Duplicated enforcement of Article 102 TFEU and the gatekeeper obligations under the Digital Markets Act in light of *ne bis in idem* and proportionality

Abuse of dominance, the DMA and the double jeopardy defence

Student: Veerle Peters (6221289)
Supervisor: dr. Malgorzata Kozak
Second supervisor: dr. Lavinia Kortese

Utrecht University

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"just as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anti-competitive unilateral conduct. And the economists, just as the physicists, have not yet found it"

~ Philip Lowe, Director General of DG Competition, Washington D.C. 11 September 2006

List of abbreviations

ACM	Autoriteit Consument & Markt
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
BKa	Bundeskartellamt
Charter	Charter of Fundamental Rights of the European Union
CISA	Convention Implementing the Schengen Agreement
CJEU or Court	Court of Justice of the European Union
CPS	Core Platform Service
DG Connect	Directorate-General for Communication Networks, Content and Technology
DG Competition	Directorate-General for Competition
DMA	Digital Markets Act
EAW	European Arrest Warrant
EC or Commission	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Competition Network
EU or Union	European Union
FRAND	Fair, reasonable and non-discriminatory
GWB	Gesetz gegen Wettbewerbsbeschränkungen
GDPR	General Data Protection Regulation
MS	Member State
NCA	National Competition Authority
NIICS	Number-independent interpersonal communication service
SCI	Single Continuous Infringement
SEE	Single Economic Entity
SO	Statement of Objectives
TFEU	Treaty on the Functioning of the European Union

1. Introduction

In 2022, two developments altered the competition law landscape in the European Union ('EU' or 'Union'). First, the Court of Justice of the European Union ('CJEU' or 'Court') altered the approach to the *ne bis in idem* principle in competition law matters with the *bpost* and *Nordzucker* judgments. The Court extended the approach used in other areas of EU law to competition law and thereby unified *ne bis in idem* throughout EU law.[1] Second, the Digital Markets Act ('DMA)', a new instrument to regulate digital markets, came into force. The DMA is meant to supplement competition law and protect the fairness and contestability of digital markets by imposing obligations on digital gatekeepers. These obligations show striking similarities with abuse of dominance precedents.[2] This supports the statement by Philip Lowe that it seems to be impossible for one theory to exhaustively cover all aspects unilateral anti-competitive behaviour.[3] The following sections contain more detailed descriptions of these developments and lead to the research question.

1.1. *Ne bis in idem* developments

Ne bis in idem is a fundamental principle of EU law and is codified in Article 50 of the Charter of Fundamental Rights of the European Union ('Charter'). It entails that no one shall be confronted with two proceedings or two punishments for the same offence.[4] Whether limitations of *ne bis in idem* are justified, is reviewed through the proportionality principle enshrined in Article 52(1) Charter. The combination of Articles 50 and 52(1) Charter, to assess whether *ne bis in idem* is restricted and whether this restriction is justified, was applied for the first time by the Court in the *Menci* judgment and is therefore referred to as the *Menci* test.[5] Article 50 Charter consists of two cumulative criteria: *bis* and *idem. Bis* refers to the duplication of proceedings with a criminal character and presupposes that one of the proceedings has been closed with a final decision (*res judicata*).[6] A two-pronged *idem* test assesses whether the two proceedings concern the same facts (*idem factum*) and whether the same natural or legal person is subjected to criminal proceedings twice (unity of the offender).[7] Article 52(1) Charter allows for limitations to the *ne bis in idem* principle under the condition that the limitations are provided by law, protect the essence of the right not to be confronted with duplicated proceedings or sanctions and are in line with the principle of proportionality.[8] In short, the proportionality review requires that the two procedures follow separate aims, the authorities involved coordinate their enforcement efforts, clear and precise rules prompt the predictability of duplication and the duplication does not incur an excessive burden on the legal or natural person involved.[9]

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[1] Case C-117/20 *bpost*, ECLI:EU:C:2022:202; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203.
[2] Recital 11 DMA; Articles 5, 6 and 7 DMA.
[3] See page 2.
[4] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 22; Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 European Competition Journal 86.
[5] Case C-524/15 *Menci*, ECLI:EU:C:2018:197.
[6] The criminal nature of proceedings is determined based on ECtHR 8 June 1976 *Engel e.a. v The Netherlands*, ELCI:NL:XX:1976:AC0386, para. 81 and Case C-489/10 *Bonda*, ECLI:EU:C:2012:319, para. 37.
[7] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 31; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 33; Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 64.
[8] Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 European Competition Journal 86.
[9] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, paras. 49-51.

In March 2022, in the *bpost* and *Nordzucker* judgments the Court unified the approach towards *ne bis in idem* for all areas of EU law. Prior to the *bpost* and *Nordzucker* judgments, the *ne bis in idem* test applicable to competition law cases - the *Toshiba* test - contained a third *idem* condition (*idem crimen*) and did not include the proportionality review.[10] This third additional *idem* step was met if both proceedings were intended to protect the same legal interest. The Court in *bpost* and *Nordzucker* unified *ne bis in idem* for all areas of EU law by overturning and abandoning the separate approach for competition law.[11] A consequence of the unified *Menci* test is that focus shifts from the avoiding *ne bis in idem* infringements in the direction of justifying *ne bis in idem* infringements by relying on proportionality.[12]

1.2. A new instrument in the European Commission's toolbox

Over the past decades, the economy and markets have digitalised. The emergence of digital markets has led to the development of new market dynamics and structures and the accumulation of market power into the hands of a small number of economic operators.[13] National competition authorities ('NCAs') and the European Commission ('EC' or 'Commission') - more specifically the Directorate General for Competition ('DG Competition') - have relied on the abuse of dominance regime to combat abuses of market power by 'superdominant'[14] or 'ultra-dominant'[15] undertakings on digital markets.[16] Article 102 of the Treaty on the Functioning of the European Union ('TFEU') forms the abuse of dominance prohibition. In November 2022, the DMA entered into force. Designed to impose prefabricated obligations on undertakings that operate as gatekeepers on digital markets, the DMA is sectoral legislation that can be enforced without the burden of the lengthy case-by-case, effects-based analysis that Article 102 TFEU requires.[17] According to the EU legislator, the DMA is aimed at protecting the proper functioning of the digital internal market by keeping it fair and contestable.[18] This is achieved by imposing a number of obligations on digital gatekeepers in Articles 5, 6 and 7 DMA. Generally, the gatekeeper status is bestowed upon undertakings that meet the following cumulative criteria: providing a certain core platform service ('CPS'), being a gateway for business users to end users, meeting certain turnover and active user thresholds, having significant impact of the internal market and possessing an entrenched and durable position (Article 3(1) DMA). The DMA confers investigatory and

[10] Case C-17/10 *Toshiba*, ECLI:EU:C:2012:72.

[11] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, paras 53 and 75; Case C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6; Case C-17/10 *Toshiba*, ECLI:EU:C:2012:72; Case C-857/19 *Slovak-Telekom*, ECLI:EU:C:2021:139; Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 European Competition Journal 86; Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker. The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.

[12] See Section 2.4.2..

[13] See Section 3.1.; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[14] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, para. 182.

[15] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, para. 180.

[16] See Section 3.4.3..

[17] See Section 3.1.; Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 European Competition Journal 1; Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12 Journal of European Competition Law & Practice 500; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Recital 5 DMA; Recital 5 DMA; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis', (2021) 12 Journal of European Competition Law & Practice 561.

[18] Recital 2 DMA.

enforcement powers to the EC, specifically Directorate-General for Communications Networks, Content and Technology ('DG Connect').[19] As sole enforcer of the DMA, the EC is competent to impose fines under Article 30 DMA, whereas national competition authorities merely have an investigatory competence under Article 38 DMA. On 9 September 2023, the EC designated six gatekeepers: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft.[20] On 7 March 2024, after the designated gatekeepers have had six months to comply with the material obligations, the enforcement of the DMA commences.[21]

The material obligations codified in Articles 5, 6 and 7 DMA match with previous findings of abuse of dominance by (super)dominant undertakings on digital markets. The DMA's legislative history, *inter alia* case studies into abuse of dominance precedents, suggests that the match is not accidently but rather intentionally.[22] The Director General of DG Competition confirms that the DMA is inspired by competition law enforcement.[23] On the one hand, the EC has in the past decades fined undertakings operating on digital markets for abusing their dominant positions. For example, Microsoft has been fined for technically tying its operating system to a media player programme, Google has been scrutinised for self-preferencing in *Google Shopping* and Apple has been investigated for the lack of interoperability of in-app purchase systems and raising a 30% commission over purchases through this in-app purchase system by the EC and the Autoriteit Consument & Markt ('ACM'), the Netherlands competition authority.[24] On the other hand, the DMA imposes similar material obligations on designated gatekeepers. It requires, *inter alia*, interoperability of payments systems in Article 5(7), prohibits self-preferencing in Article 6(5) and technical tying in Article 6(3) and (4) of the DMA. Regarding the enforcement, the responsibility for enforcement of Article 102 TFEU is shared between DG Competition and the NCAs based on Articles 4 and 5 of Regulation 1/2003 whereas DG Connect is the sole enforcer of the DMA. Section 3.4.3. sets out the comparison in a more detailed manner.

Due to the overlapping material rules and enforcement powers, legal scholars predict that *ne bis in idem* issues could arise due to dual enforcement of abuse of dominance infringements and infringements of the gatekeeper

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[19] Karl Stas and Tosca Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[20] European Commission, 'Digital Markets Act: Commission designates six gatekeepers' < Digital Markets Act: Commission designates six gatekeepers (europa.eu) > accessed 9 September 2023.

[21] Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023.

[22] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 4; European Commission, 'Digital Markets Act - Impact Assessment support study - Executive Summary and Synthesis Report', (EU Publications Office 2020); European Commission, 'Digital Markets Act - Impact Assessment support study - Annexes', (EU Publications Office 2020), p. 209-381; Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023; Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614.

[23] Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023.

[24] *Microsoft (Tying)* (AT.37792); *Google Shopping* (AT.39740); European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector' (*European Commission*, 22 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143> accessed 11 July 2023; *Apple – App Store Practices* (AT.40437); European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules' – Press Release – 16 June 2020 < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 > accessed 17 October 2023; *Abuse of dominant position Apple* (ACM/19/035630).

obligations from Articles 5, 6 and 7 DMA. In this regard, it is important to note that duplication is merely hypothetical until the six-month period that allows gatekeepers to get their ducks in a row ends on 7 March 2024. Multiple authors acknowledge the possibility of a duplication involving a procedure to impose a fine on a gatekeeper for infringement of a gatekeeper obligation and a procedure to impose a fine due to abuse of dominance, aimed at the same undertaking.[25] In practice, dual enforcement can occur in consecutive order or simultaneously in a parallel manner.[26] The EU legislator recognises the possible *ne bis in idem* issues too; recital 86 DMA expressly mentions *ne bis in idem* and recital 91 DMA adds that it can be difficult to establish during the investigatory phase whether gatekeepers' conduct infringes the DMA or antitrust law.[27]

1.3. Research question and sub-questions

The above leads to the following research question and sub-questions: To what extent is dual enforcement of Article 102 TFEU and the DMA in line with the principles of *ne bis in idem* and proportionality under Articles 50 and 52(1) Charter?

1. How does the CJEU apply *ne bis in idem* stemming from Article 50 Charter and proportionality from Article 52(1) Charter to overlapping competition law and administrative sectoral legislation proceedings?
2. How do the material obligations for gatekeepers in the DMA relate to the abuse of dominance cases on digital markets?
3. What are the *ne bis in idem* risks in enforcement of the same infringements under Article 102 TFEU and the DMA?
4. To what extent can *ne bis in idem* and proportionality be safeguarded in the dual enforcement of Article 102 TFEU and the DMA by the NCAs and the EC?

1.4. Academic and practical relevance

The relevance of this topic lies in the entry into force of the DMA and the recent change in course by the Court in *bpost* and *Nordzucker* regarding the interpretation of the *ne bis in idem principle* in competition law cases. These two developments influence the enforcement of competition law in general and Article 102 TFEU and the DMA in particular. At the same time, it is unclear at this stage how the enforcement of the DMA by DG Connect will interrelate with the Article 102 TFEU enforcement by DG Competition and NCAs.[28] The unified *ne bis in idem* principle test takes away part of the uncertainty by ensuring that the same legal framework applies to both the DMA and Article 102 TFEU cases. In addition, the practical relevance of this thesis lies in

[25] Marco Cappai and Giuseppe Colangelo, 'A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation (2021) < http://dx.doi.org/10.2139/ssrn.3951088 > accessed 26 August 2023; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239;

[26] See also Section 5.1.2..

[27] See Article 38(7) DMA in relation to Recital 91 DMA.

[28] Damien Geradin, 'The DMA has been published: Now the real challenges start' (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/10/12/the-dma-has-been-published-now-the-real-challenges-start/ > accessed 10 November 2023.

the recommendations on how to coordinate the duplicated enforcement of the DMA in order to meet the requirements of Article 52(1) Charter.[29]

1.5. Research methods, research approach and general outline

This thesis is divided into six chapters. The method of research for this thesis is document-based and includes case-law from the CJEU, the European Court of Human Rights ('ECtHR'), Decisions from the EC and NCAs, as well as relevant academic literature. Moreover, this thesis takes a fundamental rights approach which means that the *ne bis in idem* and proportionality principles form the foundation and main perspective. Other interests, such as effective enforcement and the interest of undertakings are touched upon occasionally.

Chapter 2 entails a predominantly descriptive overview of case-law on *ne bis in idem* and the proportionality principle to establish the legal framework. This legal framework is used in the following chapters to assess to what extent *ne bis in idem* is infringed by the predicted or hypothetical duplication of DMA and Article 102 TFEU proceedings. This chapter also reflects on the implications of the unified *Menci* test on the *ne bis in idem* principle. Thereafter, Chapter 3 and 4 are partly descriptive and partly evaluative. They are descriptive in providing an overview of the material obligations and the enforcement procedures for both the DMA and Article 102 TFEU. Chapter 3 compares the material obligations of Articles 5, 6 and 7 DMA to the abuse of dominance precedents from case-law and decisions. The goal of Chapter 3 is to explain the similarities between the material obligations for gatekeepers under the DMA and the abuse of dominance on digital markets precedents. This comparison is necessary for the *idem* criteria and essential to assess whether the DMA and Article 102 TFEU pursue complementary aims as part of the proportionality review. Chapter 4 compares the procedural provisions of the DMA to Regulation 1/2003 for the enforcement Article 102 TFEU. The goal of Chapter 4 is to describe and compare the enforcement and sanctioning mechanisms of the DMA and Article 102 TFEU. This is seminal for the proportionality review because it shows the possibilities for coordination, the predictability of duplication and the likelihood of an excessive burden caused by the duplication. The differences and similarities between the material obligations and enforcement mechanisms of both the DMA and Article 102 TFEU illustrate to what extent the material obligations and the enforcement competences overlap and to what extent the procedures can be considered to be complementary. Chapter 5 is the most analytical chapter as it applies the framework of Articles 50 and 52(1) Charter to the possibility of duplicated enforcement of the DMA and Article 102 TFEU. This framework is used to assess whether *ne bis in idem* is breached by this duplicated enforcement and whether the breach can be justified by relying on proportionality. Finally, recommendations are formulated on how to coordinate or allocate in the dual enforcement of DMA and Article 102 TFEU. Chapter 6 concludes.

