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Double Jeopardy of Article 102 TFEU and the DMA – the Challenges of a Multi-Level Enforcement System

ARTICLE

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ABSTRACT

This article addresses the complexities and challenges of enforcing Article 102 TFEU and the Digital Markets Act in the context of the principles of *ne bis in idem* and proportionality under Articles 50 and 52(1) of the Charter of Fundamental Rights of the European Union. It critically examines the intersection of the abuse of dominance prohibition with the *ex ante* regulatory framework established by the DMA, aimed at curtailing the anti-competitive behaviours of designated gatekeepers in digital markets. By mapping out the *ne bis in idem* and proportionality framework, the article navigates through the evolving legal landscape, highlighting the shift towards a restriction-justification approach in applying the *ne bis in idem* principle in competition law.

The analysis delves into the alignment of competition law and DMA enforcement, considering their overlapping objectives and the potential for dual enforcement to infringe upon the *ne bis in idem* principle.

After identifying multiple scenarios, some more probable than others, of duplicated enforcement, the article focuses on the role of the European Competition Network in the allocation of cases and coordination mechanisms. The pitfalls experienced in the parallel enforcement of most favoured nation clauses against Booking.com are used to illustrate areas of improvement within the ECN. Different options for strengthening the coordinating and cooperation capacities within the ECN are weighed up. Furthermore, a possible redistribution of enforcement and investigatory powers between the European Commission and national competition authorities regarding the enforcement of the DMA and competition law is considered.

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1. INTRODUCTION

Over the years, the European Commission (EC or Commission) has attempted to use the abuse of dominance prohibition as outlined in Article 102 TFEU to confront anti-competitive actions of Big Tech. Despite these efforts, there has been a growing recognition that merely enforcing competition law *ex post* is inadequate for addressing dominance abuse in digital markets.[1] Throughout their investigations, the EC and national competition authorities (NCAs) assess the consequences of alleged anti-competitive behaviour. Case-by-case analysis is crucial in competition law yet time-intensive and, in the digital domain, markets often quickly skew towards a single player gaining substantial market power due to data-driven network and tipping effects,[2] a situation sometimes referred to as 'ultra-dominance' or 'super-dominance'.[3] To bridge the regulatory gap and keep up with the dynamics of digital markets, the Digital Markets Act (DMA)[4] was adopted, setting out *ex ante* obligations for identified gatekeepers, with the EC responsible for designating these gatekeepers and enforcing their obligations.[5]

Consequently, the same actions of gatekeepers can be targeted with fines imposed by the EC and NCAs for competition law infringements and by the EC for not adhering to gatekeeper obligations.[6] Moreover, Member States also decided to adopt national legislation applicable to gatekeepers such as the German law Article 19a GWB. These overlapping material rules and enforcement competencies, due to the multilevel, or polycentric, system of enforcement[7] with enforcement and investigatory powers divided between national authorities and centralised EU authorities, create the possibility of duplicated enforcement and, thus, double jeopardy.[8]

Nevertheless, the *ne bis in idem* principle, as codified in Article 50 of the Charter of Fundamental Rights of the European Union (the Charter), protects against duplicated enforcement procedures with a criminal character, while the proportionality principle allows for derogations. This principle has significantly developed in EU law, transitioning to a restriction-justification approach.[9] In 2022, the CJEU's judgements in *bpost* and *Nordzucker* and more recently *Volkswagen*,[10] rectified divergences in the application of the *ne bis in idem* principle, by aligning competition law with the general approach in EU law and unifying the legal framework. So far, the literature has discussed the question of *ne bis in idem* based on the DMA draft,[11] or has analysed specific developments, e.g. concerning competition law (following *bpost* and *Nordzucker*).

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1 Commission Staff Working Document, Impact Assessment Report – Digital Markets Act, SWD(2020) 363 final {COM(2020) 842 final} – {SEC(2020) 437 final} – {SWD(2020) 364 final}, paras. 118 – 123.

2 K Stas & T Bokhove, 'The Digital Markets Act: The EU Takes On "'Big Tech"' (2022) 219 *Computerrecht* 403.

3 Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021], ECLI:EU:T:2021:763, paras 180 and 182.

4 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12.10.2022, 1–66); Recital 5 DMA.

5 In both cases it is the EC which is the sole enforcer of the DMA. A joint team within the Directorates-General for Competition (DG COMP) and Communications Networks, Content and Technology (DG CONNECT) is tasked with carrying out and upholding the implementation and enforcement of the DMA.

