact that they exercise control over whole platform ecosystems in the digital economy.

131 It follows that having a digital platform ecosystem can constitute a relevant factor for the purposes of assessing whether the undertaking concerned is a gatekeeper and whether, more particularly, the CPS at issue is an important gateway.

132 However, it should be pointed out, as the Commission did in recital 130 of the contested decision, that the existence of an ecosystem is one of the typical characteristics of ‘some’ gatekeepers referred to in recitals 2 and 3 of the DMA. Similarly, no provision or recital of the DMA suggests that, in order to be designated as a gatekeeper, a company must necessarily control a platform ecosystem. On the contrary, by providing that ‘a [CPS]’ can be an important gateway, Article 3(1)(b) of the DMA implies that a CPS can, alone, be such a gateway without necessarily forming part of an ecosystem.

133 Consequently, the fact that a CPS is not part of an ecosystem is insufficient to demonstrate that that CPS is not an important gateway.

134 It should also be clarified that it is the benefits or disadvantages associated with the existence or absence of an ecosystem which are the elements that make it possible to assess whether the CPS concerned is an important gateway, and not the mere existence or absence of an ecosystem as such. As the Commission rightly observed in recital 130 of the contested decision, the very concept of ‘ecosystem’ comprises various business models. Therefore, each ecosystem must be examined on a case-by-case basis, taking into account the benefits or lack of benefits deriving from such a business model, in particular as regards contestability.

135 Those clarifications having been made, it is necessary to consider, in the first place, whether the applicant has sufficiently substantiated its assertion that ByteDance does not have an ecosystem.

136 All of the applicant’s arguments concerning recitals 127 to 133 of the contested decision are based on the premiss that ByteDance has no ecosystem. Thus, it disputes the Commission’s finding in recital 132 of that decision that ByteDance does, in fact, have an ecosystem, consisting of highly popular video-editing services, enterprise software, advertising, news, and healthcare applications, including CapCut in particular, by arguing that that finding is incorrect and that, in any event, the Commission failed to give sufficient reasons for its conclusion on that point.

137 The Commission contends, inter alia, that the applicant did not substantiate, during the administrative procedure, its assertion that ByteDance does not have an ecosystem.

138 In that regard, it must first be borne in mind that the burden of proof to rebut the presumptions laid down in Article 3(2) of the DMA lies on the undertaking concerned, as noted in paragraph 59 above.

139 Accordingly, it was for the applicant to substantiate to the requisite legal standard its argument that ByteDance did not have an ecosystem and to specify the effect of that circumstance on the presumption laid down in Article 3(2)(b) of the DMA.

140 When questioned in the context of a measure of organisation of procedure in that connection, the applicant replied that, during the administrative procedure, it substantiated its argument that ByteDance did not have an ecosystem by referring to certain documents which it had submitted during that procedure.

141 However, in the documents in question, the applicant confined itself, in essence, to asserting that, unlike certain competitors, in particular Meta and Alphabet, ByteDance did not have an ecosystem, without however providing substantiated evidence to support the contention that the various digital services that ByteDance provided in the European Union were not part of an ecosystem in the light of the criteria referred to in paragraphs 128 and 129 above.

142 It is true that, in order to rebut a presumption, the undertaking concerned cannot be required to take excessive or unrealistic steps (see, to that effect and by analogy, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 41).

143 However, the requirement to substantiate its claim that ByteDance did not have an ecosystem does not amount to imposing excessive or unrealistic steps on the applicant. It was entirely open to the applicant to explain which digital services ByteDance provided in the European Union and to describe the relationship between them in the light of the criteria referred to in paragraphs 128 and 129 above, especially since, as a provider of those services, it was in the best position to do so.

144 Accordingly, it is clear that, as the Commission rightly observes in the present proceedings, the applicant, on which the burden of proof lies, has not substantiated its argument that ByteDance did not have an ecosystem of which TikTok formed part.

145 Consequently, since the applicant has failed to demonstrate the premiss on which its line of argument concerning recitals 127 to 133 of the contested decision is based, that line of argument must be rejected as ineffective, without it being necessary to examine whether recital 132 of the contested decision is sufficiently reasoned.

146 In the second place, and in any event, even if ByteDance does not have an ecosystem, as the applicant claims, the Commission’s conclusion remains valid all the same.

147 It is true, as the applicant claims, that the considerations set out in recitals 127 to 129 of the contested decision do not fully address the arguments which it had submitted in the notification. It is apparent from that notification that it had referred to several advantages associated with having an ecosystem, one of which concerned the sale of online advertising. It follows that the applicant’s argument based on the alleged lack of an ecosystem was not limited to the advantages associated with the sale of online advertising, contrary to what the Commission found in recital 127 of that decision. Therefore, the considerations set out in recitals 127 to 129 of the contested decision are based on an incomplete interpretation of the applicant’s arguments.

148 However, as the Commission observed in recital 133 of the contested decision without being challenged by the applicant, despite the lack of an ecosystem or, at the very least, of an ecosystem comparable to that of Meta, TikTok saw its number of end users increase from [>45] million in 2020 to 125 million in 2022, thus reaching half the size of Facebook and of Instagram, according to the data available to the Commission.

149 Similarly, in recital 126 of the contested decision, the Commission observed that, in terms of absolute scale, in 2022, TikTok significantly exceeded the user thresholds laid down in Article 3(2)(b) of the DMA, with more than [>10 000] business users and 125 million end users.

150 It follows that TikTok, which was not launched in the European Union, in its current version, until August 2018, succeeded, in a short time, in attracting a very large number of end users, with the result that, in 2022, that number was almost three times higher than the threshold laid down in Article 3(2)(b) of the DMA, as well as a very high number of business users, that is to say more than [>10 000] in 2022, thereby far exceeding the threshold of 10 000 business users laid down in Article 3(2)(b) of the DMA, and reached half the size of Facebook and of Instagram in a limited period of time.

151 That tends to show that the alleged lack of an ecosystem in no way prevented TikTok from growing in both absolute and relative terms, by following an exponential upward trend in terms of user numbers.

152 In the third place, contrary to what the applicant claims, the lack of an ecosystem does not in any way mean that the CPS at issue has no significant network effects.

153 Network effects occur when the value of a product or service increases as more people use it. Consequently, online social networks generate strong network effects and data-driven advantages when, gradually, their number of users increases, since the more users there are, the more useful that network is to those users and the more its value increases for them, which, in turn, attracts more users. In addition, the greater the number of end users of an online social network, the more business users are attracted to that network (see, to that effect, Commission staff working document of 15 December 2020, entitled ‘Impact assessment report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)’ (SWD(2020) 363 final, points 130 and 386)). An online social networking platform may thus generate significant network effects on its own, even where it is not part of an ecosystem. There is nothing in the DMA to suggest that a CPS can produce significant network effects only if it is part of an ecosystem. On the contrary, it follows from recitals 2 and 13 of the DMA that significant network effects are a characteristic of CPSs which is distinct from that relating to the existence of vertical integration.

154 However, the applicant does not put forward any independent argument which may suggest that TikTok lacks any significant network effects. Its line of argument is based on the premiss that the alleged lack of an ecosystem leads to the absence of significant network effects. However, as has been demonstrated in paragraphs 152 and 153 above, that premiss is incorrect.

155 In that regard, the applicant merely refers in the application, without providing further details, to ‘TikTok’s absence of network effects associated with the social graph that characterises *real* social networks like Facebook or Instagram’. That argument is not sufficiently clear.

156 Moreover, in so far as that argument appears to be based on a distinction between a ‘social graph’ and a ‘content graph’, it is sufficient to note, as the Commission stated in recital 57 of the

contested decision, without being challenged on that point by the applicant, that the DMA does not refer to those concepts and there are no clear boundaries between them.

157 Similarly, the applicant does not explain why the fact that TikTok is not based on a 'social graph' must necessarily mean that it has no significant network effects. On the contrary, the data referred to in paragraphs 33 and 107 above tend rather to demonstrate the contrary.

158 In any event, as is apparent from recitals 38 to 66 of the contested decision, the Commission considered that TikTok was an online social networking service, within the meaning of point 7 of Article 2 of the DMA, and not a video-sharing platform service, within the meaning of point 8 of Article 2 of the DMA. The applicant has not challenged that classification in the context of the present action. By its argument referred to in paragraph 155 above, it is in actual fact calling into question that classification without, however, demonstrating that the considerations set out in recitals 38 to 66 of that decision are incorrect.

159 In the fourth place, the applicant claims that what matters for the purposes of the designation of ByteDance as a gatekeeper is not the number of TikTok users, but the question as to whether those users are locked in as a result in particular of the existence of an ecosystem or network effects, or otherwise.

160 However, the alleged lack of an ecosystem does not as such mean that TikTok users are not locked in (see paragraph 179 below) or that TikTok has no significant network effects (see paragraphs 152 to 157 above); the applicant has not produced any substantiated evidence to support a finding to the contrary. Consequently, the applicant fails to demonstrate that TikTok users are not locked in as a result of the lack of an ecosystem or significant network effects.

161 Therefore, even if ByteDance did not have an ecosystem, that fact does not in itself, and in the light of the foregoing, mean that TikTok was not an important gateway within the meaning of Article 3(1)(b) of the DMA, so that the Commission was entitled to conclude, without committing any error, that that argument was not capable of manifestly calling into question the presumption laid down in Article 3(2)(b) of the DMA.

