The Digital Markets Act and the enforcement of EU competition law

The Digital Markets Act and the enforcement of EU competition law: some implications for the application of Articles 101 and 102 TFEU in digital markets

1. Introduction

Maintaining genuine competition and avoiding consumer harm in digital markets is central to the attainment of the EU Commission's goals for the current quintile. Delivering "a Europe fit for the digital age" necessitates open, competitive markets where customers are fairly treated. The Commission has endeavoured to attain this goal through the proposal of a Digital Markets Act (DMA) and of a Digital Services Act (DSA). The DMA aims to ensure that large digital platforms, who due to their operational and financial might come to play the role of gatekeepers in the affected markets, do not engage in conduct that, due to their financial power, can adversely affect competition.[1] The DSA fulfils objectives of greater online safety and, more generally, of respect for fundamental rights in an online environment and to ensure a level playing field among businesses for the purpose of furthering investment, innovation and growth.[2]

The paper will reflect on some of the implications that the new regime might have for the effectiveness of the EU competition law framework. It will interrogate the perspective impact of the new Regulation on the scope of Articles 101 and 102 TFEU and the possible consequences for the role of the National Competition Authorities (NCAs) in this context. Thereafter the paper will explore how the interaction between the enforcement of the DMA and that of the EU competition rules can affect the continued observance of fundamental rights, especially of the right not to be prosecuted or sanctioned twice from the same offence, enshrined in Article 50 of the EU Charter of Fundamental Rights (EU CFR).

It will be argued that the DMA is going to have a significant impact on competition enforcement within the EU's digital markets to the extent that it could lead to parallel, overlapping investigations and potentially to the marginalisation of Articles 101 and 102 TFEU from what is a sizeable section of the European economy. Its wide-ranging effects are also likely to be felt in the field of fundamental rights' protection, in particular when it comes to the observance of the principle of ne bis in idem. It will be concluded that while recent developments in this area can provide a potentially fitting framework for the assessment of this impact, the consequences of the DMA for competition policy overall remain to be seen.

2. The Digital Markets Act: an ex ante regime for large online platforms

This section will sketch the key features of this proposal and discuss its key points, for the purpose of exploring its interactions with general competition enforcement. The DMA sets out a substantive and procedural framework aimed at ensuring that large online platforms that enjoy position of market power in relation to the entry in and the expansion of other competitors on specific digital market segments and/or consumer and supplier segments do not impair competition on these markets.[3]

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[1] For a primer on the DMA see e.g.: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[2] For a primer on the DSA see e.g.: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

[3] See Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act) https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN (hereinafter referred to as DMA), 15 December 2020 (and successive amendments), available at: , Preamble, Recitals 32-34.

This system is based upon the designation of specific platforms as "gatekeepers" on the basis of objective requirements in terms of financial strength and breadth of operation and reach, enshrined in Article 3 of the new Regulation. as "gatekeepers". It is in the first instance for online platform to self-assess whether they meet the criteria enshrined in the proposed Regulation. If the undertaking fits within the requirements, it is obliged to notify of the Commission and to provide the information identified in subsection (2) of Article 3. The Commission will consider the notification and, if the relevant criteria are fulfilled, issue a decision of designation of the platform as "gatekeeper". The Commission can also, acting proprio motu, designate platform undertakings as "gatekeeper" as a result of a market investigation, in accordance with Article 17 of the new Regulation.

The designation as "gatekeeper" status has important consequences for the concerned platforms. According to Article 5, the latter will not be able, for instance, to impose price parity obligation on their users or to tie the provision of core services to the purchase of other goods or services from the same platform. Article 6 expands the range of these obligations by allowing the Commission to impose duties that are "susceptible to being further justified" in a number of areas, such as that of interoperability services' access and of data portability. The DMA underpins the framework summarised above by conferring to the Commission a range of powers of investigation to detect and sanction the infringement of the obligations imposed on gatekeeping platforms.[4] According to Article 25, the Commission can adopt non-compliance decisions and impose fines of up to 10% of the world turnover generated by the gatekeeper on the market affected by its position.

The DMA marks a departure the established approach to competition law in Europe, where restrictive arrangements and unilateral anti-competitive conduct are detected and sanctioned ex post by the EU Commission, the NCAs and, increasingly, by national courts. The new Regulation enshrines a comprehensive normative and institutional structure which applies exclusively to large online platforms and prohibits practices that, in the specific markets in which the former operate, cause harm to competition. This ex ante approach is regarded as enhancing legal certainty and limiting the compliance costs often caused by the existence of fragmented norms across the Union.[5] The DMA also heralds a shift in the way in which it is going to be enforced. In contrast with Article 101 and 102 TFEU, whose application is entrusted with the NCAs as partners to the EU Commission, the new Regulation is predicated upon the Commission enjoying a hegemonic position. As will be discussed below, the Commission can relieve NCAs of any investigation concerning designated gatekeepers so as to uphold the effectiveness and uniformity of the DMA.[6]

It is, however, clear that, for its very structure and for the substance of the obligations that it imposes, this new regime is very likely to impact on general EU competition law enforcement. The DMA's Preamble addresses this issue by envisaging a framework that should complement the enforcement of the EU competition rules.[7] However, it does not appear to address the practical implications of future concurrent application of the two sets of rules. Could the same practice infringe both Article 5 of the DMA and at the same time be sanctioned for violation of Article 102 TFEU? To what extent does the DMA affect the powers of the NCAs in relation to the application of the EU competition rules to platforms subject to the DMA? Could the principle of ne bis in idem affect the outcome of this question? These issues will be addressed in the following sections.