6 Please note that the DMA does not refer to NCAs in this regard, it refers to 'national competent authorities enforcing competition law for infringements of gatekeeper obligations'.

7 By 'polycentric system of enforcement' we refer to a system that includes 'many centres of decision-making which are formally independent of each other… (t)o the extent that they take each other into account in competitive relationships, …[they]…enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts': M Polanyi & H Prosch, *Meaning* (University of Chicago Press, 1975). For a broader discussion of a polycentric system of enforcement in a case of competition law, see e.g. I Lianos, 'Polycentric Competition Law' (2018) 71 *Current Legal Problems* 161, < https://ssrn.com/abstract=3257296 > last accessed 26 January 2025.

8 See inter alia M Cappai & G 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 > (last accessed 8 March 2024); 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II' (2022) The Platform Law Blog, 29 March 2022, < https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/ > (last accessed 8 March 2024); B 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 *CMLR* 239.

9 J Tomkin, 'Commentary on Article 50 – Right not to be tried or punished twice' in S Peers et al. (eds.), *The EU Charter of Fundamental Rights:A Commentary* (Hart, 2021), para 50.86; See also Zelger (n 8).

10 Case C-117/20 *bpost* [2022] ECLI:EU:C:2022:202; Case C-151/20 *Nordzucker* [2022] ECLI:EU:C:2022:203; Case C-27/22 *Volkswagen* [2023] ECLI:EU:C:2023:633.

11 M Cappai & G Colangelo (n 8); Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (n 8); Zelger (n 8).

Up until now, it was the European Competition Network (ECN) that had historically played a role in fostering cooperation among NCAs and the Commission. This cooperation within the ECN has been a forum of discussion and cooperation amongst NCAs of the EU Member States and the Commission.[12] However, the effectiveness and the workability of this cooperation can be questioned as illustrated by 10 years of subsequent NCAs' decisions concerning the so-called most favoured nation clauses (MFNs), which were finally resolved by the Court of Justice of the European Union (CJEU) in 2024.[13]

Therefore, the aim of this article is to verify how to reconcile the polycentric system of enforcement of Article 102 TFEU, the DMA and national digital-related regulations with the *ne bis in idem* and proportionality principles as stipulated in Articles 50 and 52(1) of the Charter. Subsequently, we want to analyse if the existing cooperation mechanisms within the ECN can be modified to prevent the *ne bis in idem* infringements also through an *integrated* approach.

This article is structured as follows. Section 2 sets out the current *ne bis in idem* and proportionality framework. It illustrates that the complementary aims part of the proportionality review, requiring that cumulated proceedings pursue complementary aims, is of significant influence. Section 3 compares the enforcement prescribed by the DMA to the enforcement of Article 102 TFEU. Different viewpoints and angles are applied to specify the relationship between traditional competition law, more specifically the abuse of dominance prohibition in Article 102 TFEU, and the gatekeeper duties in the DMA. In Section 4 the challenges of the multilevel enforcement of Article 102 TFEU and the DMA are set out. In Section 5 we weigh and compare potential solutions to streamline the multilevel enforcement system and to simplify coordination.

2. THE LEGAL FRAMEWORK: NE BIS IN IDEM AND PROPORTIONALITY

2.1. RESTRICTION – JUSTIFICATION APPROACH

Through case law from the CJEU and the European Court of Human Rights (ECtHR), the *ne bis in idem* framework has developed into the current restriction-justification approach. In this approach, ascertaining whether the *ne bis in idem* principle from Article 50 of the Charter is restricted due to duplicated enforcement, is the first step. The CJEU clarified in *Volkswagen*[14] – a case concerning the cumulation of administrative fines in Italy and criminal prosecution in Germany – that for the principles of *ne bis in idem* and proportionality to be invoked, it is sufficient that one of the parallel proceedings is governed by EU law. Consequently, the principles laid out in Articles 50 and 52(1) of the Charter apply to cases of duplication involving either EU competition law or the DMA or both.

In this remainder of Section 2, we assess how the principle of *ne bis in idem* is applied in EU law through developments in case law.

2.2. THE FIRST STEP OF THE ANALYSIS: BIS AND IDEM

According to settled case law, the first step consists of two criteria, *bis* and *idem*. First, *bis* refers to the duplication of proceedings with a criminal character and presupposes that one of the proceedings has resulted in a final decision (*res judicata*).[15] The existence of a final decision should block the initiation or continuation of another criminal procedure concerning the same facts.