162 Accordingly, the first complaint of the third part of the first plea must be rejected as unfounded.

(b) ***The existence of multi-homing and the alleged absence of lock-in effects***

(1) *Arguments of the parties*

163 The applicant claims, in essence, that a significant proportion of TikTok users multi-home, which shows that there are no significant lock-in effects and that TikTok's business users do not depend on TikTok to reach their end users. Furthermore, the fact that TikTok invests in interoperability and encourages multi-homing shows that TikTok is not a gatekeeper.

164 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 134 to 142 of the contested decision, the content of which is set out below.

(2) *Contested decision*

165 In recital 134 of the contested decision, the Commission acknowledged the existence of a certain degree of multi-homing by end users and business users in relation to TikTok and other

online social networks. However, it considered that that fact was insufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA for the following reasons.

166 First, in recitals 135 and 136 of the contested decision, the Commission stated, in essence, that, while the absence of multi-homing may be a relevant element to assess whether a CPS constitutes an important gateway, the existence of some degree of multi-homing was not in itself an indication that a CPS was not such a gateway and did not mean that the contestability of the market was not limited or that there could be no unfair practices.

167 Secondly, in recitals 137 to 139 of the contested decision, the Commission found, in essence, that the fact that business users and end users use different services offered by online social networks in parallel does not imply equal use of those services since those users can use them asymmetrically. In any event, even if certain end users or business users were similarly active on various online social networks – which the applicant has not demonstrated – that does not mean that a specific online social networking service is not an important gateway enabling business users to reach their end users, for example, certain end-user demographic groups.

168 Thirdly, in recital 140 of the contested decision, the Commission noted, in essence, that the comparison between the advertising expenditure of business users on the platforms of TikTok, Meta and Alphabet, produced by the applicant, could not manifestly call into question the presumption laid down in Article 3(2)(b) of the DMA.

169 Fourthly, in recital 141 of the contested decision, the Commission found that the evidential value of the figures produced by the applicant to show that the majority of TikTok users also use Instagram and Facebook was limited, on the ground that Instagram and Facebook had a greater number of end users and had been active in the Union before TikTok, so that, statistically, it could be expected that a large number of Facebook and Instagram users also use TikTok. Moreover, in its view, those figures failed to reflect the intensity of use of the various online social networks, bearing in mind that TikTok had a higher engagement rate than other social networks, in the sense that those end users spend more time on TikTok than on other platforms, which was particularly the case for young users.

170 Lastly, in recital 142 of the contested decision, the Commission observed, in essence, that the applicant's argument that TikTok, as a challenger, invests in interoperability and in facilitating multi-homing was raised in support of the applicant's line of argument regarding multi-homing in general and, therefore, it had to be rejected for the same reasons as those set out in recitals 134 to 141 of that decision.

(3) *Findings of the Court*

171 It should be noted that, in the context of digital services in general and online platforms in particular, the concept of 'multi-homing' describes the situation in which users use several competing digital services in parallel; in the present case, those services are online social networking services.

172 It is apparent from recital 2 of the DMA that CPSs differ from the other digital services owing to certain characteristics which enable undertakings that provide them to exploit them, such as their extreme scale economies, which often result from nearly zero marginal costs to add business users or end users, their very strong network effects, their ability to connect many business users with many end users through their multisidedness, a significant degree of dependence of both

business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data-driven advantages.

173 Recital 13 of the DMA explains that weak contestability and unfair practices in the digital sector are more frequent and pronounced for certain digital services than for others and that that is the case in particular for widespread and commonly used digital services that mostly intermediate directly between business users and end users and which are characterised mainly by factors such as those referred to in paragraph 172 above.

174 It follows that the absence of multi-homing and the existence of lock-in effects are relevant factors, among others, capable of characterising a gatekeeper providing a CPS which is an important gateway.

175 That being so, it should be pointed out, first, that the factors listed by way of example in recitals 2 and 13 of the DMA do not constitute conditions *sine qua non* for a CPS to be regarded as an important gateway.

176 Second, where the undertaking concerned presents arguments relating to the factors listed by way of example in recitals 2 and 13 of the DMA, account must be taken, in accordance with Article 3(5) of the DMA, of the circumstances in which the relevant CPS operates.

177 Accordingly, the existence or absence of multi-homing or lock-in effects must not be examined in the abstract, but in relation to the circumstances in which the relevant CPS operates.

178 In addition, account must be taken of the specific and concrete characteristics of the multi-homing in question. As is apparent from recital 137 of the contested decision, which is not challenged by the applicant, the mere fact that users of an online social networking platform use other online social networking platforms in parallel does not mean that those different platforms are of equal importance to them. Consequently, as is apparent, in essence, from recitals 138, 139 and 141 of that decision, the intensity of that use, that is to say the time spent by a user interacting on that platform, and the importance of such a platform for certain categories of users, may constitute, among other factors, and as the case may be, relevant factors for assessing whether the existence of a certain degree of multi-homing can manifestly call into question the presumption that the CPS concerned is an important gateway.

179 It is also important to note that the lock-in effects that an online social networking platform may have on its users is a factor different from that relating to the existence or absence of multi-homing, as is apparent from recitals 2 and 13 of the DMA. Such effects may arise even in the presence of multi-homing, depending, for example, on the significant network effects generated by the platform in question, the intensity of use of a given online social networking platform, the stronger engagement of certain categories of users with that platform, or behavioural bias which certain groups of users might display towards such a platform, to which they may be particularly attached. In addition, even in the presence of multi-homing, some users may be faced with switching costs when they switch the focus of their activities from one platform to another, such as those linked to adjusting their content to the format and algorithm of the various platforms, as the Commission rightly observed in recitals 136 to 139 of the contested decision.

180 It follows that, while the existence or absence of multi-homing and lock-in effects can constitute, depending on the case, relevant elements to assess whether the presumption that the CPS concerned is an important gateway may be manifestly called into question, it is necessary to take

into account the specific and concrete characteristics of that multi-homing and of the lock-in effects as they arise in the circumstances in which the relevant CPS operates.

181 It is in the light of the foregoing that the applicant's arguments must be examined.

182 In the first place, it follows from paragraphs 174 to 177 above that the Commission rightly pointed out, in recitals 135 and 136 of the contested decision, that, even if the absence of multi-homing may be a relevant element to assess whether a CPS constitutes an important gateway, the existence of a certain degree of multi-homing is not in itself an indication that a CPS is not an important gateway. Consequently, the relevance of that factor, as an element to be taken into consideration for the purposes of determining whether a CPS is such a gateway, may vary according to the different CPS categories.

183 In that regard, as the Commission explained in its reply to a measure of organisation of procedure – without being challenged on that point by the applicant – for certain CPS categories, such as online social networking services, multi-homing is a common practice. Were the mere existence of multi-homing to be of particular importance for the purposes of determining whether an online social network is an important gateway, the consequence would be that no, or virtually no, online social networking service would be regarded as being such a gateway; that circumstance would run counter to the wording and the *ratio legis* of the DMA, which comprises online social networking services among the CPSs covered by point 2(c) of Article 2 of the DMA.

184 The prevalence of multi-homing among users of online social networks is illustrated by the data produced by the applicant itself. It follows from that data that all the online social networks to which it refers have high degrees of multi-homing, in so far as more than 65% of the end users of those networks use two other platforms in parallel.

185 Accordingly, in view of the characteristics of the CPS concerned, the mere existence of multi-homing, even to a significant degree, is not in itself sufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

186 In the second place, and as is apparent from paragraph 178 above, the Commission's findings, set out in recitals 137 to 139 of the contested decision, that, in essence, the parallel use of various online social networking services does not imply equal use, given that users with a presence on more than one social network may use them asymmetrically, are not vitiated by error.

187 Further, as the Commission notes in recital 138 of the contested decision, the fact that most content creators on TikTok multi-home does not give any indication of the relevance of each platform, since those content creators can, for example, be mostly active on TikTok and use other platforms only to a limited extent. Therefore, the Commission was right to find that, as content creators have an incentive to increase their exposure to as wide an audience as possible, the fact that they multi-home is not surprising. Similarly, it rightly noted that, to the extent that certain content creators focus most of their activities on a given platform, they may face switching costs should they decide to switch the focus of their activities to another platform, such as costs associated with building an audience or adjusting their content to the format and algorithm of different platforms.

188 Lastly, as is apparent from recitals 139 and 141 of the contested decision, in essence, even if some users were similarly active on several online social networks, a specific online social networking service could still be an important gateway for business users to reach, inter alia, a certain demographic group of end users, such as younger end users.

189 It should be noted that the arguments and evidence submitted by the applicant – on which the burden of proof lies – during the administrative procedure, concerned only the existence of multi-homing in general, and not the intensity of use of the various online social networking platforms.

190 In the context of the present action, the applicant confines itself to stating, in addition, that the Commission should have taken into account the fact that the intensity of use of TikTok 'as a social network' is practically non-existent because the principal purpose of that platform is to offer video-sharing services.

191 That argument cannot succeed.

192 First, by its argument referred to in paragraph 190 above, the applicant in actual fact calls into question the classification of TikTok as an online social networking service, without however demonstrating that the considerations set out in recitals 38 to 66 of the contested decision are incorrect.

193 Second, in accordance with point 7 of Article 2 of the DMA, the concept of 'online social networking service' is defined as a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations. It follows that one of the essential functions of an online social network is that of enabling content to be shared and discovered, in particular videos. Thus, information concerning the sharing and discovery of videos on TikTok is entirely relevant for assessing the intensity of use by the end users of that platform.

194 Therefore, it must be concluded that the Commission's assessments in recitals 137 to 139 of the contested decision are not vitiated by error.

195 In the third place, the Commission correctly stated, in recital 141 of the contested decision, that the evidential value of the figures produced by the applicant showing that the majority of TikTok users also use Instagram and Facebook was limited.