[29] Bernadette Zelger, 'The Principle of ne bis in idem in EU competition law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?' (2023) 60 Common Market Law Review 239; Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

2. *Ne bis in idem* and proportionality in EU competition law

This chapter contains an overview of case-law on the *ne bis in idem* principle - Article 50 Charter - and the proportionality principle - Article 52(1) Charter - from the CJEU. The first section describes the scope of applicability of *ne bis in idem* and the development of the principle in the case-law of the CJEU and the ECtHR. Thereafter, Section 2.2. focusses the evolution of *ne bis in idem* in competition law culminating in *bpost* and *Nordzucker*. This overview results in the legal framework to assess potential violations of *ne bis in idem* by overlapping Article 102 TFEU and DMA proceedings and whether these violations can be justified by the proportionality principle. Finally, Section 2.4 assesses the implication of the unification in *bpost* and *Nordzucker*.

2.1. General introduction to *ne bis in idem*

2.1.1. The right not to be confronted twice with criminal proceedings for the same facts

Ne bis in idem entails that '[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted'[30]. The rationale behind *ne bis in idem* is plural. *Ne bis in idem* is linked to legal certainty, protects legitimate expectations of defendants and presupposes that legal disputes must come to an end. Moreover, the integrity of the first judgment requires that the first judgment on specific conduct is also the final judgment.[31] The first codification of the principle in EU law, Article 54 of the Convention Implementing the Schengen Agreement ('CISA'), reveals that *ne bis in idem* also strives to encourage cross-border movement; a final judgment in criminal proceedings one Member State ('MS') means that the same person cannot be targeted for the same facts in another Member State.[32] The *ne bis in idem* principle is also codified in Article 4 Protocol 7 of the European Convention on Human Rights ('ECHR').

An essential precondition for the applicability of *ne bis in idem* is the criminal character of both proceedings. It has to be determined to what extent proceedings within the realm of Article 102 TFEU and the DMA are criminal in nature. According to settled case-law from the ECtHR and the CJEU, the criminal character of sanctioning procedures is determined via the three *Engel* criteria. The notion of criminal charge is a precondition for the applicability of various fundamental or human rights as protected by the Charter and the ECHR. The Charter has to provide an equivalent level of protection as the ECtHR, pursuant to Article 6 TEU and Article 52(3) Charter. Therefore, the CJEU applies the criteria created by the ECtHR to determine the criminal character of sanctioning proceedings.

[30] Article 50 Charter.

[31] Michael Luchtman, 'The ECJ's recent case-law on ne bis in idem: Implications for law enforcement in a shared legal order' (2018) 5 Common Market Law Review 1717; John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211.

32 Case C-27/22 Volkswagen, ECLI:EU:C:2023:633, para. 81; Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431; Michiel Luchtman, 'Transnational Enforcement in the European Union and the Ne Bis In Idem Principle' (2011) 4 REALaw 5.

In *Engel e.a. v The Netherlands*, the ECtHR introduced the three criteria.[33] In *Bonda*, the CJEU copied the *Engel* criteria to EU law for the first time: [34] i) 'the legal classification of the offence under national law'[35], ii) 'the very nature of the offence'[36] and iii) 'the nature and the degree of the severity of the penalty'[37]. In the assessment of the potential criminal nature of procedures, the punitive nature and the severity of sanctions tend to be the decisive factors. In contrast, the legal classification is not the determining factor because the guarantees applicable to criminal proceedings cannot be dependent on the arbitrary classification in national legislation.[38] Therefore, administrative fines can be categorised as criminal depending on the punitive nature or severity of the sanction.[39] In general, sanctions with a deterrent or punitive objective are considered criminal while sanctions with a reparative purpose are not criminal in nature.[40] The CJEU has not explicitly categorised administrative fines or competition law fines as criminal sanctions but has recognised that *ne bis in idem* applies to fines imposed for competition law infringements.[41] Moreover, the CJEU has consistently applied the *ne bis in idem* principle to sanctioning proceedings such as administrative fines or competition law fines since these are 'sufficiently similar in nature'[42] to criminal law.[43] Moreover, Advocate General ('AG') Kokott in *Toshiba*, referring to settled case-law, has confirmed 'the similarity of EU anti-trust law to criminal law'[44] to merit the application of *ne bis in idem* to competition law proceedings. In my opinion, extrapolating this to the sanctioning competences of the DMA leads to the conclusion that *ne bis in idem* is also applicable to the fines and periodic penalty payments the EC can impose pursuant to Articles 30 and 31 DMA. Section 4.1.2. contains an overview of the sanctioning regimes under Regulation 1/2003 and the DMA.

2.1.2. Legal bases and the applicability of the Charter

The *ne bis in idem* and proportionality principles are part of the Charter. Article 51(1) Charter demands that EU institutions comply with the Charter. According to settled case-law, national authorities are bound by the

[33] See ECtHR 8 June 1976 *Engel e.a. v The Netherlands*, ELCI:NL:XX:1976:AC0386, para. 82; Case-law from the ECtHR
[34] John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211.
[35] Case C-489/10 *Bonda*, ECLI:EU:C:2012:319, para. 37.
[36] Case C-489/10 *Bonda*, ECLI:EU:C:2012:319, para. 37.
[37] Case C-489/10 *Bonda*, ECLI:EU:C:2012:319, para. 37.
[38] ECtHR 8 June 1976 *Engel e.a. v The Netherlands*, ELCI:NL:XX:1976:AC0386, para. 81.
[39] Gianni Lo Schiavo, 'The Principle of ne bis in idem and the Application of Criminal Sanctions: Of Scope Restrictions' (2018) 14 European Constitutional Law Review 644.
[40] Case C-97/21 *MV*, ECLI:EU:C:2023:371, para. 42; Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 49.
[41] Markus Kärner, 'Procedural Rights in the Outskirts of Criminal Law: European Union Administrative Fines' (2022) 22 Human Rights Law Review 1; , para. 41.
[42] Jonathan Tomkin, 'Commentary on Article 50 – Right not to be tried or punished twice' in Peers, Hervey, Kenner and Ward (Eds.), The EU Charter of Fundamental Rights – A Commentary (Hart 2021) para. 50.37; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.
[43] See *inter alia* Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P AND C-254/99 P *Limburgse Vinyl Maatschappij NV*, ECLI:EU:C:2002:582; Case C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6; Case C-17/10, *Toshiba*, ECLI:EU:C:2012:72; Case C-501/11 P *Schindler*, ECLI:EU:C:2013:522; Case C-117/20 *bpost*, ECLI:EU:C:2022:202; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023.
[44] Case C-17/10, *Toshiba*, ECLI:EU:C:2011:552, Opinion of AG Kokott, paras 48 and 100.

Charter in the enforcement of EU law.[45] Apart from the Charter, the *ne bis in idem* principle is part of the constitutional tradition of Member States.[46] This entails that undertakings have to rely, if possible, on national variations of the *ne bis in idem* principle in matters outside the scope of EU law, where the Charter does not apply. In practice, the protection against duplicated enforcement or punishment offered by *ne bis in idem* has to be balanced against the interest of effective enforcement.[47] In other words, a higher level of protection is liable to hinder enforcement endeavours and vice versa. The CJEU is tasked with striking the balance between these two interests in the interpretation of the *ne bis in idem* principle and restriction of *ne bis in idem* in line with the proportionality.[48]

However, the *ne bis in idem* codification in Article 50 Charter does not exist in a vacuum. *Ne bis in idem* is also codified in Article 4 Protocol 7 ECHR, which falls within the jurisdiction of the ECtHR. Pursuant to Article 6 TEU and Article 52(3) Charter, the interpretation of *ne bis in idem* by the CJEU is linked to the interpretation by the ECtHR. Corresponding rights from both sources of law are expected to provide equivalent protection.[49] As a consequence, the CJEU case-law regarding *ne bis in idem* is intertwined with case-law from the ECtHR. AG Bobek in *bpost* provides a useful overview of the development of *ne bis in idem* in the case-law of the CJEU and the ECtHR.[50]

2.1.3. Evolution of ne bis in idem by the CJEU and the ECtHR

Case-law of the CJEU and the ECtHR forms the legal framework for assessing whether Article 50 Charter is infringed and whether the infringement is justified under article 52(1) Charter. The *ne bis in idem* principle consists of two elements: *bis* and *idem*. In a longstanding line of case-law - intertwined with and inspired by the case-law of the ECtHR - the CJEU has developed the two-pronged *idem* test.[51] The two criteria are i) the same legal or natural person is involved in proceedings twice and ii) *idem factum* which means that both proceedings are aimed at the same set of facts.[52] This version of the *idem* test is used in all areas of EU law, such as the duplication of administrative and criminal proceedings concerning 'tax evasion, market manipulation and insider trading'[53], CISA cases, European Arrest Warrant ('EAW') cases and other cases in the Area of Freedom Security and Justice ('AFSJ').[54]

The *idem crimen* step, abandoned by the Court for competition law cases in *bpost* and *Nordzucker*, was already abandoned by the Court in 2006 for other areas of law in *Van Esbroeck*, a case on the *ne bis in idem* codification

[45] Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras. 17-19.
[46] John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211.
[47] See for example Recital 14 Directive 2019/1.
[48] John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211.
[49] ECtHR 30 June 2005 *Bosphorus v. Ireland* ECLI:CE:ECHR:2005:0630JUD004503698, paras. 155-156.
[50] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 75.
[51] Max J. Vetzo, 'The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma' (2018) 2 REALaw 55.
[52] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para. 25.
[53] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 75.
[54] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, paras. 53 and 75.

in Article 54 CISA. The ECtHR followed suit in the landmark case of *Zolotukhin v. Russia.*[55] This created the schism in the *idem* test between competition law and other areas of EU law. The differences grew with the *A and B v. Norway* judgment from the ECtHR which inspired the *Menci* judgment from the CJEU.[56] In *A and B v. Norway,* the applicants were simultaneously involved in tax proceedings with a criminal character and criminal proceedings. The ECtHR considered that parallel proceedings that are 'sufficiently connected in substance and in time'[57] are not incompatible with the *ne bis in idem* principle. This test entails that *ne bis in idem* is not violated if the two proceedings are 'sufficiently connected in substance and in time'[58]. The CJEU applies a similar test in *Menci* but chooses a slightly different approach. In *Menci,* the Court answered a preliminary question about the duplication of an administrative penalty and a criminal penalty for a failure to pay value added tax on time. Instead of using the factors to assess whether *ne bis in idem* within the meaning of Article 50 Charter is limited by the duplication, the Court uses the factors to fill in the proportionality test from Article 52(1) Charter.[59] According to the Court, limitations of Article 50 Charter are in line with the proportionality principle in so far as the duplication is provided for by law and i) 'meets an objective of general interest'[60] ii) pursues 'objective, complementary aims relating to different aspects of the same unlawful conduct'[61], iii) is based on 'clear and precise rules'[62] to enable the predictability of duplication and iv) these rules prescribe coordination to limit the additional disadvantage for the person concerned and the severity of the penalties to what is strictly necessary.[63]

This approach is also known as the restriction-justification approach.[64] It entails that restrictions or limitations of *ne bis in idem* can be justified; duplication is allowed under the condition that the interests of the person or undertaking involved are not ignored. The two procedures must be 'sufficiently coordinated and within a proximate timeframe'[65] in pursuit of complementary general interests, be provided by law and predictable, without disproportionally burdening the person or undertaking involved. Lastly, the penalties must be imposed in line with the (other) principle of proportionality from Article 49(3) Charter which prescribes that the severity of the penalty cannot be disproportionate to the offence committed.[66]

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[55] ECtHR 10 February 2009 *Zolotukhin v. Russia*, ECLI:CE:ECHR:2009:0210JUD001493903, para. 82; Case C-17/10 *Toshiba*, ECLI:EU:C:2011:552, Opinion of AG Kokott, para. 121.
[56] ECtHR 15 November 2016 *A and B v. Norway*, ECLI:CE:ECHR:2016:1115; Case C-524/15 *Menci*, ECLI:EU:C:2018:197.
[57] ECtHR 15 November 2016 *A and B v. Norway*, ECLI:CE:ECHR:2016:1115, para. 131.
[58] ECtHR 15 November 2016 *A and B v. Norway*, ECLI:CE:ECHR:2016:1115, para. 131.
[59] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, paras. 11-16 and 40; Case C-129/14 PPU *Spasic*, ECLI:EU:C:2014:586, para. 56.
[60] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, paras. 44 and 48.
[61] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para. 44.
[62] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para. 49.
[63] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, paras. 53 and 55.
[64] Jonathan Tomkin, "Commentary on Article 50 – Right not to be tried or punished twice" in Peers, Hervey, Kenner and Ward (Eds.), The EU Charter of Fundamental Rights – A Commentary (Hart, 2021), para. 50.86; See also Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.
[65] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 95.
[66] Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239; Case C-524/15 *Menci*, ECLI:EU:C:2018:197, paras. 55 et seq.

2.2. Competition law and *ne bis in idem*

2.2.1. Ne bis in idem in competition law before bpost and Nordzucker

Prior to *bpost* and *Nordzucker*, the *idem* test in competition law consisted of three cumulative criteria: the same person, the same facts or *idem factum*, and the same legal interest or *idem crimen*.[67] This *idem crimen* condition required that the two procedures were aimed the same offence, the identity of an offence depends on the legal interest or asset it protects.[68] The origins of *idem crimen* lie in *Wilhelm and Others*, the first *ne bis in idem* case in the realm of competition law.[69] In *Aalborg Portland* the Court reiterated that 'the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset'[70]. Post-Lisbon, after *ne bis in idem* was codified in Article 50 Charter, the Grand Chamber of the Court confirmed this approach in *Toshiba*.[71] In the *Toshiba* judgment, the Court answered preliminary questions on the *ne bis in idem* principle in a dispute about cartel fines that were imposed on the same undertakings by both the EC and the Czech competition authority before the accession to the EU.[72]

In other areas of law the *idem crimen* criterion was already abandoned because it was deemed irrelevant in establishing whether the offence is the same.[73] Contrastingly, the Court hold on to *idem crimen* in competition law without ever applying it in practice,[74] it became a dead letter. Ultimately, the persistence of the Court in upholding the *idem crimen* approach until *bpost* and *Nordzucker* caused competition law to deviate from all other areas of law. AG Bobek in *bpost* described the status quo before *bpost* and *Nordzucker* as 'a fragmented and partially contradictory mosaic of parallel regimes'[75].