Second, 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

12 M Kozak, 'ECN Directive – A missed opportunity for strengthening the rights of parties?' in C Rusu et al (eds.), *New Directions of Antitrust Enforcement* (Wolf Legal Publishers, 2020).

13 Case C-264/23 *Booking.com* [2024] ECLI:EU:C:2024:764; Case C-264/23 *Booking.com* [2024] ECLI:EU:C:2024:470, Opinion of AG Collins.

14 Case C-27/22 *Volkswagen* (n 10), paras 17–19 and 37.

15 The criminal nature of proceedings is determined based on a decision of the ECtHR 8 June 1976, *Engel e.a. v The Netherlands*, ECLI:NL:XX:1976:AC0386, para 81 and Case C-489/10 *Bonda* [2012] ECLI:EU:C:2012:319, para 37: Case C-117/20 *bpost* (n 10), para 29.

proceedings twice (unity of the offender).[16] The same person sub-element tests whether the same natural or legal person is involved twice. Both EU competition law and the DMA use the notion of undertaking as the personal scope of application. The *idem factum* test *is* satisfied if the material conduct is identical and not 'merely similar'.[17] In other words, there has to be a set of concrete circumstances which are inextricably linked together.[18] This is ascertained by assessing the territory, the product market, and the period in which the alleged infringement occurred.[19] Regarding territory, the CJEU in *Volkswagen* clarified that a decision from one Member State ruling on acts committed in another Member State and the fine taking into account the turnover from the other Member State, are important indications for establishing *idem factum*.[20] Previously, the *idem* test used to contain a third criterion focusing on the identity of the offence (*idem crimen*) and was meant to ensure effective enforcement. This third criterion was used to assess whether the two procedures were aimed at the same offence, i.e., aimed at the protection of the same legal interest or asset. However, this third sub-element has now been abolished by the CJEU in *bpost* and *Nordzucker* in order to align the *ne bis in idem* test in competition law with all other areas of EU law.[21]

2.3. JUSTIFICATION TO RESTRICTION – GENERAL INTEREST OBJECTIVE

Article 52(1) of the Charter stipulates that limitations to the *ne bis in idem* principle are allowed in so far as 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.[22] This proportionality review forms the second step of the *ne bis in idem* principle and consists of four assessment criteria. In short, the proportionality review requires that the two procedures follow separate and complementary 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 for the legal or natural person involved.[23]

In *Volkswagen* the CJEU reiterated the conditions for justifying *ne bis in idem* limitations as previously set out in *Menci* and repeated in *bpost* and *Nordzucker*. First, the duplicated proceedings or sanctions must 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.[24] 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, to make the duplication predictable, it has to be provided for in clear and precise national legislation.[25] 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'[26] does not exceed what is necessary.

A key part of the proportionality test is that the two processes should protect different legal interests rather than the same one.[27] Although the CJEU has not explicitly defined the 'legal interest' test, AG Bobek in *bpost* defines the legal interest as 'the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that

16 Case C-117/20 *bpost* (n 10), para 31; Case C-151/20 *Nordzucker* (n 10), para 33; Case C-27/22 *Volkswagen* (n 10), para 64.

17 Case C-117/20 *bpost* (n 10), para 36.

18 ibid, para 33.

19 ibid, para 48; Case C-151/20 *Nordzucker* (n 10), para 41.

20 Case C-27/22 *Volkswagen* (n 10), paras 73 and 74; Case C-151/20 *Nordzucker* (n 10), para 46.

21 A Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2023) 19 *ECJ* 86; Case C-117/20 *bpost* [2021] ECLI:EU:C:2021:680, Opinion of AG Bobek, para 41.

22 Ribera Martínez (n 21), 86.

23 Case C-117/20 *bpost* (n 10), paras 49–51.

24 Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197, para 44.

25 ibid, paras 46 and 49.

26 ibid, para 53.

27 Case C-117/20 *bpost* (n 10), para 44.

good or value that the offence at issue harms, or with which it interferes'.[28] According to the CJEU in *bpost,* in reference to the ECtHR's decision *A and B v Norway*, the two procedures should focus on separate aspects of the same social problem.[29]

To prevent excessive burden, the impact of duplicating proceedings and penalties must be minimal, considering the severity of sanctions or the size of fines.[30] For instance, the CJEU in *Volkswagen* ruled that the duplication of the fine did not appear to be an excessive disadvantage 'for ***that*** company [emphasis added]'.[31]