196 In that regard, the applicant produces data according to which approximately 82% and 77% of TikTok end users also use Instagram and Facebook, respectively, while 38% of Facebook end users and 48% of Instagram end users also use TikTok. It observes that the asymmetric nature of multi-homing shows that, unlike 'real social networks' such as Facebook or Instagram, TikTok does not benefit from network effects and lock-in effects.

197 However, first, and as noted in paragraph 184 above, the data produced by the applicant show high degrees of multi-homing among all the platforms referred to, in so far as more than 65% of the end users of those platforms use two other platforms in parallel.

198 Second, and as explained in recital 141 of the contested decision, the asymmetric nature of multi-homing, as far as TikTok users are concerned, can be explained by the economic and historical context in which online social networks operate in the Union. It is common ground that Facebook and Instagram had been active in the Union long before TikTok and that the former already had a large user base in the Union before TikTok was launched in the internal market. In those circumstances, it was to be expected that a large proportion of TikTok users were already using Facebook and Instagram prior to the launch of TikTok and would continue to do so, in parallel, thereafter.

199 Moreover, as the Commission pointed out in recital 141 of the contested decision, without being challenged on that point by the applicant, the figures produced by the applicant fail to reflect the intensity of use of the various online social networks, particularly because, as the Commission also observed in that context, TikTok enjoyed a higher engagement rate than other social networks since end users, in particular young people, spend more time on TikTok than on other social networks.

200 In any event, the applicant has not demonstrated that the asymmetric nature of multi-homing as practised by TikTok users, on the one hand, and Facebook and Instagram users, on the other, was due not to the economic and historical context in which online social networks operate in the Union (see paragraph 198 above), but to the absence of network effects and lock-in effects on TikTok.

201 First, as has been pointed out in paragraphs 152 to 157 above, the applicant has not submitted any substantiated evidence to support the conclusion that TikTok lacked any significant network effects.

202 Second, the applicant does not present any separate argument relating to the alleged absence of lock-in effects associated with TikTok. Its line of argument is based on the premiss that the existence of a significant degree of multi-homing demonstrates in itself the absence of lock-in effects. However, for the reasons set out in paragraph 179 above, that premiss is incorrect.

203 Similarly, the reference to the fact that TikTok does not operate on the basis of a ‘social graph’ cannot succeed for the reasons set out in paragraphs 155 to 157 above.

204 In the fourth place, the applicant claims that ByteDance put in place, on TikTok, several tools to enable its users to repost and cross-post content on other platforms and link their accounts on other platforms to their TikTok accounts. In its view, the fact that it encouraged multi-homing shows that it is a challenger seeking to attract more users, and that it is not a gatekeeper with a CPS which is an important gateway.

205 In the contested decision, the Commission rightly rejected, in recital 142, that argument for the same reasons as those justifying the rejection of its arguments relating to the existence of multi-homing.

206 The creation of such tools can be explained in particular by the fact that TikTok was not launched in the Union, in its current version, until August 2018 and that it therefore sought to attract more users who already used other platforms. Furthermore, as the applicant confirmed at the hearing, other online social networking services also enable their users to repost and cross-post on competing platforms.

207 In those circumstances, the fact that ByteDance allows TikTok users to repost and cross-post content on other platforms and to connect their accounts on other platforms to their TikTok accounts is insufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

208 In the fifth place, the applicant claims that its arguments demonstrate, in general, that TikTok’s business users do not ‘depend’ on that platform to reach their end users, since they have alternative means to do so, as is confirmed by the fact that a large number of those users multi-home. In its opinion, this means that TikTok is not an important gateway within the meaning of Article 3(1)(b) of the DMA.

209 In that regard, it is apparent, in essence, from recital 20 of the DMA that an undertaking must, in principle, be regarded as providing a CPS which is an important gateway where that CPS has a very high number of business users that depend on that CPS to reach a very high number of end users, since that fact enables the undertaking providing that CPS to influence the operations of a substantial part of those business users to its advantage.

210 However, in order to consider that business users of a CPS 'depend' on it in order to reach their end users, it is not necessary for that CPS to be the only channel through which those undertakings can reach those users. It is sufficient for it to be an important channel for that purpose, which those business users can access only if they have an account on that CPS.

211 That is precisely the case here. First, it is not disputed that TikTok has a very large number of business users and end users. Second, it is also not disputed, as the applicant confirmed at the hearing, that a TikTok business user can access its end users only if it is itself registered on TikTok. Therefore, in particular, that business user cannot access those end users from its account registered on another platform.

212 Consequently, the applicant's argument based on the lack of 'dependency' of TikTok business users in order to reach end users on that platform must be rejected.

213 Lastly, the applicant's argument relating to the advertising expenditure of advertisers on TikTok compared to that of advertisers on the platforms of Alphabet and Meta, to which the Commission responded in recital 140 of the contested decision, overlaps with its arguments on the allegedly minimal engagement of advertisers with the platform TikTok, which were assessed in a separate part of the contested decision and will therefore be examined in paragraphs 248 to 285 below.

214 It follows that the Commission did not err in rejecting the applicant's arguments and evidence relating to the existence of multi-homing and the alleged absence of lock-in effects on the ground that they were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

215 Therefore, the second complaint of the third part of the first plea must be rejected as unfounded.

(c) ***The smaller scale of TikTok compared with other platforms and the large number of competitors***

(1) *Arguments of the parties*

216 The applicant submits, in essence, that the scale of TikTok is smaller than that of certain other online social networking services, such as Facebook and Instagram, and that it faces a large number of competitors.

217 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 143 to 146 of the contested decision, the content of which is set out below.

(2) *Contested decision*

218 In the first place, in recitals 143 to 146 of the contested decision, the Commission considered that the applicant's argument that TikTok's scale in the Union was smaller than those of other

platforms in terms of revenue, number of end users and average revenue per user (‘ARPU’) could not manifestly call into question the presumption laid down in Article 3(2)(b) of the DMA.

219 In that regard, first, in recitals 144 and 145 of the contested decision, the Commission noted that the applicant’s argument relating to the size of TikTok in terms of revenue and of ARPU was irrelevant, since it concerned revenue derived from online advertising, and that the relative scale measured on the basis of revenue and ARPU was not a good indicator for assessing whether a CPS was an important gateway.

220 Secondly, in recital 146 of the contested decision, the Commission found that TikTok’s absolute scale in terms of number of end users and business users in the Union significantly exceeded the thresholds laid down in Article 3(2)(b) of the DMA and that TikTok’s relative scale, that is to say the scale of TikTok compared with that of other online social networking services, in terms of number of end users, was not small, since it was equal to approximately half the size of Facebook and of Instagram. It added that the mere fact that TikTok is smaller than other platforms is insufficient to rebut the presumption laid down in that provision inasmuch as TikTok’s number of end users in the Union had increased in previous years and TikTok enjoyed a higher engagement rate than other online social networks, in particular among young users.

221 In the second place, in recitals 150 to 154 of the contested decision, the Commission rejected the applicant’s argument that, in essence, TikTok faced a large number of competitors, some of which had well-established ecosystems.

(3) *Findings of the Court*

222 Among the elements referred to in recital 23 of the DMA, which the Commission may take into account in its assessment of the arguments presented by the undertaking concerned to rebut the presumption laid down in Article 3(2)(b) of the DMA, features, inter alia, the ‘importance of the [CPS of the undertaking concerned] considering the overall scale of activities of the respective [CPS]’. However, that recital does not specify the parameters on the basis of which the importance and scale of the CPS at issue must be measured.

223 In the present case, the applicant submits that TikTok is not an important gateway, within the meaning of Article 3(1)(b) of the DMA, on the ground that TikTok is smaller in size than other well-established platforms, in terms, first, of advertising revenue and of ARPU and, second, of number of end users.

224 In that regard, in the first place, the Commission found, in recital 146 of the contested decision, without committing any error and without the applicant disputing the figures referred to by the Commission in that recital, that TikTok’s absolute scale in terms of number of end users and business users in the Union significantly exceeded the thresholds laid down in Article 3(2)(b) of the DMA, and that the relevant scale of TikTok was not small, since it reached approximately half the size of Facebook and of Instagram. Moreover, the number of TikTok users in the Union has continuously increased in the past few years.

225 In addition, in recital 153 of the contested decision, the Commission stated, without being challenged on that point by the applicant, that the number of TikTok business users in the Union has also increased very significantly since 2020, that number also far exceeding the threshold laid down in Article 3(2)(b) of the DMA, which indicates that TikTok’s importance for business users has also increased since 2020.

226 In the context of the present action, the applicant puts forward new arguments and new figures, which it had not submitted during the administrative procedure, seeking to demonstrate TikTok's alleged small scale compared with other online platforms.

227 First of all, the applicant claims that the number of TikTok end users in the Union in 2022 represents only [5-10]% of the combined total number of end users of the following online platforms: Facebook, Instagram, YouTube, Snapchat, Twitter, Pinterest, LinkedIn, Reddit and TikTok.

228 Next, the applicant observes that, in the contested decision, contrary to what is required by recital 23 of the DMA, the Commission did not compare TikTok with the overall scale of activities of online social networking services, but merely compared it with Instagram and Facebook.

229 Lastly, the applicant claims that the Commission should also have taken into account online video-sharing services, such as DailyMotion and Vimeo.