AG Kokott in *Toshiba* initiated the call for unification.[76] In the opinion of AG Kokott, the lack of uniformity was 'detrimental to the unity of the EU legal order'[77] and not based on a 'objective reason'[78]. AG Wahl also questions the existence of any reasons in favour of the *idem crimen* approach of the Court.[79] Thereafter, and after *Menci*, AG Tanchev confirmed the lack of relevance of the *idem crimen* criterion.[80] Undeterred by the

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[67] Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 European Competition Journal 86.
[68] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 41.
[69] Case C-14/68 *Wilhelm and Others*, ECLI:EU:C:1969:4.
[70] Case C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, para. 338.
[71] Case C-17/10 *Toshiba*, ECLI:EU:C:2012:72, para. 97; Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 47.
[72] Case C-17/10 *Toshiba*, ECLI:EU:C:2012:72, para. 19.
[73] Case C-436/04 *Van Esbroeck*, ECLI:EU:C:2006:165, para. 36; Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, paras. 54 and 55; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.
[74] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 41.
[75] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 6.
[76] Case C-17/10 *Toshiba*, ECLI:EU:C:2011:552, Opinion of AG Kokott, paras. 114-122.
[77] Case C-17/10 *Toshiba*, ECLI:EU:C:2011:552, Opinion of AG Kokott, para. 117.
[78] Case C-17/10 *Toshiba*, ECLI:EU:C:2011:552, Opinion of AG Kokott, para. 118.
[79] Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, ECLI:EU:C:2018:976, Opinion of AG Wahl, paras. 45 and 46.
[80] Case C-10/18 P *Marine Harvest*, ECLI:EU:C:2019:975, Opinion of AG Tanchev, para. 45; See Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 52 and sources cited.

ever louder calls for unification, the Court stayed on the *Toshiba* route even after *Menci*. In *Slovak-Telekom*, a case concerning the duplication of abuse of dominance proceedings initiated by both the Slovak competition authority and the EC, the Court reaffirmed the *idem crimen* approach.[81] AG Bobek joined the other three AGs in criticising the fragmentation. In contrast to the other AGs, the unification suggested by AG Bobek entailed a return to the *idem crimen* approach for all areas of EU law.[82] The Court in *bpost* set AG Bobek's objections and suggestions aside.[83]

2.2.2. Toshiba or not Toshiba?

In *bpost* and *Nordzucker* the Grand Chamber of the Court was confronted with preliminary questions regarding *ne bis in idem* in competition law and thus had to choose between the *Toshiba* route and the *Menci* route. *Nordzucker* is about the duplication of Article 101 TFEU proceedings by two NCAs whereas the *bpost* case is about the duplication of abuse of dominance proceedings and the enforcement of sectoral legislation regarding postal services.[84] Preliminary questions were referred to the Court about the interpretation of the three-fold *idem* criterion in competition law. Moreover, the Court was asked in *bpost* whether the duplication of fines for 'infringing EU competition law'[85] and sectoral legislation is justified if the conditions the Court stipulated in *Menci* are met.[86]

The Court 'untangled'[87] the two lines of case-law by considering that the level of protection offered by Article 50 Charter cannot 'vary from one field of EU law to another'[88]. Therefore, the Court rules that the legal interest is irrelevant in the *idem* test 'for the purposes of establishing the existence of the same offence'[89]. Instead, the 'identity of the material facts'[90] determines whether it is the same offence. A determining factor in this regard is 'the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned.'[91] The Court explicitly refers to a connection both in time and space.[92] Moreover, the proportionality review of Article 52(1) Charter derived from *Menci* is applied by the Court in both judgments.[93] In *bpost* this leads to the conclusion that the sectoral

[81] Case C-857/19 *Slovak-Telekom*, ECLI:EU:C:2021:139, paras. 7 and 43.
[82] The reasoning behind this can be found in Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek.
[83] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023.
[84] Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239; Case C-151/20 Nordzucker, ECLI:EU:C:2022:203, paras. 16-17; Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 10 and 12.
[85] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 20.
[86] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 20; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 25.
[87] Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.
[88] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 35; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 40.
[89] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 34; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 39.
[90] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 33.
[91] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 33.
[92] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 37.
[93] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 50; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 49.

regulation and Article 102 TFEU do not pursue the same legal interest, which legitimises the duplication.[94] The *Nordzucker* judgment encompasses that duplicated enforcement of Article 101 TFEU is in line with Article 50 Charter because the *bis* requirement is not fulfilled if 'the territory, product market and period'[95] of the first decision do not overlap with the second procedure.[96] Overall, the Court unifies the application of *ne bis in idem* across all areas of EU law and strikes a new balance between the protection of the fundamental right against duplicated prosecution or conviction and effectiveness in the enforcement of EU competition law.[97]

2.3. The legal framework: a restriction-justification approach[98]

The developments described in the previous sections has led to a united test across all fields of EU law to ascertain whether *ne bis in idem* is restricted and whether such restrictions can be justified through the proportionality review. This results in the legal framework for the hypothetical duplication of fining procedures for infringement of Article 102 TFEU and fining procedures related to gatekeeper obligation infringements. In *bpost* and *Nordzucker,* and more recently *Volkswagen*, all preliminary question procedures, the Court provided guidance to national courts on how to apply *ne bis in idem.* The *Volkswagen* judgment was about the duplication of a criminal penalty and an administrative fine, imposed on Volkswagen in different MSs in relation to Dieselgate.[99]

2.3.1. Applicability of the Charter

It goes without saying that in order for the *ne bis in idem* principle in Article 50 Charter to apply, the Charter itself has to apply. According to the Court in *Åkerberg Fransson* - a judgment about the duplication of administrative penalties and criminal penalties for the same tax offence - the Charter is only applicable in situations that fall within the scope of EU law. Enforcement of EU law by national authorities is included in the scope of EU law.[100] In *Volkswagen,* the Court clarifies that the applicability of the *ne bis in idem* and proportionality principles codified in Articles 50 and 52(1) Charter requires that only one of the duplicated proceedings falls within the scope of EU law.[101] In other words, one EU law leg is enough to trigger the Charter. This entails that Articles 50 and 52(1) Charter are applicable to duplications where either EU competition law or the DMA is involved.

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[94] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 47.
[95] Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 42.
[96] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023; Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.
[97] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.
[98] Jonathan Tomkin, "Commentary on Article 50 – Right not to be tried or punished twice" in Peers, Hervey, Kenner and Ward (Eds.), The EU Charter of Fundamental Rights – A Commentary (Hart, 2021), para. 50.86; Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.
[99] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 17-19.
[100] Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras. 12, 13 and 17-19.
[101] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 17-19 and 37.

2.3.2. Article 50 Charter - restriction of ne bis in idem

- *Bis*: This element requires the duplication of proceedings, provided that a final decision on the merits has been reached in one of the proceedings.[102] The existence of a final decision blocks the initiation or continuation of another criminal procedure concerning the same facts. Even more so, the order wherein the sanctions gain *res judicata* status is irrelevant in this regard. The imposition of a second criminal sanction that becomes final before the first criminal sanction has gained *res judicata* status is contrary to *ne bis in idem* as well.[103]

- *Idem*: This element possesses two sub-elements; the same person and the same offence. First, the same person sub-element is straightforward and tests whether the same legal person is involved twice. Both EU competition law and the DMA use the notion of undertaking as personal scope of application. Undertaking, in this regard, entails 'every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed.'[104] Second, *idem factum* is satisfied if the material conduct is identical and not 'merely similar'[105]. In other words, there has to be 'a set of concrete circumstances which are inextricably linked together'[106]. This is ascertained by assessing the territory, the product market and the period in which the alleged infringement took place.[107] Regarding territory, the Court in *Volkswagen* clarifies that the fact that a decision from one Member State rules on acts committed in another Member State and the fine takes into account the turnover from the other Member State, is an important indication for *idem factum.*[108] Bania and Van den Boom apply these factors to the DMA by analogy. As described more elaborately in Section 3.4.2., the core platform services defined in the DMA coincide with relevant product markets in competition law. Therefore, overlap exists in so far as the conduct occurs on a coinciding product market and CPS. In a similar vein, assessing whether a DMA fine and an Article 102 TFEU fine cover the same time period and territory does not have to be challenging in practice.[109] Another perspective to assess the *idem* criterion entails comparing the personal, temporal and material scopes of both proceedings. If the personal scope, temporal scope and material scope of the first procedure coincide with the same scopes of the second procedure, the *idem* test is fulfilled.

Moreover, competition law has developed the concepts of single economic entity ('SEE') and single continuous infringement ('SCI') to expedite enforcement.[110] The SEE doctrine prescribes that parents can be held liable for the competition law infringements of their subsidiaries if the group operates as a single economic

[102] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 29.
[103] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 59 and 77.
[104] Case C-41/90 *Höfner and Elser*, ECLI:EU:C:1991:161, para. 21. See Article 2(27) DMA.
[105] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 36.
[106] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 33.
[107] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 48; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 41.
[108] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 73 and 74; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 46.
[109] Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116; .
[110] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.

unit.[111] This means that targeting different legal entities from the same group for the same facts could result in duplicated punishment of a single economic entity as 'one culpable subject'[112]. In a similar vein, the concept of a SCI bundles a set of actions that fulfil different aspects of an overarching plan to disrupt competition.[113] It allows competition authorities to integrally prosecute a set of inextricably connected anti-competitive acts as a whole. Regarding *ne bis in idem*, these broad concepts have the potential to trigger the *idem* requirement because it increases the chances that the same undertaking or the same facts are involved in proceedings twice.[114]

2.3.3. Article 52(1) Charter - justification of the restriction

In *Volkswagen* the Court reiterates the conditions for justifying *ne bis in idem* limitations as defined in *Menci* and repeated in *bpost* and *Nordzucker*. First, the duplicated proceedings or sanctions have to pursue an objective of general interest that can justify the cumulation. Second, the duplicated proceedings or sanctions must have complementary aims or objectives of general interest.[115] Case-law reveals that regarding limitations of *ne bis in idem*, the relevant general interests are the aims and objectives of the rules that are being enforced. Third, in order to make the duplication predictable, it has to be provided for in clear and precise national legislation.[116] Finally, the enforcement agencies involved are required to coordinate their efforts to assure that 'the additional disadvantage associated with such a duplication for the persons concerned'[117] does not exceed what is necessary.

– Complementary aims*:* A seminal element of the proportionality review is the criterion that the two procedures do not target the same general interest, instead the proceedings should be aimed at the protection of distinct legal interests.[118] As stated in Section 2.2.1., the legal interest test has never been applied or clarified by the Court. AG Bobek in *bpost* defines the legal interest as follows: 'It is the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that good or value that the offence at issue harms, or with which it interferes.'[119] According to the Court in *bpost*, in reference to ECtHR *A and B v. Norway*, the two procedures should focus on separate aspects of the same social problem.[120]

[111] Case T-112/05 *AkzoNobel v Commission*, ECLI:EU:T:2007:381, paras. 57-58.
[112] Sven Frisch, '*Ne bis in idem* under an optimal antitrust enforcement framework' (2023) 24 ERA Forum 183–200 < https://doi.org/10.1007/s12027-023-00753-w > accessed 15 September 2023.
[113] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, para. 1562.
[114] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.
[115] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para. 44.
[116] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, paras. 46 and 49.
[117] Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para. 53.
[118] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 44;
[119] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 136.
[120] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para; ECtHR 15 November 2016 *A and B v. Norway*, ECLI:CE:ECHR:2016:1115, paras. 121 and 132.

- No excessive burden: To assure that the interests of the person or undertaking involved are not disproportionally harmed due to the duplication, the actual impact of the duplication of proceedings and penalties has to be limited.[121] This means that the severity of the imposed sanctions, or in case of fines the amount, should be taken into consideration.[122] For instance, the Court in *Volkswagen* rules that the duplication of the fine did not appear to be an excessive disadvantage 'for ***that*** company [emphasis added]'[123].

- Predictability through clear and precise rules: The predictability criterion does not require that the possibility of duplication is explicitly or specifically mentioned in the rules that are the legal bases for the duplicated sanctioning proceedings. The Court seems to suggest in *Volkswagen* that the criterion is met if the pieces of legislation that form the legal bases for the proceedings are clear and precise. The existence of multiple legal bases that can be applied to the same facts, should give rise to possibility of duplicated enforcement.[124]

- Coordination and proximate timeframe: Lastly, the Court requires actual cooperation and actual exchange of information between enforcement agencies. The sheer existence of a provision prescribing coordination does not suffice.[125] Moreover, the distinction between the two procedures has to be limited from the perspective of the person or undertaking involved. This entails, *inter alia*, that the duplication has to be conducted within a 'proximate timeframe'[126] and thus cannot be dragged on for too long.[127] AG Campos Sánchez-Bordona in *Volkswagen* recognises some paradoxicality regarding the requirement of coordination. The mechanisms in place to ensure coordination in EU law enforcement are designed to avoid cumulation of proceedings and *ne bis in idem* issues. By contrast, Article 52(1) Charter by virtue of CJEU precedence, stimulates close coordination as a requirement to exempt limitations to *ne bis in idem.*[128]

2.4. Implications of unification

The first section explains the practical implications of unification for the *ne bis in idem* and proportionality principle. Thereafter, Section 2.4.2. maps out how the current approach towards *ne bis in idem* affects the essence of the principle. Illustrating the practical consequences and the implications for the essence of *ne bis*

[121] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 53; Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.
[122] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 97.
[123] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 97.
[124] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 98.
[125] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 55; Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 98; Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.
[126] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 95.
[127] Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.
[128] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:265, Opinion of AG Campos Sánchez-Bordona, para. 111.

in idem, is important to understand the past development of *ne bis in idem* and to assess *ne bis in idem* in the context of dual enforcement of Article 102 TFEU and DMA infringements.

2.4.1. Practical implications of the unification

The long-awaited unification of *ne bis in idem* by the Grand Chamber of the Court has practical implications for antitrust enforcement, the part the legal interest protected plays and legal certainty. First and foremost, the unification means that the interpretation of *ne bis in idem* by the CJEU matches the interpretation by the ECtHR in all areas of law.[129] This unified restriction-justification approach applies to duplication of competition proceedings by two NCAs (*Nordzucker*) and the duplication of Article 102 TFEU proceedings and administrative proceedings of criminal nature regarding sectoral legislation (*bpost*).[130] The latter is relevant regarding the duplication of DMA enforcement and abuse of dominance enforcement. Second, although the Court discarded the *idem crimen* test, the legal interest resurfaces as part of the proportionality review.[131] Prior to *Nordzucker* and *bpost*, two proceedings pursuing the protection of the same legal interest would be liable to infringe Article 50 Charter as opposed to failing the complementary aims test of the proportionality review under Article 52(1) Charter. In other words, the same legal interest used to lead to a restriction of *ne bis in idem* and under the current approach it leads to failing the justification of the restriction.[132] Thirdly, in academic literature the implications concerning legal certainty are disputed. On the one hand, restrictions can be justified via the proportionality review which grants flexibility to enforcement authorities and diminishes legal certainty.[133] According to AG Bobek, the conditions of the proportionality review fail to provide sufficient legal certainty due to their circumstantial nature.[134] On the other hand, the threshold for a *ne bis in idem* restriction is lowered and the burden of proof regarding the proportionality review lies with the enforcing authorities.[135]

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[129] Bernadette Zelger, 'The Principle of ne bis in idem in EU competition law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?' (2023) 60 Common Market Law Review 239.

[130] Case C-117/20 *bpost*, ECLI:EU:C:2022:202; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203; Jonathan Tomkin, "Commentary on Article 50 – Right not to be tried or punished twice" in Peers, Hervey, Kenner and Ward (Eds.), The EU Charter of Fundamental Rights – A Commentary (Hart, 2021), para. 50.86.

[131] Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.

[132] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023; Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.

[133] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431; , paras. 111-112.

[134] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 111.

[135] Bernadette Zelger, 'The Principle of ne bis in idem in EU competition law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?' (2023) 60 Common Market Law Review 239; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/ > accessed 16 July 2023.