The predictability criterion does not require the possibility of duplication explicitly or specifically mentioned in the rules that are the legal bases for the duplicated sanctioning proceedings. The CJEU suggests in *Volkswagen* that the criterion is met if the laws 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, gives rise to the possibility of duplicated enforcement which in turn can result in *ne bis in idem* issues.[32]

Lastly, the CJEU requires actual cooperation and exchange of information between enforcement agencies beyond just having a legal requirement for coordination.[33] The distinction between the two procedures has to be limited from the perspective of the affected parties. In addition to close coordination, the duplication must be conducted within a 'proximate timeframe'[34] and thus cannot be dragged on for too long.[35] AG Campos Sánchez-Bordona in *Volkswagen* recognises some paradoxicality regarding the requirement of coordination as it seems to play a double role. The mechanisms in place to ensure coordination in EU law enforcement are designed to avoid cumulation of proceedings and *ne bis in idem* issues before they materialise. By contrast, the interpretation of Article 52(1) of the Charter by the CJEU requires close coordination as a requirement to create an exemption for duplicated proceedings limiting the *ne bis in idem* principle.[36]

2.4. IMPLICATIONS ON THE ESSENCE OF NE BIS IN IDEM: NE MEANS NE

A cardinal part of Article 52(1) of the Charter is ensuring that a fundamental right's essence – or core – remains unaffected. The abovementioned developments in the sphere of *ne bis in idem* have ramifications for the essence of the *ne bis in idem* principle.

First, according to the CJEU 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. Van Cleynenbreugel objects that this definition of the essence – 'same objective double proceedings' – 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 of the Convention Implementing the Schengen Agreement (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 CJEU.[37] However, the

28 Case C-117/20 *bpost* (n 21), Opinion of AG Bobek, para 136.

29 Case C-117/20 *bpost* (n 10), para 49; ECtHR 15 November 2016 *A and B . Norway* [2016] ECLI:CE:ECHR:2016:1115, paras 121 and 132.

30 Case C-117/20 *bpost* (n 10), para 53; F 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.

31 Case C-27/22 *Volkswagen* (n 10), para 97.

32 ibid, para 98.

33 Case C-117/20 *bpost* (n 10), para 55; *Volkswagen* (n 10), para 98; M Cappai & G Colangelo, 'Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets' (2023) 60 *CMLR* 431.

34 Case C-27/22 *Volkswagen* (n 10), para 95.

35 Rizzuto (n 30), 154.

36 Case C-27/22 *Volkswagen* [2023], ECLI:EU:C:2023:265, Opinion of AG Campos Sánchez-Bordona, para 111.

37 P 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, 371; M Luchtman, 'Transnational Enforcement in the European Union and the Ne Bis In Idem Principle' (2011) 4 *Review of European Administrative Law*, no. 2, 5.

defendant's 'additional burden'[38] in time and effort of the second procedure is not sufficiently taken into account by the CJEU.[39] Formally, the proportionality review should assess the actual impact of the duplication of both penalties and proceedings.[40] 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.

Second, Van Cleynenbreugel points to the effective enforcement rationale of *ne bis in idem* in administrative law as a reason why competition law enforcement by the EC and NCAs should not hinder each other.[41] The two authorities have to co-exist through coordination and avoiding overlap by creating 'silos (…) of separate enforcement actions'.[42] Cappai and Colangelo support this opinion and add that the *idem* test which the CJEU applies in *Nordzucker* (and again in *Volkswagen*) can nullify 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 duplication by 'gerrymandering'.[43] In this way Cappai and Colangelo anticipate situations wherein enforcement authorities with surgical precision divide or split up procedures to carve away any overlap in terms of time, product market or territory. Fragmenting the same offence into parts also seems contrary to the rationale of Article 54 CISA, which upholds the freedom of movement across borders. However, this risk is mitigated by the practical impossibility of such fragmentation due to strong cross-border economic ties between different parts of the offence, particularly in digital markets.[44]

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) of the Charter. The restriction-justification approach is an *ex post* correction mechanism 'against the disproportionality of combined or aggregated sanctions'[45] instead of an *ex ante* test that blocks the initiation of a second procedure. Even though the CJEU in *Volkswagen* seems to emphasise that *ne bis in idem* 'precludes criminal proceedings in respect of the same facts from being initiated or maintained',[46] the proportionality assessment can only be carried out after the second procedure 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*.[47]

3. POSSIBLE CONFLICTS BETWEEN ENFORCEMENT OF ARTICLE 102 TFEU AND THE DMA

3.1. POLYCENTRIC ENFORCEMENT

In practice, a range of substantial provisions and enforcement competencies exist at the EU and Member State levels, which apply to very similar, or even identical, types of conduct

38 P Harrison et al., 'Ne Bis in Idem: The Final Word?' (2022) Kluwer Competition Law Blog, 7 April 2022, < https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/ > (accessed 8 March 2024).