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[4] See inter alia Akman, "Regulating competition in digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act", (2022) 47(1) ELRev 84 at p. 98-99.

[5] See: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en.

[6] Desai, "Changing competition for the digital sector", (2021) 5 Eur. Competition & reg L Rev 11, p. 18.

[7] DMA, Preamble, Recital 9.

3. Assessing the interaction between the general EU competition rules and the DMA

3.1. Auxiliary to or displacing the general competition rules? Discussing the impact of the proposed regulation on antitrust enforcement on digital markets

The previous section sketched some of the salient features of the regime introduced by the DMA and highlighted the novel approach to the control of undertakings providing platform services that it seeks to introduce. This section will consider to what extent the mainstream competition rules can continue to apply without affecting the effectiveness of the DMA. It will also discuss the possible consequences of the new Regulation for the public enforcement of EU antitrust law and in particular for the role of the NCAs.

The initial proposal had not expressly addressed the interplay between the two systems. While the Preamble had affirmed that the DMA should complement mainstream competition law, no practical rules had been laid out in order to address the practical implications of this relationship.[8] It was not until the proposal came before and was amended by the European Parliament that these questions were answered.[9] The amended Recital 10 of the Preamble states that the DMA will not prejudice the applicability of EU or national competition laws to practices falling within its remit or prevent or limit the application of domestic sector regulation pursuing objectives other than preserving open and fair markets.[10] Consistently with this commitment, Article 1(6) of the new Regulation provides for the parallel application of the DMA and competition law, as well as sector specific regulation. To ensure that any concurrent proceedings do not lead to inconsistent outcomes or to prejudicing the effectiveness of the new Regulation's own framework, the DMA establishes a framework for ensuring coordination and limit the likelihood of divergent outcomes. Article 40(5) establishes a high level Group of Digital regulators, whose purpose is to act as a forum for the discussion of "matters of mutual cooperation and coordination between the Commission and the Member States in their enforcement actions".[11] The Group can also make recommendations to the EU Commission as regards new market investigations.[12] Furthermore, Article 38 introduces an obligation for all NCAs to inform the Commission of any investigations concerning identified gatekeepers[13] and to notify it of any decision it intends to adopt imposing obligations on them before the former is adopted. The Commission can object to the proposed decision on the ground that it "runs counter" the DMA and if this objection is made, the NCA will be prevented from adopting it.[14]

In light of the forgoing analysis, it is argued that the DMA marks a significant change in the way in which restrictive or unfair practices are detected and sanctioned in platform services markets. To address the perceived concerns that the new normative and administrative framework it established might affect adversely the uniform application of competition law in the EU, the Regulation creates a

[8] See inter alia Monti, "The Digital Markets Act—institutional design and suggestions for improvement", TILEC Discussion Paper No 2021-04, available at: https://deliverypdf.ssrn.com/delivery.php?ID=130069006013113014126066121070004031034018053020030049097000101125124103002068085122020018034045018032097091104020117125109073044016056009084002124101001025103100037023032116031025065007069085124068070076088000103121103067112079023080016076068077117&EXT=pdf&INDEX=TRUE, p. 14-15.

[9] Amended proposal, 2020/374 D, available at: https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf, hereinafter referred to as Amended DMA.

[10] Id., Preamble, Recitals 9-10.

[11] Amended DMA, Preamble, Recital 93.

[12] Id., Article 40(5).

[13] Amended DMA, Preamble, Recital 91; see also Article 1(7); Article 38(3).

[14] Amended DMA, Article 1(7); see also

set of arrangements designed to boost cooperation between the Commission and the NCAs. However, it remains unclear whether, notwithstanding the creation of these coordination and discussion mechanisms, the new Regulation will deliver on its stated objectives without unduly affecting the continued application of Articles 101 and 102 TFEU.[15] In particular it remains to be seen to what extent the EU Commission will rely on its power to "relieve" NCAs of investigations concerning designated gatekeepers. It is submitted that whether the Commission adopts an "interventionist stance" in this respect might have a potentially significant impact on the residual jurisdictions of the NCAs, as EU competition enforcers, in platform services markets.[16] The next section will explore some of the implications of this change for the future application of the competition rules contained in the TFEU.