2.4.2. Implications on the essence of ne bis in idem: ne means ne

Another cardinal part of Article 52(1) Charter is to ensure that the essence of a fundamental right remains unaffected. The recent developments in the sphere of *ne bis in idem* have ramifications for the essence of the *ne bis in idem* principle.

Firstly, according to the Court in *bpost*, the duplication of proceedings or penalties honours the essence of *ne bis in idem* as long as the two proceedings do not strive to protect the same general interest.[136] Van Cleynenbreugel objects this definition of the essence - 'same objective double proceedings'[137] - is essentially the same criterion as the complementary aims part of the proportionality review. According to Van Cleynenbreugel, the introduction of the proportionality review has shifted the principle's centre of gravity away from protecting free movement (in the spirit of Article 54 CISA). Avoiding over-punishment and assuring effective enforcement seem to be the main driving force behind the current *ne bis in idem* and proportionality review, as designed by the Court.[138] In my opinion, the 'additional burden'[139] in time and effort of the second procedure is not sufficiently taken into account by the Court.[140] Formally, the proportionality review should assess the actual impact of the duplication of both penalties and proceedings.[141] For example, an acquittal in the second procedure after a conviction in the first procedure can still excessively burden the person involved even though there is no cumulation of penalties.

Secondly, Van Cleynenbreugel recognises that another consequence of effective law enforcement being the main rationale of *ne bis in idem* in administrative law, is that competition law enforcement by the EC and NCAs should not hinder each other.[142] The two authorities have to co-exist through coordination and avoiding overlap by creating 'silos (…) of separate enforcement actions'[143]. Cappai and Colangelo support this and add that the *idem* test the Court applies in *Nordzucker* is capable of nullifying the spirit of *ne bis in idem.* The idem test - based on relevant market, time period and territory - reflects the notion of inextricably connected circumstances and simultaneously gives enforcement authorities a step-by-step guide to formally avoid

[136] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 43.
[137] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.
[138] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.
[139] Harrison P. et al, 'Ne Bis in Idem: The Final Word?' (2022) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/> accessed 15 July 2023.
[140] See in a similar vein: Harrison P. et al, 'Ne Bis in Idem: The Final Word?' (2022) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/> accessed 15 July 2023.
[141] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 53; Francesco Rizzuto, 'Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism concerning the Principle of Ne Bis in Idem' (2022) 6 European Competition & Regulation Law Review 154.
[142] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.
[143] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.

duplication by 'gerrymandering'[144]. Therefore, Cappai and Colangelo anticipate situations wherein enforcement authorities divide the two procedures with surgical precision to carve away any overlap in terms of time, product market or territory. Fragmenting the same offence into parts also seems contrary to the freedom of movement across borders rationale of Article 54 CISA. This risk, however, is nuanced by the circumstance that fragmenting, however, seems practically impossible due to strong cross-border economic ties between parts, especially on digital markets.[145]

Third, as AG Bobek in *bpost* argues, the shift of focus from *ne bis in idem* and avoiding duplication to proportionality and minimising the burden of duplication does not sufficiently respect the essence of *ne bis in idem*, as is required according to Article 52(1) Charter. The restriction-justification approach is an *ex post* correction mechanism 'against the disproportionality of combined or aggregated sanctions'[146] instead of an *ex ante* test that blocks the initiation of a second procedure.[147] Even though the Court in *Volkswagen* seems to emphasise that *ne bis in idem* 'precludes criminal proceedings in respect of the same facts from being initiated or maintained'[148], the conditions of the proportionality assessment can only be checked after the second procedures has been closed. For example, whether the duplication has led to an excessive burden or whether the procedures have not taken too long cannot be determined before the second procedure has come to an end, these assessments are intrinsically *ex post*. AG Bobek states that the restriction-justification approach does not respect the essence of *ne bis in idem*.[149] Section 5.3. presents recommendations to deal with these essence issues in the enforcement of Article 102 TFEU and the DMA.

[144] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.
[145] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023; Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 41; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493; See Section 1.1. on Article 54 CISA.
[146] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 109.
[147] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 107.
[148] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 59.
[149] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, paras. 108 and 117; Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

2.5. Interim conclusion

The developments in the case-law of the Court show that the centre of gravity in the *ne bis in idem* assessment has shifted towards the proportionality review. Before *Menci* - and before *bpost* and *Nordzucker* concerning competition law - the *ne bis in idem* focussed on the existence of a restriction based on the *idem* and *bis* criteria. The introduction of the proportionality review entails that *ne bis in idem* restrictions are not per se problematic. Duplication of proceedings is justified if the proportionality criteria are fulfilled. *Nordzucker* provides that one single test applies to duplication of proceedings concerning Article 102 TFEU and sectoral legislation, this is relevant for the duplication of DMA proceedings and Article 102 TFEU proceedings because the DMA qualifies as digital sector legislation. Moreover, *Volkswagen* contains useful guidance on how to ensure that duplication serves general interest objectives, is predictable, not excessively burdensome and exercised with sufficient coordination.

3. The DMA, gatekeepers and abuse of dominance on the digital market

This chapter contains an overview of market dynamics in the digital economy, abuse of dominance on digital markets and the material obligations the DMA imposes on gatekeepers. The objective of this chapter is to examine and compare the DMA and Article 102 TFEU in order to provide a clear image of the objectives, legal basis, the methodology and the overlap between abuse of dominance and gatekeeper obligation infringements. In general, this comparison is useful to gain insights into both instruments. Moreover, comparing the infringements is necessary to analyse whether dual enforcement can fulfil the *idem* requirement of *ne bis in idem*. Analysing the aims of Article 102 TFEU and the DMA is necessary to assess whether the two instruments pursue complementary aims within the meaning of the proportionality review under Article 52(1) Charter.

3.1. Characteristics of digital markets: the winner takes it all[150]

Over the past decades, digital markets have emerged along with the digitalisation of society. An inherent feature of digital markets is the accumulation of economic power in a handful of economic operators. This is due to the unique dynamics on digital markets such as data-driven network effects and multi-sided markets where platforms operate as intermediaries.[151] Network effects are, in essence, a positive feedback loop wherein a product or service becomes more valuable or convenient for users as the number of users grows. For example, a telecommunications network can be used to reach more people as more people subscribe, which in turn makes the network more useful.[152] The feedback loop gains force when algorithms and data come into play because algorithms use the data fed to them by users to become more intelligent. The algorithm improves, therefore the platform becomes more attractive to users which increases the data input.[153] On another note, digital platforms connect end users to business users and vice versa. Due to their multi-sided nature, platforms can leverage economic power from one market onto another market, in other words 'a quasi-monopolistic position on one market may lead to dominance in an adjacent market'.[154] To illustrate, a digital social network with a lot of end-users is also valuable to business users who want to advertise their product or service on that platform. Users can develop 'a significant degree of dependence'[155] because the economic power created by data-driven network effects weakens their bargaining power vis-à-vis the platform. Moreover, platforms tend to lock users in by merging various separate services into ecosystems. Inside the invisible fence of such an integrated ecosystem, the user has access to interconnected software and hardware that is not compatible with

[150] Rupprecht Podszun, 'Digital Ecosystems, Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition (March 19, 2019) < http://dx.doi.org/10.2139/ssrn.3420692 > accessed 17 October 2023.
[151] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614.
[152] Richard Whish and David Bailey, Competition Law, (10, Oxford University Press 2021) para. 1.3.C.v.a.
[153] M. E. Stucke and A. P. Grunes, Big Data and Competition Policy (Oxford University Press 2016) para. 13.
[154] Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614; Recital 3 DMA
[155] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

competing (eco)systems.[156] These dynamics lead to digital markets tipping in favour of one economic operator and enable superdominant undertakings to arise.[157] There is no longer competition on the market, instead it has become competition for the market.[158] This dynamic is harmful due to its potential to discourage innovation and limit consumer choice which, ultimately, also affects the quality and price.[159] Therefore, the EC together with the EU legislator considers that in these instances *ex post* competition enforcement, mainly via Article 102 TFEU, is not suitable. Instead, *ex ante* regulation, similar to merger control, is deemed necessary to avert these market failures in the digital economy. The DMA can be seen as the regulatory response to this gap (see Section 3.4.2.).[160] In order to draw a comparison in Section 3.4., the next sections contain a brief description of abuses of dominance on digital markets and the DMA.

3.2. Abuse of dominance on the digital market

3.2.1. Dominance on digital markets

Article 102 TFEU regulates unilateral abusive conduct of dominant undertakings on a given market. The Court defines dominance as economic strength that empowers an undertaking to operate 'to an appreciable extent independently of its competitors, customers and ultimately of its consumers'[161] and restricts effective competition.[162] In order to establish dominance, the relevant market has to be delineated and the market power of an undertaking on that relevant market has to be assessed. Taking hold of and holding on to very large market shares is an important indication of dominance.[163] In the same vein, possessing a market share of ≥ 50% justifies the presumption of dominance.[164] Due to the dynamics described in Section 3.1., superdominance is a reoccurring phenomenon on digital markets.[165] For example, in *Microsoft*, *Google Shopping*, *Google Android*, *Google Search* the market shares were above 90%. In *Google Shopping* the Court considered that the

[156] Rupprecht Podszun, 'From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act' (2023) 17 Economics 1; Rob Frieden, 'The Internet of Platforms and Walled Gardens: Implications for Openness and Neutrality' (March 25, 2016) < https://ssrn.com/abstract=2754583 > accessed 25 September 2023; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; Rupprecht Podszun, 'Digital Ecosystems, Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition (March 19, 2019) < http://dx.doi.org/10.2139/ssrn.3420692 > accessed 17 October 2023.

[157] Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[158] Rupprecht Podszun, 'Digital Ecosystems, Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition (March 19, 2019) < http://dx.doi.org/10.2139/ssrn.3420692 > accessed 17 October 2023.

[159] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; Impact Assessment Report – Digital Markets Act: SWD(2020) 363 final, Annex 3, p. 50. ; European Commission, 'The EU Digital Markets Act - A Report from a Panel of Economic Experts' (Publications Office, 2021), p. 7 and 10.

[160] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; Recital 5 DMA; Impact Assessment Report – Digital Markets Act: SWD(2020) 363 final, paras. 115 and 119; European Commission, 'Digital Markets Act - Impact Assessment support study - Executive Summary and Synthesis Report', (EU Publications Office 2020), p. 18-19.

[161] Case C-27/76 *United Brands*, ECLI:EU:C:1978:22, para. 65.

[162] Case C-27/76 *United Brands*, ECLI:EU:C:1978:22, para. 65.

[163] Case C-85/76 *Hoffman- La Roche*, ECLI:EU:C:1979:36, para. 41.

[164] Case C-62/86 *AKZO Chemie*, ECLI:EU:C:1991:286, para. 60.

[165] See also: Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614.

superdominance Google obtained on the online search services market had led to Google becoming 'a gateway to the internet'[166].

3.2.2. Abuse of dominance on digital markets

Nevertheless, dominance cannot constitute anti-competitive behaviour without a finding of abuse. A dominant position is accompanied by a 'special obligation'[167] to not distort genuine competition. Even more so, overwhelming dominance, superdominant or quasi-monopolistic positions which are common to digital markets bring along an even stronger obligation.[168] In contrast to the gatekeeper obligations stipulated in Articles 5, 6 and 7 DMA, the list of abuses in Article 102 (a)-(d) TFEU is not exhaustive.[169] Moreover, abuse is an objective concept which entails that the lack of intent of the undertaking involved is not relevant. Anti-competitive intent, however, can be taken into account to assess that a dominant undertaking has abused its position.[170] Analysing the anti-competitive effects forms the core of the abuse of dominance assessment.[171] In this regard, the effects on consumer welfare as well as the effects on the competitiveness and structure of the market are relevant.[172]

3.3. The DMA, digital gatekeepers and core platforms services

The DMA assumes that undertakings providing certain core platform services can become gatekeepers by exploiting the market failures of digital markets described in Section 3.1..[173] For the DMA, the starting point is identifying and designating gatekeepers in relation to the provision of CPSs. The gatekeeper status is tied to a specific CPS. Thereafter, the DMA imposes certain obligations on gatekeepers that are designed to ensure the contestability and fairness of digital markets. These gatekeeper obligations apply to the provision of the specific CPS by the designated gatekeeper.[174]

Article 2(1) DMA defines a gatekeeper as an undertaking that provides at least one of the ten CPSs listed. Gatekeepers are designated in accordance with the procedure set out in Article 3 DMA. Undertakings that i) have a significant impact on the internal market, ii) provide a CPS that is used by business users as an important gateway to end users and iii) have established an entrenched and durable position, qualify as a gatekeeper according to Article 3(1) DMA. Thereafter, Article 3(2) DMA lists thresholds that give rise to the presumption

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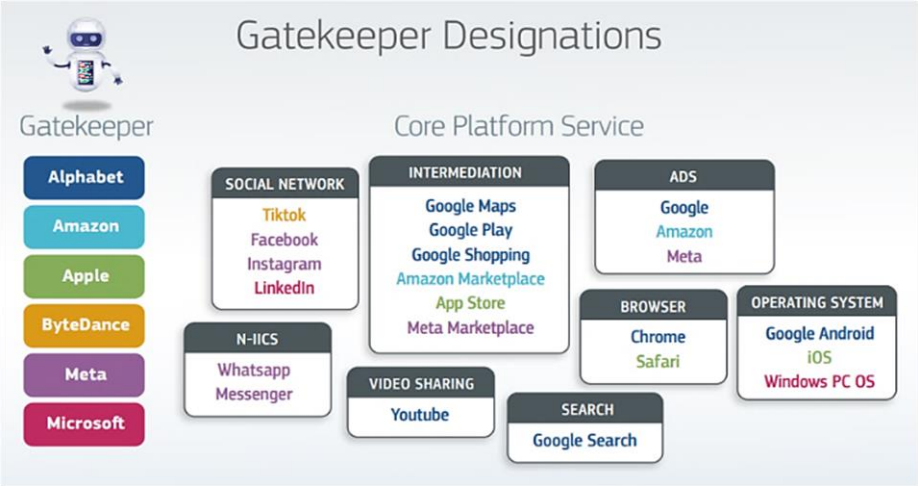
[166] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, para. 183.
[167] Case C-332/81 *Michelin I*, ECLI:EU:C:1983:313, para. 57.
[168] *Microsoft (Tying)* (AT.37792), para. 435; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, para. 183; See also: Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and Super-problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614.
[169] Case C-6/72 *Continental Can*, ECLI:EU:C:1973:22, para. 26.
[170] C-377/20 *Servizio Elettrico Nazionale*, ELCI:EU:C:2022:379, para. 64: Case C-85/76 *Hoffman- La Roche*, ECLI:EU:C:1979:36, para. 91.
[171] Case C-23/14 *Post Danmark II*, ECLI:EU:C:2015:651, para. 29.
[172] C-377/20 *Servizio Elettrico Nazionale*, ELCI:EU:C:2022:379, para. 45; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) O.J. C 45/70, para. 5; Case C-6/72 *Continental Can*, ECLI:EU:C:1973:22, para. 26.
[173] Recitals 2-4 DMA; Impact Assessment Report – Digital Markets Act: SWD(2020) 363 final, para 119.
[174] See for example article 5(1) DMA.