230 It is on that comparative basis that the applicant considers that the Commission should have concluded that TikTok's smaller relative scale demonstrated that it was not an important gateway, as was the case in its conclusions in its Decision C(2023) 6078 final of 5 September 2023 in Cases DMA.100015, DMA.100028 and DMA.100034, from which it was apparent that the fact that Bing accounted for 10% of desktop search queries and that Edge accounted for a market share of 12%, as opposed to Chrome's 60.5% market share, was sufficient to rebut the presumption laid down in Article 3(2)(b) of the DMA.

231 However, first, it should be noted that, during the administrative procedure, the applicant did not compare the number of TikTok end users with the overall scale of activities of online social networking services and did not submit any data relating to the overall scale of those activities. Moreover, it did not compare the number of TikTok end users with those of Pinterest, LinkedIn, Reddit, DailyMotion or Vimeo, nor did it provide any information in that regard.

232 In the context of the present action for annulment, the role of the General Court is to determine whether the Commission erred in its assessment of the arguments presented by the undertaking concerned during the administrative procedure in rebuttal of the presumptions, and not to examine whether those presumptions could be rebutted in the light of new arguments and evidence submitted by that undertaking for the first time before it.

233 It should be noted that the DMA has established a specific regulatory framework governing the designation of gatekeepers, which is characterised by features that are particular to it. Thus, in order to ensure the effective application of the DMA, the Commission must, within a short time, designate gatekeepers. To that end, the DMA introduced the presumptions laid down in Article 3(2) of the DMA, intended to streamline the designation process. The possibility of rebutting them is subject to strict requirements, both at procedural level and as regards the burden and standard of proof. Thus, Article 3(5) of the DMA states that the undertaking concerned may present, 'with its notification', sufficiently substantiated arguments to call those presumptions into question. In addition, Article 2(3) of Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to [the DMA] (OJ 2023 L 102, p. 6) requires the undertaking concerned to provide its arguments in an annex to its notification by clearly identifying to which of the three cumulative requirements set out in Article 3(1) of the DMA its arguments relate and, for each argument, to explain why, exceptionally, the CPS concerned does not satisfy that requirement, despite the fact that it meets the corresponding threshold laid down in Article 3(2) of the DMA.

234 Accordingly, the undertaking concerned cannot submit, for the first time before the Court, arguments or evidence, under Article 3(5) of the DMA, which it had not submitted during the administrative procedure in rebuttal of the presumptions laid down in Article 3(2) of the DMA, unless, by those arguments, it seeks to challenge a matter of law or of fact raised in the contested decision on which it was not able to comment during that procedure. That is not the case here as regards the arguments set out in paragraphs 227 to 229 above.

235 It follows that those arguments are inadmissible.

236 That conclusion is not called into question by the applicant's argument that, by referring to certain judgments concerning competition law and State aid, such arguments and evidence are admissible, even if they are submitted for the first time before the Court. It cites in that regard a number of judgments, such as those of 1 July 2010, *Knauf Gips* v *Commission* (C-407/08 P, EU:C:2010:389, paragraphs 89 to 92); of 21 September 2005, *EDP* v *Commission* (T-87/05, EU:T:2005:333, paragraph 158); and of 10 May 2023, *Ryanair and Condor Flugdienst* v *Commission (Lufthansa; COVID-19)* (T-34/21 and T-87/21, under appeal, EU:T:2023:248, paragraph 86).

237 However, that case-law concerns legal frameworks and fields of law which are different from those covered by the DMA, the latter being characterised, as noted in paragraph 233 above, by strict requirements governing the rebuttal of the presumptions laid down in Article 3(2) of the DMA, in terms of procedural requirements as well as burden and standard of proof. That case-law is therefore not applicable in the present case.

238 Secondly, and in any event, it should be noted, as did the Commission, that the arguments presented by the applicant for the first time before the Court are founded on an incorrect comparative basis. Some of the online platforms referred to by the applicant for the purposes of that comparison are not online social networks, but belong to other CPS categories, whereas, according to recital 23 of the DMA, it is necessary to assess the importance of the undertaking's CPS considering the overall scale of activities of the CPS concerned. That is the case, in particular, of YouTube, which was designated by the Commission as a CPS consisting of a video-sharing platform, and of DailyMotion and Vimeo, described by the applicant as video-sharing platforms.

239 In addition, and as the Commission found in recital 146 of the contested decision, TikTok's size cannot be assessed in a static manner, but must take account of the rapid and significant growth in the number of end users in the Union, reaching approximately half the size of Facebook and of Instagram in a few years.

240 For the same reasons, the applicant's reference to the Commission's decision concerning the services Bing and Edge (see paragraph 230 above) cannot lead to a different conclusion. Besides the fact that the Courts of the European Union are not bound by the Commission's administrative practice, the applicant has not established that ByteDance was in a situation comparable to that of Microsoft. The Commission decision cited by the applicant concerned other CPS categories and not online social networking services and the applicant does not explain why the circumstances in which those other CPS categories operate are comparable to those in which an online social networking service such as TikTok operates. Furthermore, in that decision, the Commission observed that Microsoft had produced data showing, in particular, that Bing represented only 3.6% of the overall scale of online search engine activities and was 25 times smaller than Google Search, and that Edge represented only 5.8% of the overall scale of activities of web browsers and was ten times smaller than Google Chrome. In the present case, the applicant did not submit data comparable to those data in the notification as regards TikTok's scale. The fact of the matter is that

the circumstance that TikTok's relative scale reached approximately half of Facebook's size and of that of Instagram distinguishes the present case from those referred to above.

241 In the second place, the applicant cannot, similarly, criticise the Commission for having relied, in recital 146 of the contested decision, on the increase in the number of TikTok end users in the Union between 2020 and 2022, without comparing it with that of the platforms of Meta and Alphabet or with the pace at which the services of Meta and Alphabet emulating TikTok developed.

242 It was for the applicant, on whom the burden of proof lies, to submit to the Commission, during the administrative procedure, data setting out such a comparison, which it did not do. Such arguments, submitted for the first time before the Court, are therefore inadmissible for the reasons set out in paragraphs 232 to 237 above.

243 In the third place, the applicant's argument that TikTok cannot be compared with Meta's platforms or other online social networks on the ground that TikTok's main objective is to offer video-sharing services and not online social networking services must be rejected. That argument is, first, contradictory because the applicant itself repeatedly compares ByteDance with Facebook and Instagram. Second, and in any event, that argument must be rejected for the same reasons as those set out in paragraphs 190 to 193 above.

244 Lastly, the applicant does not put forward any argument with respect to recitals 151 to 154 of the contested decision, from which it is apparent, in particular, that the number of TikTok business users in the Union has also increased very significantly since 2020 (see paragraph 225 above), that business users which have self-identified as such and therefore have self-identified business accounts in the Union have access to business-specific functionalities, such as performance insights, creative tools, and exclusive account options, and that ByteDance continues to develop new functionalities for business users. Those circumstances, taken together, show that TikTok's social networking service is an important service for those undertakings.

245 It must therefore be concluded that the Commission was correct to consider that the arguments presented by the applicant relating to TikTok's scale, in terms of number of end users, compared to that of other online social networking platforms, and to the existence of a large number of competitors, were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

246 As for the applicant's argument relating to TikTok's relative scale in terms of advertising revenue and of ARPU, it overlaps with that relating to the degree of advertiser engagement on TikTok, and will thus be examined in paragraphs 248 to 285 below.

247 Therefore, the third complaint of the third part of the first plea must be rejected as unfounded.

(d) ***Advertising revenue and the level of engagement of business users registered on TikTok***

(1) *Arguments of the parties*

248 The applicant claims, in essence, that the fact that its advertising revenue, its ARPU and the level of engagement of advertisers and business users registered on TikTok are minimal and lower than those of certain other platforms shows that TikTok is not an important gateway.

249 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 127 to 129, 140, 144, 145 and 147 to 151 of the contested decision, the content of which is set out below.

(2) *Contested decision*

250 In the contested decision, the Commission rejected the applicant's arguments relating to ByteDance's advertising revenue, the ARPU or the allegedly minimal engagement of advertisers and business users registered on TikTok, on the ground, first, that they were irrelevant and, second, that they were, in any event, insufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

251 Accordingly, the Commission rejected those arguments by finding that they were irrelevant on the ground, in essence, as is apparent from recitals 127 to 129, 140, 144, 147 and 150 of the contested decision, that they concerned another CPS category, namely online advertising services, and not online social networking services, and that business users of those two CPS categories were defined separately in Part E, entitled 'Specific definitions', of the annex to the DMA.

252 In addition, the Commission stated, in recital 145 of the contested decision, that advertising revenue and ARPU were not appropriate indicators for assessing whether a particular CPS was an important gateway.

253 Moreover, the Commission added, in recital 148 of the contested decision, that, in any event, while certain advertisers on TikTok could also be business users of online social networking services, it was necessary to take account, for the purposes of the assessment under Article 3(2)(b) of the DMA, of all business users and not only those which are 'paid advertisers' since 'non-advertising business users' may still rely on TikTok to gain visibility for their activities. Furthermore, in recital 149 of the contested decision, it found that the figures on the engagement of registered business users produced by the applicant were not representative.

254 Lastly, in recital 151 of the contested decision, the Commission stated that it was inappropriate to compare figures relating to ByteDance's online advertising with those of Alphabet, Meta and Amazon, because the latter undertakings offered a wider range of services on which advertising could be displayed than TikTok.

(3) *Findings of the Court*

255 In the first place, it is necessary to examine whether the Commission could, without erring, reject the applicant's arguments relating to online advertising as being irrelevant for the purposes of rebutting the presumption laid down in Article 3(2)(b) of the DMA, for the reasons set out in paragraph 251 above.