3.2. Maintaining competition in digital markets—at the crossroads between ex-post and ex-ante regulation

So far we have discussed some of the features of the DMA and its potential interaction with mainstream EU competition law. The aim of this section is to explore the uncertainties arising from the future interaction between the two frameworks. For this purpose, it will outline the terms of the policy debate underlying the DMA's adoption. Thereafter, it will interrogate the possible impact of the application of the DMA on the enforcement of the general EU competition rules.

In a speech in 2020 the EU Commission Vice-President, Margrethe Vestager argued that, despite the "inbuilt flexibility" of mainstream competition law,[17] its structural features might not be fully capable of addressing the risks for competition typical of platform markets, such as the impact of network effects, the likelihood that markets could "tip in favour" of one particular platform.[18] In the face of these challenges, general competition law proceedings were regarded by commentators as partly ineffective due to their length, to their reliance on ex post analysis and to the limitations associated with a finding of dominance.[19] The ex ante approach enshrined in the DMA was seen as a more fitting response to anti-competitive behaviour in digital markets where harm to rivalry was often very difficult to detect and reverse.[20]

General, systemic factors performed an additional and rather significant role in encouraging this shift.[21] The EU Commission saw the proposed reforms as part of a broader plan to attain broader policy goals, such as encouraging innovation, enhancing fairness and achieve non-economic objectives linked to open democracy and green transition.[22] The introduction of a new way of regulating large online platforms occupying "gatekeeping" positions was regarded as indispensable, since it would prevent likely harm to not only competition, but also to these non-economic aims.[23]

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[15] Akman, cit. (fn. 4), p. 102-103.
[16] Ibid.
[17] Margrethe Vestager, speech given at the College of Europe, Bruges, on 2 March 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.
[18] Ibid. For commentary see, inter alia, Aravantinos, "Competition law and the digital economy: the framework of remedies in the digital era in the EU", ((2021) 17(1) Eur Comp J 135 at 154.
[19] Signoret, "Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants", (2020) 16(2) Eur Comp J 221 at 232-234; see also pp. 238-240.
[20] Id., p. 239-240.
[21] See, inter alia, Cini and Czulno, "Digital single market and the EU competition regime: an explanation of policy change", (2022) 44(1) Journal of European Integration 41 at 42, 45.
[22] EU Commission, "Strategy: priorities for 2019-2024—A Europe fit for the digital age", available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en.
[23] Ibid.; see also Cini et al., cit. (fn. 21), p. 46-47.

In light of the forgoing analysis, it is argued that the shift from ex post to ex ante regulation, enshrined in the DMA, aims to address a variety of diverse concerns. Some focus on the need to deal with competition issues typical of platform services' markets. Others are non-economic in nature and belong to broader societal values. It is, however, equally clear that the DMA is firmly rooted in the EU competition law acquis and as such, therefore, is destined to interact with the enforcement of Articles 101 and 102 TFEU. It should also be noted that, as was illustrated earlier, the DMA presents significant advantages vis-à-vis the former.[24] Articles 5 and 6 of the new Regulation, for instance, reproduce almost verbatim commitments and remedies that had been imposed by the EU Commission on undertakings that had infringed the EU competition rules. However, and by contrast with general competition enforcement, these obligations are imposed directly on gatekeepers without having to be preceded by an investigation and a formal decision.[25] It was also noted that a finding of infringement of the obligations enshrined in the proposed regulation is subject to a lower burden of proof than the level of proof associated with identifying a breach of Article 102 TFEU.[26]

Against this background, it is legitimate to query whether the entry in force of the DMA could lead to the gradual marginalisation of general EU competition enforcement from digital markets. It could be argued, not without merit, that the expansion of the DMA in these markets is a desirable outcome, since the new Regulation aims to provide a tailored response to restrictive conduct in fast-moving industries, whose competition dynamics are relatively sui generis compared with "bricks and mortar" markets. Nonetheless, it is argued that whether this outcome "fits" with the idea of a complementary relationship between the DMA and the general EU competition rules is highly uncertain.[27] In addition, it is unclear what impact the power that the Commission enjoys under Article 38(7) DMA, as a result of which it can "relieve" NCAs if their powers in respect of new cases concerning designated gatekeepers, could have on the role of national agencies under Council Regulation No 1/2003.

In light of the forgoing analysis, it can be concluded that the DMA marks a shift in the way in which competition is upheld in the Internal Market, since it enshrines a special, ex-ante regime applicable to platform markets, to the exclusion of the general EU competition rules. , while being deeply rooted in the EU competition law acquis, is novel because it addresses new challenges arising from digital markets, whose dynamics are often not fully understood, by adopting an ex ante, as opposed to ex post, approach to maintaining competition.[28] This shift, however, is likely to have drawbacks and to lead to outcomes that are incompatible with the avowed complementarity that, according to the new Regulation, should exist vis-à-vis the mainstream competition enforcement framework. The next section will move on to the issues that could arise from the impact of the DMA for the continued observance of fundamental rights and especially for the principle of ne bis in idem.