that these three cumulative criteria are met. Either an annual EU-turnover above EUR 7,5 billion over the past three financial years or a market value in the past financial year above EUR 75 billion and providing the same CPS in more than two Member States justifies the assumption of a significant impact on the internal market.[175] An undertaking is presumed to be an important gateway if it facilitates at least 45 billion active EU-based end users per month and at least 10 thousand active EU-based business user per year.[176] Finally, meeting the previously mentioned user thresholds for three consecutive financial years implies the existence of an entrenched and durable position.[177]

In September 2023, the Commission assigned the gatekeeper status to the following undertakings for providing one or more CPS as listed in Article 2(2) DMA. No gatekeepers have been designated yet in the virtual assistants and cloud computing services categories.[178]



Source: European Commission, 'Digital Markets Act: Commission designates six gatekeepers' < Digital Markets Act: Commission designates six gatekeepers (europa.eu) > accessed 9 September 2023

3.4. Differences and similarities: comparison of the DMA and Article 102 TFEU

3.4.1. Objectives and legal basis

Both the purpose and the legal basis for the DMA are illustrative of the formal differences compared with Article 102 TFEU. First, the objective of the DMA is 'complementary to, but different from' the goals of competition law. In addition, the DMA explicitly expresses that it serves a different legal interest than competition law, this is relevant for the complementary aims part of the proportionality review (Sections 2.3.3. and 5.2.1.).[179] The DMA clarifies that its aim is to protect the fairness and contestability of digital markets. According to the DMA the notions of contestability and fairness are intertwined.[180] What fairness entails is not clarified in the DMA, but unfairness is described as 'an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage.'[181] Additionally, the recitals refer

[175] Article 3(2)(a) DMA.
[176] Article 3(2)(b) DMA.
[177] Article 3(2)(c) DMA.
[178] European Commission, 'Digital Markets Act: Commission designates six gatekeepers' < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328 > accessed 9 September 2023.
[179] Recital 11 DMA.
[180] Recital 34 DMA; Article 12(5) DMA.
[181] Recital 33 DMA; Article 12(5)(b) DMA.

to fairness in relation to, *inter alia*, economic outcomes and commercial environment and business practices. Fairness protects not only end users but also competitors and business users.[182] The notion of contestability is clarified as 'the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services'[183]. Put differently, contestability is about the degree of rivalry on digital markets and fairness entails 'redistributing rents along the value chain.'[184] On a more practical level, the DMA is designed to protect the interest of end users and business users by encouraging innovation, increasing choice and restoring the balance of power between business users and gatekeepers.[185] However, according to the Commission the general objective for the adoption of the DMA is 'to ensure the proper functioning of the internal market by promoting effective competition in digital markets and in particular a contestable and fair online platform environment.'[186]

In addition, the Court in *bpost* states that the enforcement of Article 102 TFEU, which is aimed at protecting the interests of consumers and safeguarding effective competition on the merits,[187] 'is indispensable for the functioning of the internal market.'[188] In a similar vein, the legal basis for the DMA is Article 114 TFEU, the harmonisation of the internal market as opposed to the specialised competition law legal basis of Article 103 TFEU.[189] Moreover, the DMA appoints the European Commission as the sole and central enforcer of the DMA to avoid fragmentation and divergence between different Member States.[190] The choice for legislation and enforcement at Union level can be explained by the cross-border character that is inherent to digital markets.[191] Nevertheless, this choice is not undisputed since there are few 'national rules in need of harmonisation'[192] and the Explanatory Memorandum reveals that 'promoting effective competition in digital markets'[193] is one for the core objectives of the DMA. All in all, from some perspectives the aims of the DMA and Article 102 TFEU seem to be complementary, though from other angles the aims seem to coincide.

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[182] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Jörg Hoffmann et al., 'Gatekeeper's Potential Privilege – the Need to Limit DMA Centralisation' (2023) 0 Journal of Antitrust Enforcement 1.

[183] Recital 32 DMA.

[184] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[185] See Article 12(5) DMA.

[186] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 9.

[187] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) O.J. C 45/70, para 1; Case C-6/72 *Continental Can*, ECLI:EU:C:1973:22, para 26.

[188] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para 46.

[189] Recital 6 DMA; Robertson V.H.S.E, 'The Complementary Nature of the Digital Markets Act and Articles 101 and 102 TFEU' (2023) DMA working group (European Parliament's IMCO) < http://dx.doi.org/10.2139/ssrn.4458112 > accessed 6 July 2023.

[190] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 5; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493.

[191] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493.

[192] Alfonso Lamadrid de Pablo, Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12 Journal of European Competition Law & Practice 576.

[193] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 9.

3.4.2. Methodology and approach

At first glance, the structure of the DMA is similar to the abuse of dominance test. The competition parameters - price, quality, choice and innovation - are included in the DMA and can be used to assess the consequences of gatekeeper conduct.[194] Moreover, Bania compares the notion of the relevant product market, from the Article 102 TFEU assessment, with the notion of core platform service from the DMA. The CPSs listed in the DMA align with previous product market definitions from the antitrust practice and are therefore distinct and separate product markets.[195] The other parts of the DMA and 102 tests are also equivalents, or as Cenmano frames it; the DMA concepts replace the traditional competition law concepts.[196] First, to state the obvious, both instruments deal with the unilateral conduct of economically powerful undertakings. The market power of an undertaking, assessed with, *inter alia*, market shares, is comparable to the significant impact, entrenched and durable position and the important gateway function of gatekeepers and the turnover and user thresholds. Second, the gatekeeper status in a way resembles the dominant position because the dominance assessment depends on the relevant market and the market power of an undertaking whereas the gatekeeper designation depends on the provision of a CPS and meeting the conditions and thresholds set out in Article 3(1) and (2) DMA and the provision of a CPS. The comparison ends with the obvious overlap of the material gatekeeper obligations and the abuse of dominance precedents (see Section 3.4.3.).[197]

Nevertheless, the DMA has another approach than the Article 102 TFEU enforcement because the Commission recognises that Article 102 TFEU is not sufficiently suitable to tackle all gatekeeper related issues. Firstly, according to the Commission, not all gatekeepers can be caught by Article 102 TFEU because not every gatekeeper possesses a dominant position on a given market and the infringement of the gatekeeper obligations does not per se constitute abuse of dominance.[198] Moreover, in order to protect the fairness and contestability of digital markets, the DMA accelerates enforcement efforts by setting *ex ante* rules to regulate gatekeepers. In essence, the DMA flips 'the burden of intervention'[199] because it is no longer the EC that has to identify and describe abusive behaviour, instead it is now up to the gatekeepers to figure out how to comply with the prefabricated and exhaustively defined obligations. This removes the need for case-by-case analyses, taking account of the effects of alleged anti-competitive conduct and rebutting efficiency defences, which is required in classic Article 102 TFEU enforcement.[200]

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[194] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) O.J. C 45/70, para. 6; Recital 4 DMA.

[195] Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

[196] Carmelo Cennamo, 'The EU Digital Markets Act: It Is Not About Markets But Ecosystem Failures!', (2023) Network Law Review < https://www.networklawreview.org/dma-ecosystems/ > accessed 22 October 2023.

[197] Carmelo Cennamo, 'The EU Digital Markets Act: It Is Not About Markets But Ecosystem Failures!', (2023) Network Law Review < https://www.networklawreview.org/dma-ecosystems/ > accessed 22 October 2023.

[198] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 8.

[199] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis', (2021) 12 Journal of European Competition Law & Practice 561.

[200] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Recital 5 DMA; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis', (2021) 12 Journal of European Competition Law & Practice 561.

3.4.3. Material gatekeeper obligations and abusive behaviour: double trouble

Six months after undertakings have been designated as gatekeepers in the provision of certain CPSs, the gatekeepers have to comply with the material obligations from Articles 5, 6 and 7 DMA.[201] These obligations only apply to the specific CPS for which the undertaking is a designated gatekeeper and are formulated as do's and don'ts. Article 5 DMA lays down 'self-executing'[202] obligations whereas the obligations listed in Article 6 require specification via the procedure prescribed in Article 8 and Article 7 applies specifically to the interoperability of number-independent interpersonal communication services ('NIICS'). These material obligations and prohibitions largely coincide with the theories of harm and abuses developed in the realm of Article 102 TFEU enforcement regarding dominance on digitalised markets. The explanatory memorandum as well as case studies into abuse of dominance precedents conducted by the Commission in support of the DMA Impact Assessment reveal that the material obligations intentionally match abuse of dominance precedents. Competition procedures in different stages, ranging from the Statement of Objections ('SO') phase to either ongoing or finished proceedings before the CJEU, are covered by these case studies.[203] It is clear that the DMA is 'heavily inspired by competition law'[204]. Even according to the Director General of DG Competition 'antitrust enforcement has inspired and will keep inspiring digital regulation.'[205]

Firstly, Article 5(2) DMA prohibits gatekeepers from cross-using, processing or combining end users' personal data without their consent. Similarly, the German Bundeskartellamt ('BKa') has scrutinised Facebook for abusing its dominant position by combining the personal data sets from Instagram, WhatsApp and Facebook accounts without prior consent.[206] Secondly, according to Article 5(3) DMA, gatekeepers have to refrain from imposing parity, or most-favoured-nation, clauses on business users. This entails that business users should be free to offer their goods or services via other platforms or sales channels at different price levels or conditions. The EC accepted commitments from Amazon to not prohibit business users to offer e-books on the Amazon platform for higher prices compared to other sales channels.[207] Third, the preliminary findings in the *Apple – AppStore practices* SO, regarding music streaming, state that forbidding app developers to notify app users of cheaper music streaming options available outside of the app constitutes a violation of Article 102 TFEU. In

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[201] Article 3 (10) DMA.

[202] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[203] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 4; European Commission, 'Digital Markets Act - Impact Assessment support study - Executive Summary and Synthesis Report', (EU Publications Office 2020); European Commission, 'Digital Markets Act - Impact Assessment support study - Annexes', (EU Publications Office 2020), p. 209-381.

[204] Assimakis P. Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law?' (2022) < https://ssrn.com/abstract=4136146 > accessed 12 July 2023.

[205] Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023.

[206] Bundeskartellamt, 'Bundeskartellamt prohibits Facebook from combining user data from different sources' – Press Release – 7 February 2023 < https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?idp=https%3A%2F%2Fengine.surfconext.nl%2Fauthentication%2Fidp%2Fmetadata > accessed 17 October 2023; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; See in a similar vein: European Commission, 'Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover' – Press Release – 18 May 2017 , https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369 > accessed 17 October 2023.

[207] *Amazon e-books* (AT.40153) – Final commitments, paras. 1-2; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

other words, Apple is accused of imposing a prohibition on business users to not steer end users away from the Apple services. This coincides with the anti-steering provision in Article 5(4) DMA.[208] Fourth, gatekeepers under Article 5(7) DMA are not allowed to bundle payment services with other CPSs by forcing end users or business users to utilise the payment systems incorporated into the CPS. Business users providing a service to end users through the CPS should be able to use alternative payment systems. This DMA provision relates to the Apple in-app-payments abuse of dominance investigations by the EC and the ACM.[209] Fifth, Article 5(8) DMA stipulates that gatekeepers cannot tie one CPS to another CPS by compelling users of one CPS to also subscribe or register to another CPS. In a similar vein, technical tying has led to abuse of dominance infringements in *Google Android* and *Microsoft Media Player*. Google received a fine for abuse of dominance because Android phone manufacturers had to pre-install Google apps in order to obtain a license for the Google app store. Microsoft abused its dominant position by pre-installing the Microsoft Media Player programme on Microsoft hardware.[210] In the sixth place, Article 5(9) and (10) DMA prescribe that gatekeepers have to supply advertisers and publishers, to which gatekeepers provide online advertisement services, with transparent information about the price advertisers pay, the remuneration publishers receive and the calculation methods for these numbers. The SO in *Google AdTech* reveals that an absence of transparency is liable to infringe Article 102 TFEU.[211]

In addition, Article 6(2) DMA entails that gatekeepers should refrain from using data that is generated by either business users or their customers within the context of the CPS but that is unavailable to the business users. Gatekeepers relying on that data while competing with business users would enjoy an unfair advantage.[212] This shows similarities to the commitments offered by Amazon in the *Amazon Marketplace* investigation by the EC.[213] As an extension to Article 5(8) DMA, to undo technical tying, Article 6(3) DMA adds the obligation that end users need the possibility to de-install pre-installed software from operating systems offered by the gatekeeper. This is related to the commitments offered - and subsequently violated - in *Microsoft Internet Explorer* whereby Microsoft promised to show alternative browser software next to the default Microsoft browser.[214] Moreover, Article 6(4) DMA prohibits restrictions of side loading by gatekeepers, which can be

[208] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; European Commission, 'Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers' – Press Release – 28 February 2023 < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217 > accessed 17 October 2023; European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules' – Press Release – 16 June 2020 < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 > accessed 17 October 2023.

[209] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403; *Apple – App Store Practices* (AT.40437); European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules' – Press Release – 16 June 2020 < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 > accessed 17 October 2023; *Abuse of dominant position Apple* (ACM/19/035630).

[210] *Microsoft (Tying)* (; Case T-201/04 *Microsoft Corp v Commission*, ECLI:EU:T:2007:289; *Google Android* (AT.40099); Case T-604/18 *Google and Alphabet v Commission (Google Android)*, ECLI:EU:T:2022:541; K.

[211] *Google AdTech* (AT.40670) - Press Release - 14 June 2023; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[212] Recital 46 DMA.

[213] *Amazon Marketplace* (AT.40462) - Commitment Decision, para. 273; K.

[214] *Microsoft Internet Explorer* (AT.39530) - Commitments Decision, paras. 3 and 4; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

interpreted as a tying.[215] It provides that gatekeepers have to enable users to install and effectively use software apps and software app stores capable of interoperating with the gatekeepers' operating system. The software also has to be accessible through other channels than the CPS. Similarly, side loading restrictions are being investigated in the *Apple – App Store* case.[216] Furthermore, Article 6(5) DMA restricts self-preferencing as scrutinised by the EC in *Google Shopping* and *Amazon Buy Box.*[217] Instead, it requires gatekeepers to use fair, reasonable and non-discriminatory ('FRAND') conditions to rankings without placing its own services or goods in more favourable spots. Finally, the interoperability requirement from Article 6(7) DMA is similar to the *Apple – Mobile Payments* wherein the EC alleges that Apple abuses its dominant position by making the contactless payment hardware in mobile devices only accessible to the Apple Pay app and not apps from competing developers.[218] Gatekeeper obligations relating to the interoperability of NIICSs specifically are listed in Article 7 DMA.

Nevertheless, not all material gatekeeper obligations reflect abuse of dominance cases. Article 5(5) DMA provides that gatekeepers must enable end users to access, via the CPS, content or other items acquired from business users. For example, end users should be able to read their digital newspaper through a newspaper app running on the CPS, even if the subscription is not bought through the app but from the newspaper directly. Article 5(6) DMA prescribes that gatekeepers are not allowed to prevent users from calling attention of public authorities to non-compliance issues related to the behaviour of gatekeepers. In addition, according to Article 6(6) DMA end users should be able to choose freely between different services or software applications accessible via the CPS. To make choosing possible, gatekeepers are obligated to enable switching.[219] Moreover, Article 6(9) DMA gives end users the right to effective data portability to facilitate switching to competing services. It entails that data the gatekeeper accumulates from the end users within the context of a CPS should be transportable to competing services in line with the General Data Protection Regulation ('GDPR').[220] Articles 6(8), (10) and (11) DMA stipulate that under certain conditions gatekeepers have to grant business users, end users or competing search engines access to data accumulated in relation to the CPS. Gatekeepers, according to Article 6(12) DMA, also have to let business users access the online social networks, search engines or app stores mentioned in the designation decision. Lastly, gatekeepers cannot make termination of the CPS subject to disproportional conditions.[221]

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[215] K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

[216] European Commission, 'Digital Markets Act - Impact Assessment support study – Annexes', (EU Publications Office 2020), p. 285; *Apple – App Store Practices* (AT.40437); European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules' – Press Release – 16 June 2020 < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 > accessed 17 October 2023.