39 ibid.

40 Case C-117/20 *bpost* (n 10), para 53; Rizzuto (n 30), 154.

41 Van Cleynenbreugel (n 37), 357.

42 ibid.

43 Cappai & Colangelo (n 33), 431

44 Cappai & Colangelo (n 33), 431; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (n 8); Case C-151/20 *Nordzucker* (n 10), para 41; J 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; F Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 *Journal of European Competition Law & Practice* 493.

45 Case C-117/20 *bpost* (n 21), Opinion of AG Bobek, para 109.

46 Case C-27/22 *Volkswagen* (n 10), para 59.

47 Case C-117/20 *bpost* (n 21), Opinion of AG Bobek, paras 108 and 117; K Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (2023) 19 *European Competition Journal* 116.

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leading to polycentric enforcement as defined in the Introduction. These provisions come with the authority to enforce them at both the EU and national levels. The multitude of legal bases increases the chances of parallel enforcement proceedings regarding the same facts, e.g. the 'quadruple jeopardy'[48] scenario with an accumulation of four different procedures. In theory, 'quadruple jeopardy'[49] could occur due to accumulated 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 gatekeeper obligations and competition law by the EC is deemed unlikely.[50]

Before going into possible conflicting scenarios, a condition for justifying limitations to *ne bis in idem* is the notion of complementarity of the different procedures. This raises the question whether, and to what extent, the DMA and traditional competition law complement each other, or whether the two instruments pursue diverging goals. 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'.[51] However, it is not that easy to satisfy the complementary aims test. The CJEU opts for a more thorough examination.[52] On 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, which would entail that the two procedures complement each other. For example, Cennamo states that the DMA is about the health of digital ecosystems rather than markets.[53] Comparing the *ex ante* approach the DMA uses with the *ex post* nature of antitrust enforcement suggests that the DMA addresses the same harmful practices from a different angle than Article 102 TFEU. However, the difference between *ex ante* regulation and *ex post* enforcement based on precedents can be blurred in practice – even more so when the law is a codification of precedents.[54] In addition, the Commission recognises that the DMA, with 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.[55] 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.[56] Beems alleges that the DMA is a 'specific branch of competition law that applies to gatekeepers'.[57] Bania rightly points out that 'the DMA offers the Commission a shortcut'.[58] These interpretations pointing towards replacement reject complementarity.

However, the CJEU in *bpost* seems to apply a zoomed-out, more high-level approach and instead looks at the overarching objective of the instruments, which is the preferable approach. This approach leads to the conclusion that both the DMA and competition law are created 'to complete the internal market'.[59] The internal market objective of the DMA can be inferred

48 G Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) 47 *ELR* 597.

49 Ibid.

50 Bania (n 47) 116.

51 O 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 8 March 2024).

52 K Bania, 'Will DMA proceedings make competition law obsolete? No they won't' (2023) The Platform Law Blog, 10 November 2023, < https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/> (accessed 8 March 2024).

53 C Cennamo, 'The EU Digital Markets Act: It Is Not About Markets But Ecosystem Failures!' (2023) Network Law Review, 11 July 2023, < https://www.networklawreview.org/dma-ecosystems/ > (accessed 8 March 2024).

54 See also in this regard: P Bougette et al., 'Ex-ante versus Ex-post in Competition Law Enforcement: Blurred Boundaries and Economic Rationale' (2024) 18 GREDEG Working Paper Series, < https://laweconcenter.org/wp-content/uploads/2024/06/GREDEG-WP-2024-18.pdf > last accessed 26 January 2025.

55 Guersent (n 51).

56 Bania (n 52).

57 B Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 *ECJ* 1.

58 Bania (n 52).

59 Bania (n 52).

from its legal basis – Article 114 TFEU – and the legislative history.[60] According to the CJEU in *bpost,* preserving competition 'is indispensable for the functioning of the internal market'.[61] In short, the *bpost* interpretation refutes the idea that the aims of the DMA and competition law are complementary. 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.[62] In short, it is up for debate whether the duplication of Article 102 TFEU and DMA infringement procedures meets the complementarity criteria of the proportionality test.

In the following subsection, we analyse the possible conflicting scenarios that could trigger an application of the *ne bis in idem* principle.