[24] See e.g. Monti, cit. (fn. 8), pp. 99-100.
[25] See e.g. Akman, "Regulating competition in digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act", (2022) 47(1) ELRev 85 at 100-101.
[26] Ibid.
[27] Id., p. 100.
[28] Cini et al, cit. (fn. 21), p. 53-54.

4. The fundamental rights' implications of the interaction between the DMA and EU competition law enforcement—the example of the principle of ne bis in idem

4.1. The right not to be prosecuted and sanction twice for the same conduct in EU competition law—a summary

The previous sections examined some of the implications arising from the entry in force of the DMA for the application of the EU competition rules. It was acknowledged that there are legitimate reasons as to why it might be necessary to move toward ex ante regulation of large platforms. However, it was argued that the impact on the continued application of the EU antitrust rules might be significant and not fully understood. The purpose of this section is to explore how the interaction between the sector specific, platform-focused ex ante rules and the general competition law enforcement is going to impact the functioning of the ECN and in particular the scope of the principle of ne bis in idem. The current approach to the right against double jeopardy enshrined in EU law and in particular in the context of competition law will be summarised before interrogating the potential implications of the application of the DMA for its continued observance.

The parallel investigation of competition infringements is neither infrequent nor prohibited in the context of the EU, due to the co-existence of national and Union competition laws and to the concurrent ability of NCAs and the EU Commission to investigate, separately or in conjunction, specific prima facie infringements.[29] The Court of Justice took the view in the Walt Wilhelm case that since each of these sets of rules looked at a prima facie anti-competitive practice from different angles there is no obstacle to the EU Commission and the NCAs investigating and sanctioning the same undertakings for the same practice. The Court famously held that while Article 101 (then 85 EEC) is concerned with "obstacles which may result from trade between member states", domestic competition law looks at the impact that a prima facie unlawful arrangement can have on markets that are internal to its jurisdiction.[30] The only limitation to this principle is that of imposing on the authority proceeding after a sanction has already been imposed an "accounting obligation": "a general requirement of natural justice (…) demands that any previous punitive action must be taken into account in determining any sanction that is to be imposed".[31]

The approach adopted in Walt Wilhelm was applied consistently in a number of other judgments.[32] The Toshiba preliminary ruling provides a recent example of how the Court of Justice's emphasis on the three criteria outlined in the 1963 decision allowed EU and domestic competition rules to apply concurrently in virtually all cases. Toshiba considered to what extent ne bis in idem could prevent the EU Commission from investigating and sanctioning conduct that had taken place in a member state, in that case the Czech Republic, before its accession to the Union and in respect of which the Slovakian competition agency had already imposed fines. The Court of Justice confirmed that the applicability of the principle of ne bis in idem was subject to "the threefold condition" of identity of facts, of identity of infringer and identity of protected legal interest.[33] Accordingly, the Court refused to apply this principle to the case at hand on the ground that the first of these conditions had not been fulfilled. It was noted that some of the anti-competitive practices at issue in national competition proceedings had occurred within Czech territory and before the Czech Republic had become a Union member. By contrast, since the EU Commission's later decision

[29] See inter alia, Wils, "The principle of ne bis in idem in EC competition enforcement: a legal and economic analysis", (2003) 26(2) W Comp 131.

[30] Case 14/68, Walt Wilhelm v Bundeskartellamt, ECLI: EU: C: 1969: 4, para. 10.

[31] Id., para. 11.

[32] See inter alia case C-204/00, Aalborg Portland and others v Commission, EU: ECLI: C: 2004: 6, para. 338; case C-17/10, Toshiba and others, EU: ECLI: C: 2012: 72, para. 81-82.

[33] Id., para. 97.

affected facts post-dating accession, it could not be said to affect the same "facts" as those investigated by the Czech NCA.[34]

The approach to ne bis in idem in competition cases has been widely criticised. Several scholars argued that while in the days of Walt Wilhelm it could have been justified to hold that domestic and EU competition law pursued reciprocally different objectives, it may no longer be so today. It was rightly observed that the member states have aligned their domestic competition laws with the EU rules and, in accordance with Council Regulation No 1/2003, the NCAs apply these rules in close cooperation with the Commission and each other.[35] Furthermore, the Modernisation Regulation, with its strong emphasis on the decentralised application of Articles 101 and 102 TFEU has contributed to increasing uniformity in decision-making practice.[36] Accordingly, it could be argued that retaining the additional requirement of "identity of interest protected" as a standalone element of the test for the application of the principle could be difficult to justify.[37]

In light of the forgoing it is concluded that the development of a strong, broadly uniform and well-coordinated framework for the protection of competition within the EU prompts important questions as to the future of the ne bis in idem principle in relation to market regulation in the EU.[38] The impending entry in force of the DMA adds strength to the arguments in favour of a reconsideration of the approach to the right against double jeopardy in relation to restrictive behaviour rather compelling. The next section will discuss the implications of the current understanding of ne bis in idem in competition cases for the potential parallel application of Articles 101 and 102 TFEU and the DMA. Thereafter, it will interrogate the question of how this principle should be reinterpreted to take stock of the consequences of this interaction.