[217] *Google Shopping* (, paras. 341-343; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, paras. 189 and 195-196; *Amazon Buy Box* (AT.40.703) - Final Commitments, para. 3.

[218] *Apple – Mobile Payments* (AT.40.452); European Commission, 'Antitrust: Commission Sends Statement of Objections to Apple over practices regarding Apple Pay' – Press Release – 2 May 2022
< https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764 > accessed 21 October 2023.

[219] Recital 53 DMA.

[220] Explanatory Memorandum - GDPR: COM(2012) 011 final, para. 3.4.3.3; Recital 59 DMA.

[221] Article 6(13) DMA; K. Stas and T. Bokhove, 'The Digital Markets Act: The EU Takes On 'Big Tech'' (2022) 219 Computerrecht 403.

3.5. Interim conclusion

This chapter describes the new dynamics on digital markets to explain how market power accumulates. The lengthy *ex post*, case-by-case effects analysis applied in the enforcement of Article 102 TFEU is not capable of handling these digital market dynamics. The EU legislator drafted the DMA to close this regulatory gap and to protect fairness and contestability in the digital sphere. Case studies conducted during the DMA's legislative process reveal that the gatekeeper obligations, in so far as they match with previous findings of abuse of dominance, do so intentionally. The conduct these gatekeeper obligations address is the same conduct that was previously targeted by the Article 102 TFEU regime. Nevertheless, the aim of the DMA seems to be distinct from the aim of Article 102 TFEU because the DMA pursues fairness and contestability whereas competition law protects competition and consumers. The aim of the DMA and the content of the gatekeeper obligations are essential for the *ne bis in idem* and proportionality tests.

4. Multilevel enforcement of the DMA and of Article 102 TFEU

This chapter aims to describe and compare the enforcement of the DMA and Article 102 TFEU. Under the DMA, the EC has exclusive enforcement authority and NCAs have a supporting role whereas the enforcement of competition law is a shared responsibility of the EC and the NCAs together, pursuant to Regulation 1/2003. For the purpose of coordination, the enforcement of the DMA is brought into the European Competition Network that is used in the multilevel - or polycentric - enforcement of competition law. However, the enforcement image is blurred by the multilevel legislative overlap of the DMA, EU competition law, national competition law and national legislation similar to the DMA.

4.1. Enforcement competences under the DMA and Regulation 1/2003

4.1.1. Investigation and enforcement

In many ways, the enforcement of Article 102 TFEU and the gatekeeper obligations of Articles 5, 6 and 7 DMA is similar. The investigatory and enforcement powers delegated to the competent authorities are close to identical. However, the enforcement approach in competition law differs from the DMA enforcement approach. Regulation 1/2003 chooses a network approach for competition law enforcement which entails that the European Commission, through DG Competition, shares responsibility with NCAs. By contrast, Chapter V of the DMA appoints the European Commission, DG Connect, as the sole enforcer.[222] The European Commission is involved in both regimes but the execution of Regulation 1/2003 is done by DG Competition and DG Connect carries out the competences conferred to the EC in the DMA.

Both Regulation 1/2003 and the DMA confer upon the EC the power to perform market investigations, to send requests for information to undertakings, to conduct interviews, to take statements in order to collect information within the context of an investigation and to carry out inspections (also known as dawn raids). Moreover, under the DMA, the EC is empowered to impose interim measures on gatekeepers in case the interests of end users or business users are threatened by irreparable and critical damage. The EC, in a similar vein, can order interim measures based on preliminary findings of anti-competitive behaviour if competition is imminently at risk. Both the DMA and Regulation 1/2003 allow the EC to accept commitments offered by gatekeepers respectively undertakings to resolve *prima facie* findings of infringements.[223]

	Regulation 1/2003	**DMA**
Market investigations	Article 17	Articles 17 and 18
Requests for information	Article 18	Article 21
Interview and take statements	Article 19	Article 22
Inspections	Articles 20 and 21	Article 23

[222] European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' (2004) O.J. C 101; Article 38(7) DMA.

[223] Both Regulations mention the European Commission as enforcement authority in relation to these competences. In practice, DG Connect carries out the DMA and DG Competition handles the competition law cases.

In contrast to the DMA, Article 5 of Regulation 1/2003 does confer upon NCAs the power to enforce Article 101 and 102 TFEU. Accordingly, NCAs can order that infringements are halted, impose interim measures, accord commitments and impose sanctions including fines and periodic penalty payments. In the same vein, pursuant to Article 22 Regulation 1/2003, NCAs may execute inspections and possess other investigatory, fact-finding competences. A notable exception to the sole authority of the EC in the enforcement of the DMA is Article 38(7) DMA. This provision leaves the investigatory powers of NCAs under competition law intact by stretching these competences out to investigations into gatekeepers under the DMA. NCAs, after notifying the EC, are able to conduct investigations into anti-competitive behaviour as well as gatekeeper obligations because prior to an investigation 'it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation [*red.* the DMA], the competition rules which the national competent authority is empowered to enforce, or both.'[224]

4.1.2. Sanctioning

Finally, the sanctioning modalities are similar because both regimes enable the EC to impose either periodic penalty payments or fines. These sanctions can be applied to infringements of gatekeeper obligations or competition law and non-compliance with interim measures or commitments. The fines that can be imposed for the infringement of gatekeeper obligations and infringement of Article 102 TFEU are maximised at 10% of the worldwide turnover in the preceding financial year. Handing over incorrect or incomplete information, or infringing other procedural requirements, can be sanctioned with a fine that amounts to at most 1% of the worldwide turnover.[225] With *ne bis in idem* and proportionality in mind, recital 86 DMA forces the Commission to take into account other fines and penalties imposed on the same legal person for the same facts under other EU or national legal bases to assure that the overall amount is not disproportional to the infringements. This seems to reflect the proportionality requirement to avoid excessively burdening the undertaking involved in the duplication of proceedings.

	Regulation 1/2003	**DMA**
Interim measures	Article 8	Article 24
Commitments	Article 9	Article 25
Fines	Article 23	Article 30
Periodic penalty payment	Article 24	Article 31

This recital illustrates the shift of focus away from *ne bis in idem* towards the proportionality review and the replacement of the *ex ante* assessment to prevent duplication by the *ex post* justification of duplication, as described in Section 2.4.2.. Contrary to the text of Article 50 Charter, merely other fines and penalties, not other proceedings are taken into account. Moreover, the Court in *Volkswagen* reiterates that an 'overall' assessment of the cumulative punitive sanction does not suffice, Article 52(1) Charter also requires actual coordination between the enforcement authorities.[226]

[224] Recital 91 DMA; Article 38(7) DMA.

[225] Both Regulations mention the European Commission as enforcement authority in relation to these competences. In practice, DG Connect carries out the DMA and DG Competition handles the competition law cases.

[226] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 103 and 104.

Regarding the timeframe of proceedings, from the moment a gatekeeper obligation or competition law is infringed, the Commission has 5 years to impose periodic penalty payments or fines.[227] Nevertheless, *ne bis in idem* requires *res judicata* of one decision. These sanctions only become final after the appeal period has expired or, in case of review by the Court of Justice, after the judgment has become final.

4.2. Multilevel enforcement

4.2.1. Multilevel coordination and enforcement

The responsibility of antitrust enforcement is assigned to both the Commission - DG Competition - and the NCAs. Under Article 5 Regulation 1/2003, NCAs are competent to enforce competition law via interim measures, commitments, fines or periodic penalty payments. In other words, it is 'a system of parallel competences'[228] where every competition authority possesses the competence to enforce EU competition law. The Commission and NCAs unite in the European Competition Network ('ECN') to ensure uniform application of EU competition law, to enable cooperation and to exchange information. The ECN enables allocation and referral of investigations and enforcement. First and foremost, this network is designed to facilitate 'an efficient division'[229] of cases, not with *ne bis in idem* or avoiding duplication of proceedings in mind.[230] However, pursuant to Article 11(6) Regulation 1/2003, NCAs are relieved from their enforcement competences as soon as the EC initiates proceedings relating to the same facts and alleged anti-competitive behaviour.[231] In practice, 'the ECN has proven to be a successful forum'[232] for the allocation of cases and the exchange of information.[233] It is unclear to what extent the ECN coordination channel will contribute to satisfying the coordination requirement from the proportionality review because it only applies to competition law since the *bpost* and *Nordzucker* judgments from 2022.

Regarding the enforcement of the DMA, the EC through DG Connect solely enforces the DMA as guard of the gatekeepers. As described in Section 3.4.1., the EC's monopoly in enforcement is meant to avoid fragmentation during the enforcement on digital, inherently cross-border, markets.[234] NCAs can assist during

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[227] Article 25 Regulation 1/2003; Article 32 DMA.

[228] European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities', (2004) O.J. C 101, para. 1.

[229] Article 16 Regulation 1/2003; European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities', (2004) O.J. C 101, para. 3.

[230] European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities', (2004) O.J. C 101, paras. 3, 5 and 17; Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.

[231] Case C-857/19 *Slovak-Telekom*, ECLI:EU:C:2021:139, para. 38; Case T-410/18 *Silgan*, ECLI:EU:T:2019:166, para. 20.

[232] Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 European Competition Journal 1.

[233] Belle Beems et al., 'The Added Value of the DMA's Enforcement Framework', (2023) 15 The Competition Law Review 51; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023.

[234] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 5; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.

interviews and can participate in inspections, request market investigations and the EC can request information from national authorities.[235] The EC is also empowered to share information with national courts and submit observations during national proceedings within the realm of the DMA.[236] Member States also play a marginal advisory role in the adoption of implementing acts. This Digital Markets Advisory Committee is set up in Article 50 DMA and consists of Member State representatives.

Ne bis in idem complications are likely to arise due to overlapping national competition law, Article 102 TFEU and the DMA gatekeeper obligations and overlapping enforcement powers of authorities.[237] The EU legislator, in allowing NCAs to conduct non-compliance investigations into gatekeepers after informing the EC, seems to acknowledge this multilevel overlap because 'it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation [*red.* the DMA], the competition rules which the national competent authority is empowered to enforce, or both.'[238]

The proportionality review of Article 52(1) Charter requires coordination between enforcement authorities in order to justify an infringement of *ne bis in idem*. In the *Volkswagen* judgment, the Court emphasises that coordination is vital. In *Volkswagen,* no coordination between the German public prosecutor and the Italian Competition and Markets Authority took place because the German public prosecutor was not part of the consumer protection coordination network and vice versa the Italian Competition and Markets Authority was not included in the Eurojust coordination mechanism.[239] In contrast to the DMA proposal, which did not contain provisions on coordination, Articles 37, 38 and 39 DMA provide rules for coordination with national authorities and national courts. Article 38 DMA includes the DMA enforcement by DG Connect in the ECN to ensure cooperation and exchanges of information. The DMA also sets up a communications channel - 'the high-level group' - between the ECN and regulatory experts in the fields of data protection, consumer protection, electronic communications and audiovisual media.[240] Cappai and Colangelo state that including the DMA enforcement in the European Competition Network seems to comply with the Court's considerations in *bpost* and *Nordzucker*.[241] According to the ECN, the experience gathered by the EC and NCAs regarding digital platforms can contribute to the success of DMA enforcement.[242] At this stage, however, it remains to be seen to what extent the ECN can facilitate useful and effective coordination of competition law and the DMA.[243]

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[235] Articles 21(5), 22(2), 23(3) and 41 DMA.
[236] Article 39 DMA; As a Regulation, the DMA is has direct effect according to Article 288 TFEU.
[237] Supra n. 13.
[238] Recital 91 DMA; Article 38(7) DMA.
[239] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 100-101.
[240] Article 40 DMA; Recital 93 DMA.
[241] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.
[242] ECN, 'Joint paper of the heads of the national competition authorities of the European Union. How national competition agencies can strengthen the DMA', 22 June 2021
< https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/DMA_ECN_Paper.html > accessed 1 December 2023.
[243] Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 European Competition Journal 1.

4.2.2. Multilevel overlap and a German case study

This section aims to describe the blurry relationship between the enforcement competences in the DMA, competition law and national digital markets legislation. The EU legislator, in Articles 1(5) and (6) DMA, attempts to delineate these different areas of law. Nevertheless, for example Article 19a of the German Competition Act ('GWB'), illustrates the complexity of this attempted delineation.[244]

According to Article 1(5) DMA, Member States cannot impose further obligations on gatekeepers within the scope of advancing the fairness and contestability of markets. Member States, nevertheless, remain free to enact laws to regulate undertakings that provide core platforms services provided that the legislation does not come within the scope of the DMA. Furthermore, Article 1(6) DMA establishes that the DMA is without prejudice to EU competition law, national competition laws aimed at cartels and abuses of dominance and national competition laws that do not apply to gatekeepers or that impose additional obligations on gatekeepers. The German Article 19a GWB is an example national digital sector legislation which shows significant similarities to the DMA but is part of the German Competition Act.[245] This provision enables the BKa to award undertakings the status of 'paramount significance across markets'[246] based on dominance on more than one market and other indicators of economic power. Meta and Google - designated gatekeepers under the DMA - have already been given this status by the BKa. Pursuant to Article 19a GWB, the BKa has to actively impose specific obligations on undertakings with the special status whereas the gatekeeper obligations in the DMA are self-executing. These *ex ante* obligations demand interoperability, data portability and data access and prohibit self-preferencing, to protect both competitors and business users. Perpetrators of the Article 19a GWB obligations can be sanctioned by the BKa with fines. Overall, the Article 19a GWB instrument shows similarities with both the DMA and conventional competition law. On the one hand, it is formally part of German competition legislation, is enforced by the competition authority and aims to protect competition on digital markets. On the other hand, it is practically and functionally equivalent to the DMA.[247] Applying the Article 1(5) DMA test to Article 19a GWB, leads to the conclusion that both instruments can co-exist because the purpose of Article 19a GWB is not the protection of fairness and contestability and because the obligations do not result from the gatekeeper status. The 'paramount significance across markets'[248]- test is sufficiently different than the gatekeeper thresholds prescribed by the DMA to support this argument. However, the co-existence of various, possibly overlapping obligations - if more Member States decide to adopt and enact similar laws - can 'affect the uniform and effective application of the DMA obligations in the internal

[244] Gesetz gegen Wettbewerbsbeschränkungen < http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121001.pdf > accessed 18 October 2023.
[245] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.
[246] Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513.
[247] Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.
[248] Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513.

market'[249] due to fragmentation both in legislation and in enforcement powers.[250] For example, Colangelo warns for the theoretical possibility of 'quadruple jeopardy'[251] due to parallel enforcement of the DMA, EU competition law, national competition law and national sectoral legislation aimed at digital platforms.