256 As a preliminary point, it should be borne in mind, as has been noted in paragraph 53 above, that, in the contested decision, the Commission found that, with the exception of the applicant's 'additional' arguments, all of its other arguments and evidence submitted to rebut the presumptions provided for in Article 3(2) of the DMA, including those concerning online advertising, directly related to the quantitative criteria, within the meaning of recital 23 of the DMA, on which those presumptions are based.

257 As regards the relevance of the latter arguments, it is true, as the Commission points out, that online social networking services and online advertising services constitute two distinct CPS categories, pursuant to point 2(c) and (j), and point 7, of Article 2 of the DMA.

258 Similarly, the Commission rightly observes that the concept of 'business users' is defined differently in Part E, entitled 'Specific definitions', of the annex to the DMA, as regards, on the one hand, online social networking services, and, on the other hand, online advertising services. Thus, the former are defined, in essence, as being undertakings which have a business listing or business account on the social network, whereas the latter are defined as being, in essence, advertisers.

259 However, those differences do not, in themselves, justify rejecting as irrelevant the arguments or evidence relating to online advertising on the platform TikTok, for the purposes of determining whether that online social network is an important gateway.

260 First, as the parties confirmed in their replies to a measure of organisation of procedure, it is not disputed that, even though they fall within two distinct CPS categories, online social networking services and online advertising services are provided, in the circumstances of the present case, on the same platform, namely the platform TikTok. Thus, as the applicant explains, TikTok is a single platform on which, on the one hand, users interact primarily by sharing and viewing videos, while, on the other hand, advertisers pay for advertisements to appear, generally between videos viewed by those users.

261 Second, it is also common ground between the parties that, as is apparent from recital 148 of the contested decision and as they confirmed in their replies to a measure of organisation of procedure, there is a certain overlap between business users of an online social network and business users of an online advertising service, given that some advertisers may also be caught by the definition of business users of online social networking services.

262 Accordingly, it cannot be denied that the advertising revenue or the ARPU generated by TikTok could, in principle, constitute an indication among others of the importance which that platform represents for its business users in order to reach end users, in so far as advertising is, indeed, one of the means commonly used by those business users to reach their customers.

263 Consequently, the Commission could not, without erring, reject the arguments and evidence relating to online advertising, submitted by the applicant, as being irrelevant for the purpose of rebutting the presumption laid down in Article 3(2)(b) of the DMA.

264 Moreover, in its reply to a measure of organisation of procedure, the Commission acknowledged that such arguments and evidence could, in principle, be relied on to rebut the presumption laid down in Article 3(2)(b) of the DMA.

265 That being so, it should be noted that the Commission rejected the applicant's arguments and evidence relating to online advertising also on another ground, which was set out in the contested decision, namely that those arguments and that evidence were not, in any event, sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

266 Therefore, it is necessary to examine, in the second place, whether the Commission could, without erring, reject those arguments and that evidence on such a ground.

267 In that regard, first, the Commission correctly observed, in recital 145 of the contested decision, in essence, that the relative scale measured on the basis of revenue and of ARPU, irrespective of other factors, was an imperfect indicator for assessing whether a CPS is an important gateway because different business models monetise their services differently.

268 As the Commission explained in its reply to a measure of organisation of procedure, social networks often follow a business strategy aimed at expanding their user base and, thereby, at creating increasingly significant network effects, which may lead them, during a certain period of time, to prioritise growth in terms of user numbers over their monetisation.

269 Secondly, the Commission rightly stated, in recital 148 of the contested decision, that, while some advertisers on TikTok may also meet the definition of 'business users' of online social networking services, the fact remained that those users constituted a broader category than that of advertisers. It rightly observed, in the same recital, that, in order to examine whether TikTok was an important gateway, it was necessary to take account not only of paid advertisers but also of non-advertising business users, given that those businesses could still rely on TikTok to gain visibility for their activities, which, moreover, the applicant does not dispute.

270 In that regard, the Commission also explained, in recital 148 of the contested decision, without being contradicted on that point by the applicant, that several features of TikTok were specifically developed for and focused on the needs of business users that are not necessarily paid advertisers, such as content discovery and sharing across multiple devices and in particular via chats, posts, videos and recommendations, with a view to enabling them to grow their businesses (for example, via a variety of creative tools), scale their brand presence (for example, via auto-messaging and post scheduler) and drive sales with business-friendly features, for example, via link-in-bio, business contact information and lead-generation tools.

271 It follows from those considerations that, in addition to advertising, there are other ways for TikTok business users to gain visibility for their activities on that platform and thereby reach their end users, for example by publishing videos on their business accounts, or by entering into agreements with content creators or influencers to promote their brands.

272 However, the arguments and evidence provided by the applicant gave no information whatsoever as to the importance which TikTok could have for business users of that platform wishing to reach end users through means other than advertising.

273 Thirdly, as the Commission observes, in essence, in recital 149 of the contested decision, the figures produced by the applicant concerning the engagement of TikTok 'registered business users' with that platform concern only a small proportion of all business users, with the result that those figures are not sufficiently representative for the purposes of determining whether TikTok is an important gateway.

274 Indeed, as is apparent from recital 77 of the contested decision, TikTok's 'registered business users' are those which have 'registered business accounts' on that platform. That concept therefore covers only undertakings which have registered as a 'business' with TikTok, in particular by presenting their contact details and their 'business licence ID'.

275 However, in recitals 83 to 87 of the contested decision, the Commission explained the reasons why, in its view, a methodology based on the number of 'registered business users' is not a reliable method for determining the number of TikTok business users under Article 3(2)(b) of the DMA and leads to a significant underestimation of those users. In particular, it noted that the possibility of

registering as a ‘registered business user’ had only been introduced in 2022 and in a limited number of Member States, and that such registration was not mandatory.

276 It is for that reason that, in order to determine the number of business users of TikTok, under Article 3(2)(b) of the DMA, the Commission relied not on the number of ‘registered business users’, but on a different criterion, namely the number of self-identified business accounts in the Union. In this respect, it is apparent from Tables 2 and 3 of the contested decision, set out in recitals 78 and 79 thereof, that, with regard to TikTok, there are very significant differences between the number of ‘registered business users’ and the number of self-identified business accounts in the Union. Thus, by way of example, in 2022, the number of TikTok self-identified business accounts in the Union was [>10 000], while the number of ‘registered business users’ was [>10 000].

277 The applicant does not dispute, in the present action, the methodology relied on by the Commission in the contested decision to determine the number of TikTok business users under Article 3(2)(b) of the DMA and, in particular, the assessment set out in recitals 83 to 87 of that decision.

278 It follows that the arguments put forward and the data provided by the applicant were not sufficiently representative of all TikTok business users, as the Commission rightly found.

279 Fourthly, in recital 151 of the contested decision, the Commission stated, without being challenged on that point by the applicant, that it was inappropriate to compare ByteDance’s online advertising figures with those of Alphabet, Meta and Amazon, because the latter undertakings offered a wider range of services on which advertising could be displayed than that offered by TikTok.

280 In any event, the online advertising figures provided by the applicant, even if they were to be considered to be sufficiently representative, do not support its argument that TikTok is not an important gateway. Thus, for example, the level of the ARPU generated on this platform appears to be high, in absolute terms, and already reaches almost [*confidential*] of that of Instagram.

281 It follows that the Commission was entitled to conclude, without erring, that the arguments and evidence relating to advertising revenue and expenditure, the ARPU and the allegedly limited engagement of TikTok’s ‘registered business users’ were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

282 In those circumstances, the error committed by the Commission referred to in paragraph 263 above has no effect on the lawfulness of the contested decision.

283 Therefore, the fourth complaint of the third part of the first plea must be rejected as unfounded.

284 Furthermore, as regards the question of the standard of proof actually applied by the Commission when assessing the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA (see paragraph 72 above), it is apparent from all of the foregoing, and in particular from paragraphs 119 to 283 above, that there is nothing in the Commission’s analysis to suggest that the standard of proof which it actually applied was higher than that set out in Article 3(5) of the DMA. Indeed, the Commission rejected the applicant’s arguments on the ground either that they were irrelevant or that they were not sufficiently

substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

285 Therefore, and in the light of the considerations set out in paragraphs 59 to 72 above, the second complaint of the first part of the first plea, by which the applicant criticises the Commission for imposing, in the contested decision, too high a standard of proof, consisting in requiring 'convincing' evidence, must also be rejected as unfounded.

6. *The rebuttal of the presumption that ByteDance enjoyed an entrenched and durable position (first plea, fourth part)*

(a) *Arguments of the parties*

286 The applicant claims that, in recitals 155 to 160 of the contested decision, the Commission infringed Article 3(1)(c) and Article 3(5) of the DMA by rejecting its arguments seeking to show that it did not enjoy an entrenched and durable position.

287 The applicant claims, in essence, that ByteDance's market position has been successfully contested by competitors such as Meta and Alphabet, which have launched new services, namely Reels and Shorts, respectively, and which, by imitating the main features of TikTok, namely the short-video format, enjoyed rapid growth to the detriment of TikTok. Similarly, it notes that TikTok's 'user churn rate' – that is to say, the number of advertisers and end users who have left TikTok for other platforms – is significant. Accordingly, it states that ByteDance is a challenger and not a gatekeeper, those two concepts being, in its view, mutually exclusive.

288 The Commission disputes the applicant's arguments, reiterating, in essence, the reasons set out in recitals 155 to 160 of the contested decision, the content of which is set out below.

(b) *Contested decision*

289 In recitals 155 to 160 of the contested decision, the Commission rejected the arguments and evidence submitted by the applicant to rebut the presumption laid down in Article 3(2)(c) of the DMA, according to which it enjoyed an entrenched and durable position.