4.2. The influence of the Charter and the ECHR on ne bis in idem in EU law and the decentralisation of competition enforcement

So far we have outlined the key features of the DMA and highlighted the characteristics of its enforcement framework. On that basis we have attempted to gauge some of its implications for the enforcement of the EU competition rules, especially in digital markets. It was argued that although recent amendments to the DMA have gone some way to address the potential difficulties arising from the parallel application of the two sets of rules, overlaps and ensuing tension in their respective implementation cannot be excluded. This section will examine the possible impact of this interaction on the observance of the ne bis in idem principle in the context of platform markets.

It was noted earlier that although the CJEU has recognised the applicability of the rule of ne bis in idem to competition proceedings, it has adopted a rather restrictive view of its requirements, which encompass both the condition of identity of protected interest and an exacting interpretation of identity of facts.[39] Against this background, a question emerges as to whether this approach remains justified. It was observed in section 3 that the Modernisation Regulation catalysed a process of "harmonisation by stealth" as regards the substantive content of competition law and the procedural rules governing its enforcement, thereby casting doubt as to the continuing currency of

[34] Id., para. 101.

[35] See e.g. Vleeshouvers and Weestraten, "The postman always rings twice… on the application of the ne bis in idem principle in competition law", (2017) 38(7) ECLR 305 at 309-310.

[36] Id., p. 308-309

[37] Ibid.; see also p. 311-312. For comparison, see Toshiba, cit. (fn. 32), para. 100-101.

[38] See inter alia Libertini, "Cumulative enforcement of European and national competition law and the ne bis in idem principle", (2019) 12(20) YARS 231 at 235-236.

[39] See Toshiba, cit. (fn. 32), para. 101-102. For commentary see ex multis Lamadrid de Pablo et al., "Why the the proposed DMA might be illegal and how to fix it", (2021) 12(7) JECLAP 576 at 577-578.

the notion of ne bis in idem enshrined in Walt Wilhelm and reiterated in Toshiba. It is added that the applicability of the EU CFR provides a further argument in favour of a review of the approach to ne bis in idem in competition cases.

Article 50 of the Charter precludes the imposition of criminal sanctions for offences for which the accused was tried, punished or acquitted with a final decision in any of the jurisdictions of the member states.[40] This provision must be read in conjunction with Article 52(3) of the Charter, which identifies in the European Convention on Human Rights (ECHR) the "minimum standard of protection" for those rights that are common to both the Convention itself and the Charter.[41] Thus, Article 50 must be be given "the same meaning and scope" as the meaning given to the right against double jeopardy by the Convention.[42]

The case law of the European Court of Human Rights indicates that the function of the right against double jeopardy is to prevent "prosecution or trial for a second "offence" in so far as it arose from identical facts or from facts which were substantially the same".[43] "Offence" must be understood not as a concept of domestic law—namely as a concept to be determined exclusively on the basis of the relevant classification enshrined in the laws of the contracting states—but in light of the requirements of a "criminal charge" enshrined in Article 6(1) of the Convention.[44] Consequently, this notion of "criminal charge" comprises not only strictly criminal accusations that are liable to a decision by a court, but also charges or allegations which, despite not being decided by a judicial authority in accordance with domestic law, retain "criminal" character.[45] Thus, Human Rights' Court held that the right against double jeopardy would apply if the accused was threatened with fresh sanctions for facts in relation to which he or she had already been convicted and which retained a "sufficiently close connection… in space and time" with the "offence".[46]

The European Court of Human Rights' interpretation of ne bis in idem has had a visible influence on the Court of Justice's reading of the same safeguard, enshrined in Article 50 EU CFR.[47] The CJEU held in, inter alia, the X preliminary ruling that Article 50 CFR prevented every person from being tried in a criminal court in respect of an offence for which they had already been acquitted or convicted in different member state of the EU.[48] The notion of "same acts" was read as a set of concrete circumstances which are inextricably linked together, irrespective of their legal classification given to them or of the legal interest protected".[49] In Fransson the CJEU confirmed that this principle would preclude not only parallel or subsequent criminal proceedings but also administrative proceedings in relation to identical facts.[50] A similar issue was addressed in Garlsson, where the Court of Justice had to consider the legality under the Charter of the joint imposition of criminal sanctions and administrative penalties for the infringement of obligations imposed on the applicant by financial regulations.[51]