4.2.3. Multilevel enforcement complexities and a proposed solution

In practice, there are various legal bases at EU level and MS level, applicable to very similar or even identical conduct, with enforcement competences at both levels. To state the obvious, this raises *ne bis in idem* issues. The multitude of legal bases increased the changes of parallel proceedings regarding the same facts, e.g. the 'quadruple jeopardy'[252]- scenario. Moreover, in my opinion, fragmentation complicates coordination, despite the existence of the ECN, because the relationship between these legal bases has yet to crystallise. In addition, this scenario is liable to quadruple the burden on the undertaking involved in terms of proceedings and sanctions and to increase the changes of lengthy proceedings exceeding the proximate timeframe.

Even though the quadruplication of proceedings is merely a theoretical issue because the EC most likely will not subject the same undertaking to DMA and Article 102 TFEU proceedings, the predicted fragmentations in multi-level enforcement is still likely to occur in practice.[253] Van den Boom proposes more centralisation by arguing for a broad interpretation of Articles 1(5) and (6) DMA. Contrastingly, Hoffman *et alia* state that such centralisation indirectly privileges gatekeepers because it would exclude gatekeepers from the scope of national legislation aimed at the digital sector while smaller undertakings active on digital markets cannot escape, for example, Article 19a GWB.[254]

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[249] Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493.

[250] Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.

[251] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) 47 European Law Review 597.

[252] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) 47 European Law Review 597.

[253] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023; Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) 4 TILEC Discussion paper < http://dx.doi.org/10.2139/ssrn.3797730 > accessed 25 October 2023; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) 47 European Law Review 597.

[254] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Jörg Hoffmann et al., 'Gatekeeper's Potential Privilege – the Need to Limit DMA Centralisation' (2023) 0 Journal of Antitrust Enforcement 1.

4.3. Interim conclusion

This chapter maps out the investigatory and enforcement competences under Regulation 1/2003 and the DMA. The enforcement of competition law is characterised as multilevel enforcement because the EC - DG Competition - and the NCAs share the responsibility. Pursuant to the DMA, the EC - DG Connect - is the sole enforcement authority but NCAs play a role in the investigation of DMA offences. Coordination for the enforcement of the DMA and competition law enforcement can be conducted through the European Competition Network. Nevertheless, the past success of the ECN in coordination and allocation of investigations is no guarantee for dealing with the predicted duplication of gatekeeper obligation infringement procedures and antitrust procedures. The unclear relationship between national digital sector legislation, the DMA and competition law complicates the polycentric enforcement landscape.

5. *Ne bis in idem*, proportionality and the dual enforcement on digital markets

This chapter combines the previous chapters by applying the insights on the DMA and abuse of dominance from Chapters 3 and 4 to the *ne bis in idem* and proportionality framework from Chapter 2. Conducting this step-by-step analysis identifies to what extent *ne bis in idem* is restricted due to dual enforcement and to what extent this restriction can be justified through the proportionality review. This chapter concludes by proposing solutions to the identified *ne bis in idem* and proportionality issues.

5.1. Article 50 Charter - *Ne bis in idem*

5.1.1. Applicability of the Charter

According to Article 51(1) Charter, EU institutions are bound by the Charter. It follows from settled case-law that the Charter also applies to the enforcement of EU law by national authorities.[255] In *ne bis in idem* matters, only one of the two procedures has to be within the sphere of EU law for the Charter to apply.[256] This entails that Articles 50 and 52(1) Charter are applicable to duplication of proceedings whenever either EU competition law or the DMA is involved. For example, dual enforcement of Article 102 TFEU by a NCA and the enforcement of 19a GWB by the BKa suffices for the applicability of the Charter.[257] In the same vein, cumulation of national competition law proceedings and DMA proceedings also falls within the scope of the Charter.

5.1.2. Bis - two criminal proceedings, one final decision

The *ne bis in idem* principle presupposes the existence of a prior final decision. It follows from *Volkswagen* that the order wherein procedures are initiated and reach *res judicata* status after closing is irrelevant, the mere existence of one final acquittal or conviction suffices.[258] Secondly, both procedures are required to have a criminal character. According to settled case-law, this includes sanctions with a punitive objective such as fines and punitive penalty payments. Commitments or interim measures are excluded because of their reparatory character.[259] However, sanctions generally mark the closing of procedures which makes identifying the character of procedures an intrinsically *ex post* endeavour. Since *ne bis in idem* and proportionality tests are also *ex post* assessments, uncertainty surrounding the criminal character of proceedings in earlier stages of proceedings before the imposition of sanctions is unlikely to hinder the ability to invoke *ne bis in idem* in court proceedings after the imposition of sanctions.

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[255] Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras. 17-19.
[256] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 37.
[257] Marco Cappai, 'Timely Launch of Antitrust Investigations: The Right of Defence Vis-à-Vis The Effectiveness of Public Enforcement - Are There Any Elephants in the Room? The Word to the CJEU (Case C-511/23)' (2023) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2023/10/24/timely-launch-of-antitrust-investigations-the-right-of-defence-vis-a-vis-the-effectiveness-of-public-enforcement-are-there-any-elephants-in-the-room-the-word-to-the-cjeu-case-c-511-23/ > accessed 1 November 2023.
[258] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 59, 61 and 105.
[259] Section 2.1.1..

In theory, quadruple jeopardy could occur due to cumulated enforcement of the DMA, national digital sector regulation (e.g. Article 19a GWB), EU competition law and national competition law. In practice, this scenario is nuanced by Bania and others because duplicated enforcement of the gatekeeper obligations by DG Connect and abuse of dominance enforcement by DG Competition - both bodies of the European Commission - is deemed unlikely.[260] Contrastingly, while simultaneous duplication by DG Competition and DG Connect is improbable, consecutive duplication is more likely to occur. For example, the Commission, after an undesired acquittal in DMA proceedings, could try to seek a conviction in competition proceedings for the same facts in order to sanction the same behaviour and, arguably, reach the same or a similar goal. In a similar vein, Van den Boom proposes a broad interpretation of Article 1(5) and (6) DMA that excludes national legislation that does not conform to the spirit of the DMA (see Section 5.3.). Consequently, this approach, by denying the applicability of national digital sector legislation, removes another possibility for overlap.[261] All in all, the most feasible scenario is dual enforcement whereby the enforcement of Article 102 TFEU by a NCA cumulates with the enforcement of gatekeeper obligations from the DMA by DG Connect.

5.1.3. Idem - same person and same facts

In order to assess whether the *idem* criterion is met, it has to be determined whether the two proceedings involve the same person and the same facts. The Court considers the legal identity or qualification of the facts to be irrelevant.[262] First, the same person criterion prohibits that the same undertaking or group of undertakings is involved in proceedings twice. Second, the *idem factum* criterion requires that the facts are identical and inextricably linked together, similarity is not enough.[263] It follows that the conduct addressed by Article 102 TFEU precedents and Articles 5, 6 and 7 DMA has to be exactly the same. The material comparison in Section 3.4.3. illustrates that most of the gatekeeper obligations coincide with specific abuse of dominance precedents. In those instances, the material obligations from both the DMA and the Article 102 TFEU precedents scrutinise exactly the same behaviour.[264] This means that *idem factum* occurs when duplication of DMA proceedings and competition proceedings target exactly the same practices.

According to settled case-law, in order to establish whether two proceedings target the same facts, it has to be determined whether the facts occur on the same product market, within the same timeframe and in the same territory.[265] As described more elaborately in Section 3.4.2., the core platform services described in the DMA

[260] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023; Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

[261] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.

[262] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 45; Michiel Luchtman, 'The CJEU judgments in C-117/20 bpost and C-151/20 Nordzucker: Fundamental rights as a vehicle for hybrid enforcement mechanisms?' (2022) RENFORCE Blog, < https://renforceblog.sites.uu.nl/2022/05/12/the-cjeu-judgments-in-c-117-20-bpost-and-c-151-20-nordzucker-fundamental-rights-as-a-vehicle-for-hybrid-enforcement-mechanisms-2/ > accessed 15 October 2023.

[263] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, paras. 33-36.

[264] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 4.

[265] Case C-151/20 *Nordzucker*, ECLI:EU:C:2022:203, para. 42.

coincide with relevant product markets as circumscribed in competition law precedents. Therefore, this part of the assessment should not be too complex in practice. The same is true for the factor time.[266] However, assessing whether two proceedings cover the same territory is more difficult in the digital context. According to Van den Boom, it is difficult, if not impossible, to attribute behaviour of digital undertakings to one Member State territory due to their cross-border nature. As a consequence, this hinders the gerrymandering tactics described in Section 2.4.2..[267] Therefore, it is more likely that the conduct which is subject to DMA proceedings and Article 102 TFEU proceedings, covers the same territory. In addition, the notions of SCI and SEE are created to make the task of enforcement authorities easier, they widen the enforcement net to catch more competition law infringement by including more facts and more undertakings into one infringement. By doing so, they also increase the likelihood of material and personal overlap (see Section 2.3.2.).

5.2. Article 51(2) Charter - Proportionality

This section zooms in on the possibility to justify restrictions of *ne bis in idem* in the scenario of dual enforcement of gatekeeper obligations by DG Connect and Article 102 TFEU by NCAs. The proportionality review is conducted through the conditions the Court introduced in *Menci*.

5.2.1. Complementary aims of general interest: replacement or addition?

This part of the proportionality test entails that duplication of proceedings is allowed if both proceedings work towards different, complementary aims of general interest. For example, in *bpost* the Court rules that the two proceedings do not pursue the same aim because the sectoral legislation is aimed at ensuring the liberalisation of the postal sector while Article 102 TFEU protects competition to ultimately protect the health of the internal market.[268] Inspiration can also be drawn from the *idem crimen* test which used to be part of the *ne bis in idem* principle and examines whether two procedures are meant to protect the same legal interest. While this test has not been applied by the Court in practice, AG Bobek defines it as follows: 'It is the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that good or value that the offence at issue harms, or with which it interferes.'[269]

Applying the complementary aims test to the duplication of DMA and Article 102 TFEU proceedings raises the question to what extent Article 102 TFEU and the gatekeeper obligations in the DMA pursue complementary aims: Does the DMA complement Article 102 TFEU or will the enforcement of gatekeeper obligations partly replace abuse of dominance enforcement? Does the DMA fill an empty spot in competition law enforcement or does it make applying Article 102 TFEU to digital markets obsolete? In order to answer

[266] Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

[267] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.

[268] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, paras. 44-46.

[269] Case C-117/20 *bpost*, ECLI:EU:C:2021:680, Opinion of AG Bobek, para. 136.

these questions, this section presupposes that the procedures regarding the gatekeeper obligation infringements and abuse of dominance infringements cover the same practices because the DMA cannot 'replace competition law in case of practices it does not cover'[270].

The DMA explicitly states that its aims of fairness and contestability complement competition law. The Director General of DG Competition confirms this by saying that 'the Digital Markets Act and antitrust enforcement complement each other and will coexist, as they address different issues.'[271] However, it is not that easy to satisfy the complementary aims test. The Court opts for a more thorough examination.[272] One the one hand, it can be argued by analogously applying the *idem crimen* test that both instruments - the DMA and Article 102 TFEU - tackle the same problem from different sides. For example, Cennamo states that the DMA is about the health of digital ecosystems rather than markets.[273] Moreover, comparing the *ex ante* approach the DMA uses to the *ex post* nature of antitrust enforcement, suggest that the DMA addresses the same harmful practices from a different side than Article 102 TFEU. In addition, the Commission recognises that the DMA, in its ability to address antitrust concerns, allows the Commission to save resources. This also illustrates that the DMA is an instrument that addresses the same concerns as competition law from a different angle.[274] On the other hand, zooming in on the parts of the DMA that cover the same practices as abuse of dominance precedents, it can be objected that the DMA (partly) replaces competition law. In this regard it should be kept in mind that competition law is still necessary to address undertakings that fall outside the scope of the DMA.[275] Beems alleges that the DMA is a 'specific branch of competition law that applies to gatekeepers.'[276] Bania states that 'the DMA offers the Commission a shortcut'[277].

However, the Court in *bpost* seems to apply a zoomed out, high-level approach and instead looks at the overarching objective of the instruments. Therefore, this is the preferable approach. This approach leads to the

[270] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

[271] Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023.

[272] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

[273] Carmelo Cennamo, 'The EU Digital Markets Act: It Is Not About Markets But Ecosystem Failures!', (2023) Network Law Review < https://www.networklawreview.org/dma-ecosystems/ > accessed 22 October 2023.

[274] Olivier Guersent, 'Opening speech at the VI Lisbon Conference' (2023) < https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en > accessed 10 November 2023.

[275] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

[276] Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 European Competition Journal 1.

[277] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

conclusion that both the DMA and the competition law are created 'to complete the internal market'[278]. The internal market objective of the DMA can be inferred from its legal basis - Article 114 TFEU - and the legislative history.[279] According to the Court in *bpost*, preserving competition 'is indispensable for the functioning of the internal market.'[280] On a side note, Article 19a GWB clearly does not pursue the same aim as the DMA because Article 19a GWB, as part of national legislation, does not seek to safeguard the internal market and according to Ribera Martìnez it does not pursue fairness and contestability.[281]

5.2.2. No excessive burden

This element requires that the duplication of proceedings and the duplication of penalties do not pose an excessive burden for the undertaking involved. As illustrated by the Court in *Volkswagen*, this is not a general assessment that is the same for each case.[282] The specifics of the undertaking involved, e.g. the financial capacity, have to be taken into consideration for the proportionality review. Pursuant to recital 86 DMA, the Commission - DG Connect in this instance - has to consider other penalties and fines imposed for the same facts on the same legal person. However, this obligation does not cover the enforcement of competition law by NCAs. Moreover, the recital also does not force the Commission to keep the burden imposed by the duplication of proceedings into account. The 'additional burden'[283] from the second procedure is hard to quantify or measure, it comes down to a case-by-case analysis. In theory, a cumulation of proceedings does not have to pose an excessive burden for the undertaking involved but it depends on the circumstances.

5.2.3. Predictable through clear and precise rules

The Court in *Volkswagen* states that this requirement is met if both proceedings are based on sufficiently clear and precise legal bases.[284] This implies that duplication is predictable if each procedure has a legal basis, as long as these legal bases are sufficiently clear and precise. The possibility of duplication itself does not have to be provided for explicitly. Consequently, the Court expects that undertakings are able to put two and two together and deduce the possibility of duplication from the existence of more than one clear and precise legal basis. However, it is unclear what the consequences are of the existence of multiple legal bases on EU level and national level such as the DMA, Article 19a GWB, EU competition law and national competition law. Moreover, Articles 1(5) and (6) DMA fail to clearly delineate the relationship between these sources of law. The ambiguous relationship between the gatekeeper obligations in the DMA, competition law and national

[278] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.
[279] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 5; See Section 3.4.1..
[280] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para 46.
[281] Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 European Competition Journal 86.
[282] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 97.
[283] Harrison P. et al, 'Ne Bis in Idem: The Final Word?' (2022) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/> accessed 15 July 2023.
[284] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, para. 98.

digital sector regulation, does not contribute to the predictability of duplication. Instead, it creates a regulatory minefield for gatekeepers.