290 In recital 156 of the contested decision, the Commission stated that, by claiming that TikTok's position was not 'unassailable', the applicant had attempted to introduce a condition that goes beyond the requirement that the position of the undertaking concerned must be entrenched and durable, which notably occurs where contestability is limited.

291 In recitals 157 and 158 of the contested decision, the Commission found that, in any event, according to recital 21 of the DMA, it is likely that contestability is limited where an undertaking has provided a CPS in at least three Member States to a very high number of business users and end users over a period of at least three years, as was the case here. In addition, it added that TikTok's significant scale and growth in terms of number of business users and end users over recent years with an upward trajectory supported the finding that ByteDance enjoyed an entrenched and durable position. It followed, in its view, that the applicant's arguments concerning TikTok's user churn rate cannot manifestly call into question the presumption laid down in Article 3(2)(c) of the DMA.

292 In recitals 159 and 160 of the contested decision, the Commission explained that there was nothing in the DMA to indicate that an undertaking could not simultaneously be a challenger and a gatekeeper and the fact that some of ByteDance's competitors, such as Meta and Alphabet, had

emulated certain TikTok products was not unusual in digital markets and was therefore not capable as such of rebutting the presumption laid down in Article 3(2)(c) of the DMA.

(c) ***Findings of the Court***

293 Article 3(1)(c) of the DMA lays down two alternative criteria for a company to be designated as a gatekeeper, namely that it enjoys an entrenched and durable position, in its operations, or that it is foreseeable that it will enjoy such a position in the near future.

294 In the present case, it is apparent from the contested decision, and as the Commission confirmed in its reply to a measure of organisation of procedure, that the Commission considered that ByteDance enjoyed an entrenched and durable position in its operations and that, therefore, the first criterion of Article 3(1)(c) of the DMA was satisfied.

295 It should also be noted that, while the DMA does not define the concept of 'entrenched and durable position', it contains elements making it possible to determine the scope of that concept.

296 In that regard, it is apparent from a combined reading of Article 3(1)(c) and (2)(c) of the DMA, read in the light of recital 21 of the DMA, that the position of an undertaking is considered to be 'entrenched and durable' if the contestability of that position is limited. That is likely to be the case where that undertaking has provided a CPS in at least three Member States to a very high number of business users and end users over a period of at least three years.

297 Accordingly, the concept of an 'entrenched and durable' position is intended to capture the low contestability of the position of the undertaking in question, as well as the stability of that position over time.

298 Furthermore, the concept of 'entrenched and durable position' enjoyed by a gatekeeper does not necessarily overlap with that of a 'dominant position' within the meaning of Article 102 TFEU. This is demonstrated by the fact that the EU legislature knowingly chose to use a new concept, different from that of 'dominant position', and to bring gatekeepers who do not necessarily hold a dominant position within the meaning of competition law within the scope *ratione personae* of the DMA, as is apparent from recital 5 of the DMA, referred to in paragraph 19 above.

299 The applicant's arguments must be examined in the light of those considerations.

300 In the first place, the Commission rightly considered, in recital 156 of the contested decision, that the DMA does not require the position of the undertaking concerned to be 'unassailable'. As has been pointed out in paragraph 296 above, the concept of 'entrenched and durable position' implies, in particular, that the contestability of the position of the undertaking providing the CPS is limited. That concept thus does not preclude the existence of a certain degree of contestability.

301 In the second place, the Commission did not err in rejecting, in recitals 157 and 158 of the contested decision, the applicant's argument based on TikTok's user churn rate, in the light of the very large number of TikTok end users and business users, of its significant scale and growth in recent years which follows a steady upward trajectory.

302 While it is true that, as is apparent from the data produced by the applicant, some of TikTok's advertisers and end users 'unsubscribed' from that platform, the fact remains that, at the same time, many others have 'subscribed' to it. This is demonstrated by the fact that, during the period from 2021 to 2022, TikTok's revenue and number of end users continued to increase exponentially (see

paragraphs 33, 84 and 107 above). It is thus apparent that the number of unsubscribed advertisers and end users was offset, or even exceeded, by the number of new advertisers and end users which joined TikTok over the same period, which tends rather to show that ByteDance's position is entrenched and durable.

303 In the third place, concerning the applicant's argument that certain services competing with TikTok, in particular Meta's Reels and Alphabet's Shorts, have emulated certain features of TikTok and have grown rapidly in terms of number of users, even exceeding the rate of growth of TikTok, the following should be noted.

304 First, as has been recalled in paragraph 301 above, the Commission emphasised, in recital 158 of the contested decision, TikTok's significant growth, which followed a steady upward trajectory, and, in recital 160 of that decision, it stated that it was not unusual in digital markets for certain successful features of a service to be quickly emulated by other services.

305 On that basis, the Commission was entitled to consider that the fact that some platforms of other gatekeepers were able to launch services emulating certain of TikTok's features and that those platforms experienced significant growth does not mean that ByteDance's position was not entrenched and durable, since ByteDance continued to grow regardless of the above circumstances.

306 Secondly, it should be noted that the applicant's argument is based on the fact that other gatekeepers in the same CPS category, namely Meta and Alphabet, have contested ByteDance's position, which shows, according to the applicant, that that position was not entrenched and durable.

307 However, the purpose of the DMA is to ensure the contestability of the position of gatekeepers not only by other gatekeepers but also, or even especially, by other operators which are not gatekeepers for a given CPS.

308 Indeed, in accordance with Article 1(1) thereof, the DMA's purpose is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring 'for all businesses' contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.

309 In that regard, recital 32 of the DMA states that contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services. By referring to barriers to entry and expansion and to the ability of undertakings to challenge the gatekeeper, that recital establishes that the concept of 'contestability' relates above all to the ability of undertakings which are not gatekeepers for a given CPS to challenge those gatekeepers on the basis of the merits of their products and services.

310 Moreover, again according to recital 32 of the DMA, the contestability of services in the digital sector may also be limited if there is more than one gatekeeper for a CPS. It follows implicitly but necessarily therefrom that the fact that there may be a degree of competition between several gatekeepers for a CPS does not mean that the contestability of that CPS is not limited.

311 Consequently, the applicant's abovementioned arguments, in so far as they allege that ByteDance's position was contested by other gatekeepers, cannot serve as a basis for concluding that the contestability of the applicant's position is not limited, for the purposes of the DMA, and that that position is not, for that reason, entrenched and durable.

312 At the hearing, the applicant also argued that ByteDance's position had also been contested by other undertakings which were not gatekeepers. In that regard, it referred to Figure 6 set out in paragraph 125 of the application.

313 However, Figure 6 set out in paragraph 125 of the application was not submitted during the administrative procedure, with the result that it must be rejected as inadmissible for the reasons set out in paragraphs 232 to 237 above. It is true that some of the data in that figure were listed in another table included in the part of the notification relating to the presumption laid down in Article 3(2)(b) of the DMA, in order to support the applicant's argument that TikTok faced a large number of competitors. Moreover, the Commission responded to that line of argument in recitals 150 to 154 of the contested decision, regarding Article 3(2)(b) of the DMA, which have not been challenged by the applicant. However, during the administrative procedure, the applicant did not rely on that other table in order to claim that ByteDance did not enjoy an entrenched and durable position within the meaning of Article 3(1)(c) of the DMA. It must be borne in mind that, as noted in paragraph 233 above, in accordance with Article 2(3) of Implementing Regulation 2023/814, the undertaking concerned must provide its arguments in an annex to its notification by clearly identifying to which of the three cumulative requirements set out in Article 3(1) of the DMA its arguments relate and explain, for each argument, why, exceptionally, the CPS concerned does not satisfy that requirement, despite the fact that it meets the corresponding threshold laid down in Article 3(2) of the DMA.

314 Moreover, and in any event, that argument is not sufficiently substantiated. Indeed, Figure 6 in paragraph 125 of the application merely indicates the year in which a TikTok imitation service was launched, without providing any specific information regarding the scale of those services or other relevant data.

315 In the fourth place, the applicant describes ByteDance's position as that of a 'challenger' contesting the position of gatekeepers, and submits that that concept and that of 'gatekeeper' are mutually exclusive, contrary to what the Commission stated in recital 159 of the contested decision.

316 In that regard, it is sufficient to note that, although in 2018 TikTok was a challenger seeking to contest the position of established operators such as Meta and Alphabet, the fact remains that its position was consolidated rapidly afterwards, far exceeding the thresholds laid down in Article 3(2)(b) of the DMA, and enjoying an exponential growth rate, in terms of both revenue and number of users, with the result that, as is apparent from recital 159 of the contested decision, without being challenged by the applicant, TikTok's relative scale reached half the size of Facebook and of Instagram, both of which had nevertheless been present on the internal market for a long time.

317 Those circumstances tend to illustrate the fact that an undertaking which was initially a challenger, seeking to contest the position of gatekeepers, may subsequently become a gatekeeper itself.

318 Lastly, the applicant complains that the Commission failed to explain why the number of TikTok users shows that ByteDance's position was entrenched, even though it had no ecosystem and did not benefit from lock-in effects.

319 In that regard, it is sufficient to note that the applicant's arguments relating to the absence of an ecosystem or lock-in effects were assessed and correctly rejected by the Commission in the part of the contested decision concerning the presumption laid down in Article 3(2)(b) of the DMA (see paragraphs 121 to 215 above).

320 Therefore, in the light of the foregoing, the arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(c) of the DMA must be rejected.