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[40] See inter alia case C-601/15 N, EU: C: 2016: 84, para. 45 ff.
[41] Inter alia, case C-524/15, Menci, judgment of 20 March 2018, para. 22
[42] Ibid.
[43] Appl. 54012/10, Mihalache v Romania, judgment of 8 July 2019, para. 67.
[44] Id., para. 54.
[45] See ex multis appl. 37394/11, Glantz v Finland, judgment of 20 May 2014, para. 50, 52.
[46] Appl 73661/01, Nilsson v Sweden, decision of 13 December 2005, section B. See also appl no 14939/03, Zolothukin v Russia, judgment of 10 February 2009, available at: https://hudoc.echr.coe.int/tur?i=001-91222, para. 18-20; see also para. 82, 109.
[47] See ex multis, case C-524/1, Menci, ECLI: EU: C: 2018: 197, para. 22.
[48] Case C-638/16, X, ECLI: EU: 2017: 173, para. 51.
[49] Id., para. 71; see also, inter alia, C-261/09, Mantello, ECLI: EU: C: 2010: 683, para. 39-40.
[50] Case C-617/10, EU: C:2013:105, para. 34-36. See also case C-489/10, Bonda, EU:C: 2012: 319, para. 37-39.
[51] Id., see para 1-3.

The Court of Justice expressed the view that the parallel investigation and sanction of the same behaviour under, respectively, criminal and administrative laws should be regarded as an interference with the right enshrined in Article 50 of the EU Charter. As such, therefore, it should be scrutinised in light of the framework for assessment provided in Article 52(1) EU CFR. According to this provision, "any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms". Limitations can be imposed "only if they are necessary and genuinely meet objectives of general interests recognised by the Union or the need to protect the rights and freedoms of others" and in accordance with the principle of proportionality.

In light of these principles, the Court of Justice observed that the concurrent imposition of criminal and regulatory sanctions on the applicant had been prescribed by law and was appropriate to pursue the legitimate aim of protecting and maintaining financial stability. However, the Court took the view that in the case at hand the imposition of an administrative penalty on top of a criminal sanction did not conform to the requirement of proportionality, enshrined in Article 52(1) EU CFR. [52] The Court took the view that the regulatory sanction had duplicated the penalty that the criminal courts had already imposed on the applicant. [53]

Against this background, it can be queried to what extent the Walt Wilhelm's view of the ne bis in idem principle can still be justified. On this point it should be noted that, according to the EU Courts' case law, despite not constituting a criminal charge for the purpose of domestic law, allegations of anti-competitive behaviour that are backed by the imposition of severe financial penalties having general application, being sufficiently severe and having a repressive purpose are to be considered as "criminal" in nature.[54] Consequently, it is submitted that the existence of a "sector specific" test for the application of Article 50 EU CFR might not be easy to reconcile with the demands of the EU Charter as an instrument applicable across the whole spectrum of EU law. [55]

It is argued that the interpretation of ne bis in idem that was adopted in Garlsson could provide a useful alternative to the current ne bis in idem conditions and in particular could address the clear divergences that exist between the test applicable in competition cases and the requirements laid out in other areas of EU law. It is submitted that in Garlsson the CJEU went beyond the limitations of an overtly rigid reading of the idem factum requirement by relying on the "triad" of conditions of necessity in a democratic society, legality and proportionality enshrined in Article 52(1) EU CFR. [56] It is suggested that this outcome presents two key advantages. It is more consistent with the Charter's scope and in particular with the requirement of consistency with the ECHR, imposed by Article 52(3) EU CFR. It is also likely to allow a more accurate analysis of the rationale for the concurrent imposition of sanctions under different regulatory framework in the laws of the member states.[57]

It is added that the approach to ne bis in idem provided in Garlsson might constitute an appropriate structure for the assessment of the conformity of concurrent action under, respectively, Articles 101 or 102 TFEU and the DMA with Article 50 EU CFR. It is argued that the application of a requirement of 'necessity' in particular could ensure that competing concerns for legal certainty, the avoidance of over-deterrence and the assurance of predictable boundaries between the jurisdiction enjoyed by the EU Commission under the DMA vis-à-vis the sphere of application of the EU competition rules, especially by NCAs, are appropriately taken into account. In addition, preference

[52] Id., para. 54-57.
[53] Id., para. 59-61.
[54] See inter alia appl. No 43509/08, Menarini v Italy, judgment of 27 September 2011, para. 39-44.
[55] See e.g. case C-537/16, Garlsson Real Estate SA, ECLI: EU: C: 2018: 13, para. 37.
[56] See inter alia Luchtmann, "The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order", (2018) 55 CMLRev 1717, pp. 1734-1735.
[57] Ibid.; see also p. 1739.

for the Garlsson approach to ne bis in idem would do away with inconsistent interpretation of this principles, thereby securing uniformity in the application of the EU CFR across the scope of EU law.