3.2. POSSIBLE CONFLICTING SCENARIOS TRIGGERING AN APPLICATION OF THE NE BIS IN IDEM PRINCIPLE

Scenario 1. The European Commission applies Article 102 and the DMA in the case of the same (idem) infringement. For example, after an undesired acquittal in DMA proceedings, the Commission could seek a conviction in competition proceedings for the same facts to sanction the same behaviour and, arguably, reach the same or a similar goal. In this respect, the EC indicated in the Apple music streaming competition case 'that Apple's anti-steering provisions amount to unfair trading conditions, in breach of Article 102(a) of the TFEU'.[63] In the accompanying press release, Commissioner Vestager referred to the anti-steering obligation in the DMA.[64] This illustrates that the Commission recognises the complementary character of both regimes, underlining the possible future application of the DMA as a *lex specialis* to competition law. As this scenario is very theoretical, we will not discuss it further.[65]

Scenario 2. The European Commission applies the DMA in parallel with a NCA applying Article 102 TFEU. Antitrust enforcement is shared between the EC and NCAs, following a model of concurrent powers where each authority can apply EU competition law. In other words, it is 'a system of parallel competences'[66] where every competition authority possesses the competence to enforce EU competition law. As was emphasised by the CJEU:

> Regulation No 1/2003 (...) establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network (...).[67]

Article 5 of Regulation 1/2003 codifies the power of NCAs to enforce Articles 101 and 102 TFEU, conduct inspections, and apply sanctions. An exception to the EC's exclusive role in DMA enforcement is found in Article 38(7) of the DMA, preserving the investigative capabilities of NCAs in competition law, extending these powers to include probes into DMA gatekeepers. NCAs can initiate investigations into both anti-competitive practices and gatekeeper duties, provided they inform the Commission. This is because it is only in some cases clear at the start of an inquiry if a gatekeeper's actions might violate the DMA, national competition laws, or both.[68]

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60 Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, 5.

61 Case C-117/20 bpost (n 10), para. 46.

62 Ribera Martìnez (n 21) 86.

63 EC, 'Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers' < https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161 > (accessed 9 March 2024).

64 EC, 'Remarks by Executive Vice-President Vestager on the adoption of an antitrust decision against Apple over abusive App store rules for music streaming providers' < https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1309 > (accessed 9 March 2024).

65 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 8 March 2024); Bania (n 47), 116.

66 EC, 'Commission Notice on cooperation within the Network of Competition Authorities', OJ C 101, 27.4.2004, para. 1.

67 Case T-339/04 *France Télécom SA v Commission of the European Communities* [2007] ECLI:EU:T:2007:80, para. 79.

68 Recital 91 DMA; Article 38(7) DMA.

The General Court in *Amazon*[69] clarified that the EC's decision to open an investigation under Article 102 TFEU is a procedural act without binding legal effects on the applicant. This act defines the investigation's geographical and substantive scope but does not impact the rights or obligations of concerned parties beyond procedural matters.[70] The Commission retains discretion to adjust the scope during the investigation based on emerging information.[71] Additionally, paragraph 4 of the Commission Notice on cooperation within the Network of Competition Authorities confirms that exchanges within the network are internal to public enforcement bodies, while paragraph 31 specifies that companies have no individual rights to choose a specific authority.[72] More broadly, the General Court confirmed that neither Regulation 1/2003 nor the Notice grants undertakings any entitlement to have their case handled by a particular competition authority.[73]

Scenario 3. The European Commission applies the DMA and a NCA applies national digital regulation. Here, there is a question of the complex interplay between DMA enforcement, competition law, and national digital market regulations; for instance, Germany's Competition Act – specifically Article 19a GWB – highlights the challenges in distinguishing these domains. The DMA, particularly through Articles 1(5) and (6), tries to clarify the boundaries between these legal areas. Article 1(5) of the DMA restricts Member States from imposing additional requirements on gatekeepers to promote market fairness and contestability. However, they can legislate on core platform services outside the DMA's purview. Article 1(6) clarifies that the DMA does not affect EU or national competition laws regarding cartels and market dominance, nor does it impact laws unrelated to gatekeepers or those adding extra gatekeeper obligations.

Germany's Article 19a GWB, reflects aspects of both the DMA and traditional competition law, granting the *Bundeskartellamt* (BKa) authority to label companies as having 'paramount significance across markets' due to their market dominance and other power indicators. In particular, undertakings like Meta and Google, recognised as gatekeepers under the DMA, have been assigned this status by the BKa.[74] Unlike the DMA's self-implementing rules, Article 19a GWB demands the proactive imposition of specific duties, such as interoperability and non-preferential treatment, enforced through fines.