7. *The rejection of the applicant's 'additional' arguments (first complaint of the first part of the first plea)*

(a) *Arguments of the parties*

321 As noted in paragraphs 52 to 56 above, the applicant claims, as it stated at the hearing, that the Commission was wrong to reject, in recital 161 of the contested decision, its 'additional' arguments on the ground that they did not directly relate to the quantitative criteria within the meaning of recital 23 of the DMA.

322 The Commission disputes the applicant's arguments.

(b) *Findings of the Court*

323 It should be noted that, in the notification, the applicant, after submitting all of its arguments and evidence in rebuttal of each of the three presumptions laid down in Article 3(2) of the DMA, put forward, in a new part entitled 'Designation contrary to the DMA's policy intent', 'additional' arguments by which it claimed, in essence, that the designation of ByteDance as a gatekeeper is contrary to the objectives pursued by the DMA.

324 In particular, as is apparent from Section 5.1.3.1.4 of the contested decision, and from the applicant's letter of 2 August 2023 (see paragraph 6 above), by its 'additional' arguments, the applicant claimed, in essence, that (i) the application of the DMA was to enable challengers, such as TikTok, to compete with well-established platforms, (ii) the designation of ByteDance as a gatekeeper would impose a significant compliance cost on an already [*confidential*] challenger and hinder its ability to expand into new markets, and (iii) the Commission had failed to apply correctly the substantive and procedural legal framework provided for in Article 3(5) of the DMA because, first of all, it had interpreted that provision and recital 23 of the DMA too narrowly, thereby depriving the 'rebuttal [of presumptions] process' of its objective of eliminating 'false positives', next, it had rejected as irrelevant the circumstances in which TikTok operated, without, however, informing it of the circumstances which would be deemed relevant, thus foreclosing that process in infringement of its rights, and, lastly, it had infringed the principles of proportionality and sound administration, given that, in its view, the Commission was required to open a market investigation pursuant to the third subparagraph of Article 3(5) and Article 17(3) of the DMA.

325 The Commission rejected the 'additional' arguments in recital 161 of the contested decision on the ground that they did not directly relate to the quantitative thresholds laid down in Article 3(2) of the DMA, within the meaning of recital 23 of the DMA.

326 In that regard, it should be noted that the applicant's 'additional' arguments were not intended to rebut concretely and specifically one of the three presumptions laid down in Article 3(2) of the DMA, but consisted of general assertions concerning the objectives pursued by the DMA, the subject matter of Article 3(5) thereof and the effectiveness of that provision.

327 Therefore, the Commission did not err in finding that they did not relate directly to those presumptions and that they should therefore be disregarded on that ground.

328 Accordingly, and in the light of the considerations set out in paragraphs 39 to 56 above, the first complaint of the first part of the first plea must be rejected as unfounded.

8. ***The holistic assessment of the evidence submitted by the applicant (first plea, fifth part)***

(a) ***Arguments of the parties***

329 The applicant submits that the Commission took a piecemeal and siloed approach in the contested decision by failing to carry out a holistic assessment of the evidence which it had submitted to rebut the presumptions laid down in Article 3(2) of the DMA. In its view, that evidence, taken as a whole, shows that it is not a gatekeeper or, at the very least, that the Commission should have opened a market investigation in order to determine whether that was the case.

330 The Commission disputes the applicant's arguments.

(b) ***Findings of the Court***

331 In the contested decision, the Commission rejected all the arguments and evidence submitted by the applicant, concluding, in respect of each of the presumptions laid down in Article 3(2) of the DMA, that they were not sufficiently substantiated so as manifestly to call them into question, as is apparent from recitals 120, 125 and 155 of the contested decision.

332 Next, in recital 163 of the contested decision, the Commission concluded that, for the reasons set out in recitals 120 to 162 of that decision, the arguments presented by the applicant were not sufficiently substantiated so as manifestly to call into question the presumptions laid down in Article 3(2) of the DMA.

333 It follows that, having rejected each of the arguments put forward by the applicant, the Commission considered that those arguments, taken individually or as a whole in the context of each of the presumptions laid down in Article 3(2) of the DMA, were not sufficiently substantiated so as manifestly to call those presumptions into question.

334 The applicant, referring to recitals 130 and 135 of the contested decision, in which the Commission noted that the existence of an ecosystem was not an absolute prerequisite for designation as a gatekeeper and that the existence of multi-homing was not, in itself, an indication that the CPS concerned did not constitute an important gateway, complains that the Commission failed to carry out a holistic assessment of those arguments.

335 However, the Commission did not reject the applicant's arguments concerning the absence of an ecosystem and the existence of multi-homing solely on the ground that the existence of an ecosystem was not an absolute prerequisite for designation as a gatekeeper and that the existence of multi-homing was not, in itself, an indication that the CPS concerned did not constitute an important gateway. It also rejected those arguments on the basis of other grounds, set out in recitals 127 to 142 of the contested decision, deriving from the fact that they were not sufficiently substantiated so as manifestly to call into question the presumption set out in Article 3(2)(b) of the DMA, as is apparent from paragraphs 121 to 215 above.

336 The applicant does not put forward any other specific argument capable of demonstrating that the conclusion reached by the Commission would have been different had it assessed its arguments and evidence as a whole.

337 Therefore, the fifth part of the first plea must be rejected as unfounded.

B. **The second plea in law, alleging an infringement of the rights of the defence**

1. *Arguments of the parties*

338 The applicant submits that the Commission infringed Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') on the ground that, in the contested decision, the Commission relied on matters of fact and law in relation to which the applicant had not had the opportunity to submit its observations during the administrative procedure. According to the applicant, those matters were central to the Commission's assessment of the arguments which it had submitted in rebuttal of the presumptions provided for in Article 3(2) of the DMA.

339 The Commission disputes the applicant's arguments.

2. *Findings of the Court*

340 Paragraph 1 of Article 34 of the DMA, entitled 'Right to be heard and access to the file', lays down in particular the obligation for the Commission to give the undertaking concerned, before the adoption of a decision pursuant to Article 8, Article 9(1), Article 10(1), Articles 17, 18, 24, 25, 29 and 30 and Article 31(2) of the DMA, the opportunity of being heard on the Commission's preliminary findings.

341 Since decisions adopted under the second subparagraph of Article 3(5) of the DMA – that is to say, decisions in which the Commission designates an undertaking as a gatekeeper by rejecting its arguments seeking to call into question the presumptions laid down in Article 3(2) of the DMA without opening a market investigation – are not referred to in the wording of Article 34(1) of the DMA, it should be noted that that provision was inapplicable in the present case.

342 Nevertheless, Article 34(4) of the DMA provides that the rights of defence of the gatekeeper, undertaking or association of undertakings concerned are to be fully respected in any proceedings. Recital 109 of the DMA states, inter alia, that the DMA respects the fundamental rights and observes the principles recognised by the Charter and that, accordingly, the interpretation and application of the DMA should respect those rights and those principles.

343 Furthermore, according to the case-law, the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Courts of the European Union ensure. That general principle of EU law is enshrined, in the context of the right to good administration, in Article 41(2)(a) and (b) of the Charter and applies where the authorities are minded to adopt a measure which will adversely affect an individual (see judgment of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraph 80 and the case-law cited). Accordingly, observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (see judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 86 and the case-law cited, and of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited).

344 Therefore, in accordance with Article 41 of the Charter, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union, which includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. According to the

case-law, that right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited).

345 In the present case, it is apparent from the documents before the Court that, prior to the adoption of the contested decision, the applicant was heard on several occasions. Indeed, first of all, before the notification itself, four meetings, at the very least, were held between the applicant and the Commission, on 15 December 2022, and on 23 March, 2 May and 13 June 2023. Next, after the notification was submitted on 3 July 2023, the Commission sent the applicant its preliminary views on 26 July 2023 and gave it the opportunity to state its position, which the applicant did by letter of 2 August 2023. Lastly, on 17 August 2023, another meeting between the applicant and the Commission took place.

346 The applicant maintains, however, that, despite those numerous exchanges, it did not have the opportunity to put forward its observations on four specific matters of fact and law relied on against it in the contested decision.

347 In the first place, the applicant submits that it was not heard during the administrative procedure on the alleged exclusion of the ‘qualitative’ evidence under recital 23 of the DMA.

348 Nevertheless, it is apparent from the file that, contrary to what the applicant states, it had the opportunity to make observations on the interpretation of recital 23 of the DMA before the adoption of the contested decision. It is apparent from the minutes of the meeting between the applicant and the Commission on 17 August 2023, drawn up by the applicant itself, that that interpretation and the relationship between that recital and Article 3 of the DMA were discussed.

349 In any event, it is apparent from settled case-law that, while the right to be heard extends to all the matters of fact and of law which form the basis of the decision-making act, it does not extend to the final position which the administration intends to adopt (see, to that effect, judgments of 4 March 2020, *Tulliallan Burlington* v *EUIPO*, C-155/18 P to C-158/18 P, EU:C:2020:151, paragraph 94, and of 1 February 2023, *SJ* v *Commission*, T-659/20, not published, EU:T:2023:32, paragraph 11).

350 In the second place, the applicant criticises the Commission for having infringed its right to be heard, during the administrative procedure, in relation to the assertion, in recital 128 of the contested decision, that TikTok’s relative scale as compared with that of other online social networking services is determinative of gatekeeper status.