It is not just in Garlsson, however, that the Court of Justice proposed an approach to ne bis in idem that is more directly inspired by the ECHR and, as a result of its horizontal provisions, consistent with the EU CFR. The CJEU's case law concerning the application of Article 54 of the Convention Implementing the Schengen Agreement, which enshrines the right against double jeopardy in the context of the free movement of persons across the Schengen Area, could also provide support for a more expansive and flexible approach to ne bis in idem. In the Menci preliminary ruling the CJEU reiterated that 'identity of facts' should be read as a set of "material facts (…) which are inextricably linked together which resulted in the final acquittal or conviction" of the offender.[58]

The Court confirmed that the right against double jeopardy can be subjected to limitations without infringing the Charter provisions, provided that these limitations conformed to the criteria set out in Article 52(1). Any limitation of ne bis in idem must be prescribed by law: thus domestic law should not only sanction expressly the possibility of duplication of proceedings but should also lay out "exhaustively" the conditions governing the duplication, so protect the essence of the right against double jeopardy.[59] The limitation of the ne bis in idem principle must comply with the principle of proportionality and be "(…) necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[60]

The Court acknowledged that the rules imposing administrative penalties for the infringement of applicable tax legislation in force in Italy aimed to attain legitimate objectives of public interest, by deterring the infringement of fiscal obligations both in less serious cases and in more grave instances.[61] As for its compliance with the principle of proportionality, the Court observed that the domestic law had not exceeded what was appropriate for the attainment of its objectives. The CJEU observed that the applicable legislation had set out clearly and precisely "the circumstances in which the failure to pay VAT due may be subject to a duplication of proceedings and penalties of a criminal nature".[62] It had also provided rules governing the coordination of criminal and administrative proceedings, so as to "reduce to what is strictly necessary the disadvantage" linked to the duplication of proceedings for the individual concerned.[63] In this specific context the Court emphasised that under Italian law any sanction imposed for the failure to pay VAT due should reflect the severity of the infringement, meaning that, if administrative and criminal sanctions were applied in the same case, the competent authority should have taken both sanctions into account to avoid an excessive, disproportionate response to the infringement.[64]

In light of the forgoing, it is argued that support appears to emerge in favour of reformulating a notion of ne bis in idem which is applicable according to the same conditions across the spectrum of EU law and is interpreted in accordance with the horizontal provisions of the Charter. A recent judgment concerning the reach of Article 50 EU CFR in the context of competition proceedings seems to be consistent with this trend. In bpost the Court of Justice considered the legality of the imposition of competition sanctions in a case where the investigated undertaking had already been subjected to investigations by the competent sector regulator.[65] The decision discussed in particular

[58] Case C-524/15, Menci, ECLI: EU: C: 2018: 197, para. 35.
[59] Id., para. 42.
[60] Id., para. 38.
[61] Id., para. 44-45.
[62] Id., para. 51.
[63] Id., para. 54.
[64] Id., para. 55.
[65] Case C-117/20, bpost, judgment of 22 March 2022, ECLI: EU: 2022: 202, see para. 2-3.

the question of whether the "traditional" approach to ne bis in idem, enshrined in Walt Wilhelm, could apply, thereby allowing fresh sanctions for the same behaviour under competition law. In particular, should the "identity of interest protected" be examined as a separate requirement for the application of this principle? Or should the paradigm of Article 52(1) EU CFR apply to the duplication of proceedings, as in Garlsson?

The Court acknowledged the applicability of ne bis in idem to concurrent proceedings that, while not being regarded as "criminal" in domestic law, nonetheless retained a "criminal essence",[66] in accordance with the criteria of "intrinsic nature of the offence" and the "severity of the penalty in which the person concerned is likely to incur". [67] It also confirmed the approach that it had taken in Menci and Garlsson and confirmed that the condition of "identity of material facts" leading to concurrent prosecutions, must be "(…) understood as 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. (…)" On this basis, the Court examined the legality of the concurrent proceedings at issue in light of Article 52(1) of the Charter, namely on the basis of the "triad" of the requirements of "legality", pursuance of a "legitimate aim" and "necessity in a democratic society".[68] The Court emphasised that the "duplication of proceedings and penalties" preserved the "essence" of the right against double jeopardy only if "the national legislation (…) provides only for the possibility of a duplication of proceedings and penalties under different legislation".[69]

The Court of Justice applied this framework for analysis to the proceedings at issue. It was observed that each pursued different aims, namely the preservation of genuine competition and the liberalisation of the postal services within the EU internal market.[70] It added that member states could provide for the duplication of sanctions for the same conduct, so long as these concurrent proceedings did not compromise the essence of the right against double jeopardy and in particular did not impose a disproportionate burden on the accused.[71] For this purpose, the national court should consider factors such as the existence of rules ensuring coordination between the competent agencies, a "sufficiently proximate timeframe" for the adoption of the final decision and a requirement to take into account, when imposing a sanction, any other penalties already inflicted for the same conduct.[72] In this context, ascertaining whether each set of proceedings pursued different legitimate policy objectives constituted another important element of the test of "necessity in a democratic society" of the interference with the accused's rights under Article 50 EU CFR.[73] This condition would be considered fulfilled if the proceedings in question constituted "distinct legal responses to the same conduct".[74]

It is arguably difficult to underestimate the importance of the bpost judgment. It is submitted that the CJEU provided a satisfactory approach to the question of the scope of application of Article 50 EU CFR to concurrent competition law and regulatory proceedings, by resorting to a framework of assessment that relies on Article 52(1) of the Charter and is broadly aligned to the ECHR acquis. In particular, considering the nature of the legitimate aim that the laws applying concurrently pursue