While Article 19a GWB shares traits with the DMA and competition law – being part of Germany's competition regulations, enforced by its authority, and aimed at safeguarding digital market competition – it practically mirrors the DMA's objectives. Applying the DMA's criteria to Article 19a suggests both can coexist, as Article 19a's goals and obligations differ from those under the DMA. The 'paramount significance across markets' test sufficiently differs from the gatekeeper thresholds prescribed by the DMA to support this argument.[75]

Scenario 4. The European Commission applies Article 102 TFEU and a NCA applies national digital sector regulation. This scenario may also be unrealistic in practice because a broad interpretation of Articles 1(5) and (6) of the DMA, as proposed by Van den Boom, excludes national legislation that does not conform to the spirit of the DMA.[76] Consequently, this approach, by denying the applicability of national digital sector legislation, removes another possibility for overlap.

To conclude, the parallel enforcement of Articles 101 and 102 TFEU is obviously not new and can be used as a background for the discussion about reconciling *Scenarios 2* and *3*. It will be discussed in the following subsection.

69 Case T-19/21, *Amazon* [2021] ECLI:EU:T:2021:730, para. 23.

70 ibid, paras. 28, 31.

71 ibid, para. 32.

72 ibid, para. 48. I Graef, 'Regulating digital platforms: Streamlining the interaction between the Digital Markets Act and national competition regimes' in I Graef & B van der Sloot (eds.), *The legal consistency of technology regulation in Europe* (Hart, 2024), 167.

73 Case T201/11, *Si.mobil v Commission* [2014] ECLI EU:T:2014:1096, para. 39

74 Van den Boom (n 44), 57; J Franck & M Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 *JECLAP* 513.

75 Franck & Peitz (n 74), 513.

76 Van den Boom (n 44), 57.

3.3. EXISTING MECHANISMS OF PARALLEL ENFORCEMENT OF ARTICLES 101 AND 102 TFEU

The ECN provides the framework for cooperation between NCAs and the European Commission.[77] Promoting the consistent application of competition law,[78] cooperation, and information sharing, this administrative network primary aim is to ensure the efficient division of cases between the NCAs and the EC rather than preventing double jeopardy overlapping cases from a procedural perspective.

According to Article 11(6) of Regulation 1/2003, NCAs step back from their enforcement roles once the Commission starts proceedings[79] on the same issues and allegations of anti-competitive conduct. Graef[80] analyses coordination between the EC and the NCAs using the example of the Dutch *Apple* case.[81] She notes that the Dutch NCA, the ACM, found Apple imposed unfair conditions on dating apps on its platform, focusing specifically on non-competing apps in the Dutch market, while the European Commission investigated Apple's practices in other sectors like music streaming and e-books. Despite collaboration, the ACM maintained its distinct focus. Graef concludes that the Commission's decision not to request the ACM to close its Apple App Store case reflects openness to parallel NCA investigations that complement its efforts, avoiding duplication with the Commission's focus on apps competing with Apple's offerings.[82]

Similarly, Beems considered that the ECN has effectively distributed cases among the authorities,[83] and served as an effective platform for information exchange.[84] However, we suggest that this cooperation could and should be strengthened. Moreover, we will argue that its role demands coordination for the purposes of the proportionality review, especially after the *bpost, Nordzucker* and *Volkswagen* judgements.

To illustrate the weaknesses of this collaboration, we refer to the most favoured nation clause saga which, as observed by Rechtbank Amsterdam (the Amsterdam district court),[85] consists of conflicting views as to the treatment of price parity clauses or so-called 'most favoured nation' clauses. In this example, these clauses would prevent hotels from offering their rooms on their own websites or in third parties' services below the price at which they offer them on a specific platform. In all such cases, there was a different treatment of so-called 'narrow' and 'wide'[86] parity clauses which led to national discrepancies.

These discrepancies can be attributed to the EC's disengagement in the enforcement, essentially leaving the enforcement to the Member States. As a consequence, and due to legal discussion

77 Kozak (n 12).

78 M Gac, *Europejska Przestrzeń Administracyjna jako mechanizm zwiększający efektywność stosowania prawa europejskiego – analiza na przykładzie Europejskiej Sieci Konkurencji* (The European Administrative Space as a Mechanism to Increase the Effectiveness of European Law Enforcement: an Analysis Based on the European Competition Network) (2015) 1 *Rocznik Administracji Publicznej*, 107 < https://ssrn.com/abstract=2732511 > (accessed 9 March 2024); G Monti, 'Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network' (2014) 1 EUI Department of Law Research Paper < https://ssrn.com/abstract=2379320 > (accessed 9 March 2024; M Błachucki & S Jóźwiak, 'Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights' (2012) 5 *YARS* 137.