5.2.4. Coordination and proximate timeframe

The *Volkswagen* judgment provides clear guidance on how strict the coordination condition has to be applied in practice. In that case, it was unsuccessfully argued that verifying whether the overall sanction is not manifestly disproportionate to the infringements suffices and that coordination is not necessary for fulfilling the proportionality requirement. Moreover, the Court rules that a lack of coordination cannot be justified by practical difficulties or constraints for coordination caused by the cross-border context of the case.[285] In other words, coordination is vital and a lack of coordination is fatal. Nevertheless, coordination does not have to be problematic during duplication of DMA and Article 102 TFEU enforcement because DG Connect is part of the European Competition Network with DG Competition and the NCAs.

Regarding the proximate timeframe, in *bpost* the Court states that a period of approximately seventeen months between the two prosecutions is not inappropriate in complex competition investigations.[286] This implies, once again, that it depends on the specifics on the duplication of proceedings at hand whether the timeframe is indeed, sufficiently appropriate. Cappai adds that lengthy procedures are also contrary to the principle of good administration.[287]

5.3. The essence of *ne bis in idem* and enforcement recommendations

It follows from the previous sections that the dual enforcement of Article 102 TFEU by NCAs and the DMA by the EC is capable of constituting a restriction of *ne bis in idem*. Whether this restriction can be justified by relying on the proportionality review depends predominantly on whether the DMA and Article 102 TFEU pursue complementary aims. Another cardinal part of Article 52(1) Charter is to ensure that the essence of a fundamental right remains unaffected. This section examines whether the dual enforcement of the DMA and Article 102 TFEU respects the essence of *ne bis in idem*, thereafter it presents proposals to avoid *ne bis in idem* altogether during dual enforcement of the DMA and Article 102 TFEU and to reinforce the essence of *ne bis in idem* by shifting the focus back to *ne bis in idem* and away from the proportionality review.

Applying the essence test Van Cleynenbreugel distills from case-law - 'same objective double proceedings'[288] - to duplication of DMA and antitrust procedures leads to the outcome that the essence of *ne bis in idem* is not

[285] Case C-27/22 *Volkswagen*, ECLI:EU:C:2023:633, paras. 102-103.
[286] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, para. 56.
[287] Marco Cappai, 'Timely Launch of Antitrust Investigations: The Right of Defence Vis-à-Vis The Effectiveness of Public Enforcement - Are There Any Elephants in the Room? The Word to the CJEU (Case C-511/23)' (2023) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2023/10/24/timely-launch-of-antitrust-investigations-the-right-of-defence-vis-a-vis-the-effectiveness-of-public-enforcement-are-there-any-elephants-in-the-room-the-word-to-the-cjeu-case-c-511-23/ > accessed 1 November 2023.
[288] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.

affected if the two procedures do not aim for the same objective. This entails that the essence test coincides with the complementary aims test. Nevertheless, as mapped out more elaborately in Section 2.4.2., the recent developments in the Court's approach towards *ne bis in idem* pose threats to its essence.

The first option to reinforce *ne bis in idem* entails following the suggestion of AG Bobek and returning *ne bis in idem* to a system of *ex ante* review in order to repair the essence of *ne bis in idem*. However, it may be objected that it is not realistic to expect that the Court would change course again just after the unification in *bpost* and *Nordzucker*. Moreover, returning to the threefold identity test, as AG Bobek suggests, does not terminate the applicability of the *ex post* proportionality review enshrined in Article 52(1) Charter. It is therefore doubtful, whether AG Bobek's suggestion can succeed because completely removing the *ex post* assessment from the equation seems impossible in light of Article 52(1) Charter.

Secondly, interpreting Articles 1(5) and (6) DMA broadly diminishes *ne bis in idem* risks and consequently facilitates coordination and cooperation. At the same time, the ability of Member States to enforce 'complementary or stricter obligations through competition law'[289] in conformity with the spirit of the DMA remains unaffected. Through maximum harmonisation, the broad interpretation excludes diverging national legislation that is contrary to the DMA's spirit. In doing so it avoids 'regulatory fragmentation'[290] in the internal market. As a consequence, this approach reduces the risk of overlap between national digital sector legislation and the DMA and thereby reduces the risk of *ne bis in idem* issues. Due to the duty of loyal cooperation as enshrined in Article 4(3) TEU Member States are obligated to disapply national legislation that is contrary to EU law.[291] A side result of the broad interpretation of Articles 1(5) and (6) DMA is that cooperation and coordination through the ECN is easier in the absence of various diverging national regimes. Moreover, this broad interpretation sets clear boundaries between conventional competition law and the DMA and removes any national regulation that is in the grey area in between competition law and the DMA. As described in Section 5.1.2., dual enforcement of the DMA and Article 102 TFEU by DG Connect and DG Competition is unlikely. All in all, overlap possibilities that remain are DMA enforcement by DG Connect and Article 102 TFEU enforcement by NCAs. As a result, removing national digital sector regulation from the equation, thereby facilitates effective coordination through the ECN. Moreover, it provides legal certainty to gatekeepers because it clarifies that gatekeepers do not have to adhere to diverging national rules from the grey area.

[289] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57.
[290] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.
[291] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

Thirdly and finally, in an ideal scenario, the ECN would not only be used to coordinate, but also to allocate cases to one authority to avoid dual enforcement altogether. For example, the ECN could be used to allocate all gatekeeper related competition cases to the European Commission to create a one stop shop for gatekeepers. The Commission would operate as the sole enforcer of both the DMA and competition law in relation to gatekeepers. NCAs could still be allowed to investigate but the sanctioning would happen at EU level, similar to the current DMA system described in Section 4.1.1.. The objective of this allocation mechanism would be to avoid overlap, to efficiently allocate enforcement resources and to create legal certainty for gatekeepers. In order to succeed and to attain these objectives, the allocation system would have to include all competition law cases regarding gatekeepers. As Bania describes, the scope of the DMA is narrow and competition law is still necessary to deal with conduct of gatekeepers that falls outside the scope of the DMA. For example, not all services provided by a gatekeeper qualify as a CPSs.[292] Therefore, a necessary evil of this allocation proposal is the radical character that requires removing the enforcement authority of NCAs regarding gatekeepers entirely.

However, this is necessary to avoid divergence and guarantee legal certainty because NCAs cannot apply diverging approaches or interpretations and gatekeepers only have to deal with one authority for the entire Union. Moreover, it is logical to bundle DMA and competition enforcement resources in the EC because is it not always clear 'from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation [*red.* the DMA], the competition rules which the national competent authority is empowered to enforce, or both.'[293] In addition, a one stop shop for gatekeepers at EU level is in line with the cross-border business model because, as described in Section 2.4.2., it is virtually impossible to divide their business models along territorial lines. Another benefit of allocation, compared to coordination of two proceedings, is that it would be capable of avoiding duplication of proceedings targeted at gatekeepers altogether. As a consequence, the proportionality review would only have to be used as fallback option in case allocation has not been successful.

[292] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.
[293] Recital 91 DMA.

6. Conclusion

This chapter concludes by formulating an answer to the central research question: *To what extent is dual enforcement of Article 102 TFEU and the DMA in line with the principles of ne bis in idem and proportionality under Articles 50 and 52(1) Charter?*

Ne bis in idem, as codified in Article 50 Charter, has evolved to the current restriction-justification approach.[294] The developments in the case-law of the Court show that the centre of gravity in the *ne bis in idem* assessment has shifted towards the proportionality review. Before *Menci* - and before *bpost* and *Nordzucker* concerning competition law - the *ne bis in idem* focussed on the existence of a restriction based on the *idem* and *bis* criteria. The introduction of the proportionality review entails that *ne bis in idem* restrictions are not per se problematic. Duplication of proceedings is justified if the proportionality criteria are fulfilled. *Nordzucker* provides that one single test applies to duplication of proceedings concerning Article 102 TFEU and sectoral legislation, which is relevant for the duplication of DMA proceedings and Article 102 TFEU proceedings because the DMA qualifies as digital sector legislation. Moreover, *Volkswagen* contains useful guidance on how to ensure that duplication serves general interest objectives, is predictable, not excessively burdensome and exercised with sufficient coordination. Apart from practical consequences for the legal framework, the current *ne bis in idem* interpretation also affects the essence of *ne bis in idem* according to legal scholars. AG Bobek finds that the *ex post* justification scheme is contrary to the essence of *ne bis in idem* since the principle is meant to be an *ex ante* test.[295] Moreover, creating enforcement silos through gerrymandering tactics and thereby artificially dividing one infringement into smaller infringements along territorial lines is capable of nullifying the spirit of *ne bis in idem.*[296] However, this risk can be nuanced by the fact that is it virtually impossible to divide the cross-border conduct of digital undertakings into territorial parts.[297] Third, the Court focusses on over-punishment while neglecting the burden of the duplication of proceedings.[298]

Chapter 3 describes the dynamics on digital markets and how market power accumulates into the hands of a few economic operators. The *ex post*, case-by-case effects analysis applied in the enforcement Article 102 TFEU is not sufficiently suitable to deal with the dynamics common to digital markets. Therefore, the EU legislator created the Digital Markets Act. A comparison of the gatekeeper obligations to abuse of dominance precedents reveals that the gatekeeper obligations, in so far as they match with previous Article 102 TFEU

[294] Jonathan Tomkin, "Commentary on Article 50 – Right not to be tried or punished twice" in Peers, Hervey, Kenner and Ward (Eds.), The EU Charter of Fundamental Rights – A Commentary (Hart, 2021), para. 50.86; See also: Bernadette Zelger, 'The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?' (2023) 60 Common Market Law Review 239.

[295] Case C-117/20 *bpost,* ECLI:EU:C:2021:680, Opinion of AG Bobek, paras. 107-109 and 117.

[296] Marco Cappai and Giuseppe Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 Common Market Law Review 431.

[297] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493.

[298] Pieter van Cleynenbreugel, 'BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG e.a.' (2022) 18 European Constitutional Law Review 357.

abuses, do so intentionally.[299] The aim of the DMA and the content of the gatekeeper obligations are essential for the *ne bis in idem* and proportionality test. The conduct these gatekeeper obligations are designed to address is the same conduct that was previously targeted as abuses of dominant positions on the digital market. According to the EU legislator, the aim of the DMA seems to be distinct from the aim of Article 102 TFEU because the DMA pursues fairness and contestability whereas competition law protects competition and consumers. However, following the approach the Court applied in *bpost* leads to a different outcome (Section 5.2.1.).

Regulation 1/2003 opts for polycentric enforcement and confers investigatory and enforcement power to the EC and NCAs, as set out in Chapter 4. The DMA appoints the EC as sole enforcer but allows NCAs to conduct investigations. The sanctioning regimes in the DMA and Regulation 1/2003 are similar. Both competition law infringements and infringements of gatekeeper obligations can lead to the imposition of fines and periodic penalty payments. It follows from Section 2.1.1., that administrative fines and periodic penalty payments have a punitive and thus criminal character, this triggers the applicability of *ne bis in idem*. Restrictions to *ne bis in idem* can be justified if, among other criteria, the two enforcement authorities engage in coordination. Coordination for DMA enforcement and competition law enforcement can be conducted through the European Competition Network. The coordination requirement was included into the *ne bis in idem* framework through the *bpost* and *Nordzucker* judgments by the Court in 2022. Therefore, it is hard to predict how successful the ECN will be in fulfilling the coordination requirement from the proportionality review. However, complexity is added to the multilevel enforcement system due to the existence of national digital sector regulation in the grey area between competition law and the DMA. Van den Boom proposes a broad interpretation of Article 1(5) and (6) DMA to remove diverging national regulation from the equation and to avoid overlap.

Chapter 5 illustrates that dual enforcement of the DMA and Article 102 TFEU involving the same undertaking triggers a violation of *ne bis in idem* because both instruments can target the same conduct. The theoretical possibility of quadruple jeopardy can be nuanced by arguing that it is unlikely that the EC, through DG Connect and DG Competition, would initiate two proceedings against the same undertaking under both the DMA and the Article 102 TFEU regime.[300] Moreover, applying the broad interpretation of Articles 1(5) and (6) DMA as proposed by Van den Boom, excludes the applicability of diverging national digital sector regulation.[301] This brings the *ne bis in idem* risks back from quadruple to double jeopardy.

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[299] Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, p. 4; European Commission, 'Digital Markets Act - Impact Assessment support study - Executive Summary and Synthesis Report', (EU Publications Office 2020); European Commission, 'Digital Markets Act - Impact Assessment support study - Annexes', (EU Publications Office 2020), p. 209-381.

[300] Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (2022) The Platform Law Blog < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > accessed 16 July 2023; Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 European Competition Journal 116.

[301] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 European Competition Journal 57; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493.

Whether the restriction of *ne bis in idem* can be justified depends predominantly on the question whether the DMA and Article 102 TFEU pursue complementary aims. Following the approach applied by the Court in *bpost* leads to the conclusion that both the DMA and Article 102 TFEU are meant to protect the internal market.[302] This would mean that dual enforcement cannot be justified by relying on the proportionality principle. However, it remains to be seen how the Court interprets the objectives of both instruments. Another cardinal part of the proportionality review is the coordination requirement. The DMA incorporates the enforcement of the DMA into the European Competition Network. This allows for effective coordination between the EC and NCAs. In practice, it depends on the specifics of a case whether this requirement, and the no excessive burden requirement, are met. Finally, the texts of the DMA and Article 102 TFEU do not give rise to doubts regarding the predictability of duplication.

Nevertheless, following the legal framework established by the Court does not provide answers to the issues surrounding the current polycentric enforcement approach of overlapping enforcement powers and diverging national legislation and the concerns relating to (the essence of) *ne bis in idem.* The broad interpretation of Article 1(5) and (6) DMA as proposed by Van den Boom clarifies the distinction between the DMA and competition law by removing diverging national digital sector regulations from the playing field. Moreover, to reinforce the essence of *ne bis in idem* and expedite enforcement, the ECN could be used to allocate cases to one enforcement authority that bears end-responsibility. DMA and competition sanctioning proceedings targeting gatekeepers would be conducted by the EC to form a one stop shop for gatekeepers. A downside in this context is that the role of NCAs is reduced to an investigatory role. Regarding *ne bis in idem*, successful allocation provides *ex ante* legal certainty to gatekeepers by avoiding duplication of proceedings and over-punishment. Allocation also suits the digital context given the cross-border business model of gatekeepers and removes the need for enforcement silos to avoid overlap. Moreover, the *ex post* proportionality review criticised by AG Bobek in *bpost,* would transform into a backup option. All in all, combining the broad interpretation of the DMA proposed by Van den Boom with an allocation mechanism through the ECN, addresses both (the essence of) *ne bis in idem* concerns and the multilevel legislative overlap issues.

Returning to the statement by Philip Lowe, it follows that the difficulties economists face to construct a single theory to explain all unilateral, anti-competitive conduct by undertakings persists. In a similar vein, lawyers have not been able to establish a single regulatory instrument to successfully tackle the harmful conduct of powerful economic operators on digital markets. The multifaceted, ambiguous relationship between the abuse of dominance regime and the gatekeeper obligations in the DMA proves this once again.

[302] Konstantina Bania, 'Will DMA proceedings make competition law obsolete? No they won`t' (2023) The Platform Law Blog < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/ > accessed 11 November 2023.

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