[66] Id., para. 24.
[67] Id., para. 25.
[68] Id., para. 40-41.
[69] Id., para. 43.
[70] Bpost, cit. (fn. 65), para. 47.
[71] Id., para. 49; see also, inter alia, appl. 24130/11 and 29758/11, A and B v Norway, judgment of 15 November 2016, available at: https://hudoc.echr.coe.int/eng?i=001-168972, especially para. 130-132.
[72] Id., para. 48; see also para. 51.
[73] Id., para. 55.
[74] Id., para. 57.

as part of the "proportionality" assessment of the duplication of proceedings is very likely to address the concern that the "labels" attached to each proceeding might be given greater prominence than the intensity of the interference with the right against double jeopardy.[75]

The test adopted in the bpost judgment might also provide an appropriate framework for dealing with the parallel application of the DMA and the mainstream EU competition rules.[76] It is submitted that this approach entails an analysis of the features of each case, of the characteristics of each of the regulatory frameworks involved and the intensity of the disadvantage that the same applicant had suffered due to the duplication of proceedings relating to "identical facts".[77] This reading, therefore, seems to centre on the substantive question of whether the scope of the right not to be prosecuted or sanctioned twice for the same "offence" had been limited to what was strictly necessary to attain the public interest pursued by the relevant regulatory framework, thereby complying with the central tenet of "necessity" that the Charter enshrines.[78] The fact that any such limitation must be "prescribed by law" provides an additional safeguard, since it ensures that any restriction placed on the right prescribed by Article 50 EU CFR is contingent upon a set of exhaustively defined condition and as a result, is foreseeable.[79]

In light of the forgoing analysis it is concluded that the interpretation of the right against double jeopardy adopted by the CJEU in its recent case law is likely to respect the integrity of this right and at the same time maintain the effectiveness of those regulatory regimes that govern the operation of certain markets for public interest reasons. It is submitted that, if it is read in accordance with the bpost judgment, the ne bis in idem rule is likely to retain its effectiveness in case of concurrent proceedings initiated on the basis of, respectively, the DMA and the EU general competition rules. It is suggested that the framework for assessment that the CJEU has adopted is capable of providing a full assessment of the circumstances of each case and, on that basis, of avoiding placing a disproportionate burden on the investigated undertakings.

5. Competition in digital markets and the DMA—what is next? Tentative conclusions

The DMA has been hailed as a ground-breaking regulation that would identify and prohibit practices that when adopted by large online platforms occupying "gatekeeping" positions, can disrupt competition and harm consumers. The new Regulation would complement both sector specific regulation affecting platform undertakings and the mainstream framework for the application of Articles 101 and 102 TFEU.[80] Nearly two years on since the launch of this proposal, there is still significant debate as to the precise impact of the DMA on competition law more generally. This contribution discussed some of these issues and illustrated how the 2022 amendments to the DMA sought to create a framework for the inter-institutional dialogue between the EU Commission and its national partner agencies which, as a result, could limit both concurrent proceedings and diverging outcomes. However, significant questions remain as to how successful this framework might be in limiting the gradual marginalisation by stealth of the EU competition rules, and especially of Article 102, away from the ever so important platform services' markets. It was argued that since the EU Commission retains a leading role in all cases where competition law and the new Regulation are

[75] See inter alia Colangelo and Cappai, "A unified test for a European Ne Bis in Idem principle: the case study of digital markets regulation" 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088, p. 28-29.
[76] See id., p. 15-16.
[77] Ibid.
[78] See e.g., Luchtman, cit. (fn. 56), pp. 1729-1733; especially pp. 1731-1732.
[79] See mutatis mutandis, Colangelo and Cappai, cit. (fn. 75), p. 14.
[80] Speech given by Margrethe Vestager, on 15 December 2020, IPR/20/2347.

likely to apply in parallel and could lead to diverging outcomes, the NCAs' role in policing rivalry in platform services markets might be limited.

The paper also discussed the projected impact of the possibility that the DMA and general competition law might apply concurrently on the ne bis in idem principle. It was argued that the bpost judgment goes in the right direction when it comes to reconciling the effective application of Article 50 EU CFR in circumstances where both the new rules and Articles 101 or 102 TFEU might be relevant. However, it was suggested that how the CJEU will address the question of whether these proceedings, despite being "complementary" in nature, provide distinct legal responses to the same practice, as required by Article 52(1) EU CFR, is going to be especially critical.

In light of the forgoing, it can be concluded that as the DMA proposals journey toward their final adoption, numerous questions remain for the future of competition enforcement and policy in digital markets. Only time will tell whether the DMA might have marked a decided shift from ex post, decentralised competition enforcement to a decidedly hybrid, EU-centric regulation of digital platform services and whether this new status quo will remain consistent with important human rights' principles.