351 In this respect, it should be noted at the outset that, in recital 128 of the contested decision, the Commission did not consider that TikTok’s relative scale as compared with that of other online social networking services was ‘determinative of gatekeeper status’, as the applicant claims, but merely stated that, in the present case, the ‘pertinent comparison is between the scale of ByteDance’s online social networking service TikTok and that of other providers of similar services, irrespective of the scale of their online advertising activities’. Furthermore, it is apparent from the very wording of recital 23 of the DMA that it is necessary to take into account, inter alia, ‘the importance of the undertaking’s [CPS] considering the overall scale of activities of the respective [CPS]’, bearing in mind that, as noted in paragraph 348 above, the applicant had had the opportunity to make observations on the interpretation of that recital before the decision was adopted.

352 In any event, the question of TikTok's relative scale in comparison with that of other online social networking services was discussed during the administrative procedure. In the preliminary views, the Commission stated that the applicant's assertion that TikTok faced a large number of competitors in the online social networking sector disregarded the fact that the scale of TikTok was substantial, including in comparison with other online social networking services, since the size of TikTok in the Union amounted to approximately half the size of Facebook and of Instagram, which indicated that TikTok's scale was not insignificant. The applicant replied to that observation in particular in paragraphs 32 and 42 of its letter of 2 August 2023.

353 In the third place, it must be held, by contrast, that, as the applicant claims – without serious challenge on the part of the Commission – the applicant did not have the opportunity to submit its observations during the administrative procedure on the Commission's finding in recital 132 of the contested decision that ByteDance had its own ecosystem, with the result that its right to be heard had been infringed. While the absence of an ecosystem and its consequences for the designation of ByteDance as a gatekeeper had admittedly been the subject of discussions between the parties, the Commission had not informed the applicant of its view that, as a matter of fact, ByteDance did have an ecosystem.

354 The Commission contends, however, that the finding in recital 132 of the contested decision was not decisive, but was secondary in nature in the scheme of that decision, and that the applicant has not shown that it would have been better able to defend itself had there been no irregularity.

355 According to settled case-law, an infringement of the right to be heard does not automatically imply the annulment of the contested act. It is also necessary for the applicant to show, not that the Commission's decision would have been different in the absence of the procedural irregularity in question, but simply that such a possibility cannot be totally ruled out, since that party would have been better able to defend itself had there been no irregularity (see judgment of 5 May 2022, *Zhejiang Jiuli Hi-Tech Metals* v *Commission*, C-718/20 P, EU:C:2022:362, paragraph 49 and the case-law cited).

356 In the present case, the Commission's rejection of the applicant's arguments alleging the absence of an ecosystem is based on a number of grounds which are founded, with the exception of recital 132 of the contested decision, on the hypothesis most favourable to the applicant, namely that ByteDance did not have an ecosystem. As is apparent from paragraphs 121 to 162 above, those other grounds were sufficient in themselves, and irrespective of the finding made in recital 132, to justify the Commission's finding that those arguments were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

357 In those circumstances, the applicant has failed to show that, in the absence of the irregularity found, it could not be entirely ruled out that the Commission's decision would have been different.

358 In the fourth and last place, the applicant criticises the Commission for having infringed its right to be heard during the administrative procedure on the findings made in recitals 54 and 141 of the contested decision, according to which the intensity of use of TikTok is greater than that observed on other online social networking platforms.

359 In that regard, first, it should be noted that recital 54 of the contested decision forms part of Section 5.1.1 of that decision, entitled 'CPS qualification and delineation' (recitals 25 to 66 of that decision), in which the Commission set out the reasons why TikTok was to be regarded as an online social networking service within the meaning of point 7 of Article 2 of the DMA.

360 Given that, in the context of the present action, the applicant does not dispute the classification of TikTok as an online social networking service, its argument alleging infringement of its right to be heard in relation to the Commission's assessments in recital 54 of the contested decision must be rejected as ineffective.

361 Secondly, as regards recital 141 of the contested decision, the Commission does not dispute the fact that it did not hear the applicant specifically on the question of the intensity of use of TikTok, but contends that that aspect of the contested decision was merely secondary in its scheme and that the applicant does not show that, if it had been heard, it would have been better able to defend itself.

362 In recital 141 of the contested decision, the Commission found that the figures produced by the applicant to show that TikTok users multi-homed in greater proportions than those recorded for Facebook and Instagram users were of limited evidential value because Facebook and Instagram were active in the Union prior to the launch of TikTok and had a larger end-user base than TikTok. It added that, 'moreover', those figures did not reflect the intensity of use of those various platforms. In the latter regard, the Commission noted that it had been reported on numerous occasions that TikTok had a significantly higher engagement rate than other online social networking services, that end users spent significantly more time on TikTok than on other online social networking services, and that this was the case, in particular, for younger end users. In support of those assertions, the Commission referred to two articles published online, cited in footnotes 152 and 153 to that decision.

363 First, it is apparent from the wording of recital 141 of the contested decision that the Commission considered that the evidential value of the figures produced by the applicant in support of its argument on multi-homing was limited on the ground that they could be explained by the mere fact that Facebook and Instagram had been active in the Union before the arrival of TikTok and that they both already had a higher number of end users. The ground based on the fact that they did not reflect the intensity of use of the various online social networking platforms was therefore supplementary, demonstrating the low evidential value of those figures, as shown by the use of the word 'moreover'.

364 Furthermore, the criticised part of recital 141 *in fine* of the contested decision is only one of a number of reasons which led the Commission to reject the applicant's arguments based on multi-homing by its users.

365 Second, when questioned in the context of a measure of organisation of procedure as to whether it had contested, in the present action, the very substance of the findings made in recital 141 *in fine* of the contested decision concerning intensity of use, and whether it would have been better able to defend itself in the absence of the alleged irregularity, the applicant replied in the affirmative. In that regard, it referred to its arguments put forward in the application concerning the advertising expenditure of advertisers and the expenditure of business users registered on TikTok, which showed that the level of interaction of those two categories of users was low. However, that recital concerns the intensity of use of end users and not that of advertisers or business users.

366 The applicant also referred, in its response, to its argument raised in the application that TikTok is used only a little, if at all, 'as a social network', whereas the Commission relied, in the contested decision, on data recording time that users spend on TikTok passively viewing videos and not time spent interacting in the context of an online social network. In the applicant's view, time spent viewing videos is not an appropriate criterion for measuring the engagement of TikTok users

as compared to the engagement of users of social networks such as Facebook, Instagram, LinkedIn or others.

367 However, that neither in the application nor in its reply to the questions put by the Court has the applicant disputed the correctness of the fact, noted in recital 141 of the contested decision, that end users, and in particular young people, spend significantly more time on TikTok in comparison with the time they spend on other online social networking platforms.

368 The applicant merely claims that time spent by end users on TikTok consists primarily in viewing videos and that, for that reason, it is not an appropriate criterion for measuring the intensity of use of TikTok as an online social networking service. However, as noted in paragraph 193 above, in accordance with point 7 of Article 2 of the DMA, an online social networking service is a platform that enables those end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via videos. Therefore, the discovery and sharing of videos can be one of the essential functionalities of an online social networking platform, so that time spent viewing videos on such a platform constitutes a relevant criterion for measuring intensity of use by its users.

369 Moreover, in recitals 42 and 49 of the contested decision, the Commission found that one of TikTok's essential functionalities consisted in making user-generated videos available to the public and that its functionalities went beyond those specific to a video-sharing platform, with the result that TikTok had to be classified as an online social networking service. In the present action, the applicant does not dispute either those recitals or TikTok's classification as an online social networking service. Therefore, since making available to the public videos generated by users is one of the essential functionalities of TikTok as an online social networking service, the applicant cannot contest that, so far as concerns TikTok, time spent by its users viewing videos is an appropriate parameter for measuring the intensity of their use of that platform.

370 In those circumstances, the applicant has failed to show, in accordance with the case-law referred to in paragraph 355 above, that it cannot be entirely ruled out that the Commission's decision would have been different if it had had the opportunity to comment on the findings made in recital 141 *in fine* of the contested decision concerning the intensity of use of TikTok.

371 Consequently, the second plea must be rejected as unfounded.

C. **The third plea, alleging infringement of the principle of equal treatment**

1. ***Arguments of the parties***

372 The applicant claims, in essence, that the Commission infringed the principle of equal treatment because, in the contested decision, it rejected its 'qualitative' arguments, whereas, in other decisions, the Commission had accepted that kind of argument.

373 The Commission disputes the applicant's arguments.

2. ***Findings of the Court***

374 By its third plea, the applicant alleges unequal treatment stemming from the Commission's decision-making practice.

375 However, as has been observed in paragraph 68 above, the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings or other CPSs.

376 In any event, it should be noted that, according to settled case-law, the principle of equal treatment, which is a general principle of EU law, enshrined in Articles 20 and 21 of 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 16 June 2022, *Sony Optiarc and Sony Optiarc America* v *Commission*, C-698/19 P, EU:C:2022:480, paragraph 153 and the case-law cited).

377 It should also be borne in mind that, in accordance with the first subparagraph of Article 3(5) of the DMA, the assessment of the arguments presented by the undertaking concerned to rebut the presumptions laid down in Article 3(2) of the DMA must take account of 'the circumstances in which the relevant [CPS] operates'.

378 In the present case, it is sufficient to note that the recitals of the Commission decisions referred to by the applicant in its application concern other CPS categories and not online social networking services. However, the applicant does not explain why the circumstances in which those other CPS categories operate are comparable to those in which an online social networking service such as TikTok operates.

379 Therefore, the third plea must be rejected as unfounded and, consequently, the action must be dismissed in its entirety.

IV. **Costs**

380 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.

381 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission, including those relating to the proceedings for interim measures.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Bytedance Ltd to pay the costs, including those relating to the proceedings for interim measures.**

Kornezov De Baere Petrlík

Kecsmár Kingston

Delivered in open court in Luxembourg on 17 July 2024.