79 Case C-857/19 *Slovak-Telekom* [2021] ECLI:EU:C:2021:139, para. 38; Case T410/18 *Silgan* [2019] ECLI:EU:T:2019:166, para. 20.

80 Graef (n 72), 167.

81 Press release Netherlands Authority for Consumers & Markets, 'ACM launches investigation into abuse of dominance by Apple in its App Store', 11 April 2019, www.acm.nl/en/publications/ acm-launches-investigation-abuse-dominance-apple-its-app-store.

82 Graef (n 72), 167.

83 Beems (n 57), 1.

84 B Beems et al., 'The Added Value of the DMA's Enforcement Framework' (2023) 15 *Competition Law Review* 51; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (n 65); Kozak (n 12).

85 Rechtbank Amsterdam, 22 February 2023, ECLI:NL:RBAMS:2023:1242, para. 6.1.

86 Narrow parity clauses prohibit only partner accommodation providers from offering to the public on their own online channels overnight stays at a rate lower than that offered on the hotel reservation platform. Wide parity clauses prohibit partner hoteliers referenced on the reservation platform from offering, on their own sales channels or on sales channels operated by third parties, rooms at a lower price than that offered on that platform.

on the extent to which parity clauses infringe Article 101 TFEU, a combination of legislative bans and enforcement action by NCAs was used to address the parity clauses practices.[87]

In 2010, Germany's Federal Competition Authority, the BKa, initiated an investigation into HRS, another hotel booking platform, regarding its application of wide price parity clauses. In 2013, the authority concluded that the wide price parity clauses in contracts between HRS and hotels violated Article 101 TFEU, as well as the corresponding German law provision. Additionally, in 2013, the BKa launched a similar investigation into Booking.com for including wide price parity clauses in its contracts. In 2015, the BKa adopted a decision concerning MFN clauses where it banned even the narrow price parity clauses.[88] Also in 2015, the Italian, French, and Swedish Antitrust Authorities, in coordination with the Commission, accepted commitments from Booking.com regarding its use of MFN clauses in hotel contracts but they agreed to the application of narrow price parity clauses. In 2019, the Düsseldorf Court of Appeals overturned the BKa's decision. The court determined that the narrow price parity clauses were ancillary restraints essential to the main agreement between Booking.com and the hotels. They were deemed necessary to prevent free-riding and, as such, did not fall under Article 101(1) TFEU. In 2021, the German Federal Supreme Court (*Bundesgerichtshof*) (BGH) reversed the appellate court's ruling. The BGH concluded that the ancillary restraints doctrine did not apply because the restrictions were not objectively necessary for the main agreement's execution. Application of MFN clauses was also one of the charges imposed by the Spanish Competition Authority (*Comisión Nacional de Mercados y Competencia*) (CNMC) on Booking.com in 2024. In addition, in Greece, Poland and the UK investigations were shut down after Booking.com terminated the use of wide parity clauses.[89]

As a consequence of private enforcement, it was only in 2024 when the CJEU,[90] answering the preliminary reference from the Amsterdam District Court, considered that those clauses fall within Article 101 (1) TFEU and should not be treated as ancillary restraints as they are not indispensable to the platform operation.[91] However, national legislation in Belgium, France, Italy and Austria has been prohibiting recourse to wide and narrow price parity clauses. Moreover, earlier German courts refused to send preliminary reference questions to Luxembourg.[92]

Interestingly, as a result of its designation as a gatekeeper and being considered a core platform service, Booking.com has announced that it will discontinue the use of any price parity clauses in the future as Article 5(3) of the DMA prohibits price parity clauses.[93]

Even if the MFN clause saga does not *directly* concern the issue of *ne bis in idem*, it reveals the flaws in the theoretically coordinated system within the ECN. The risk is even higher if more Member States adopt similar instruments to the German Article 19a. The potential for legislative and enforcement fragmentation increases if more Member States introduce similar laws, threatening the DMA's uniform application. This scenario could lead to a 'quadruple jeopardy'[94] situation, and specifically *Scenarios 2* and *3* discussed above in subsection 3.2,

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87 J Franck & N Stock, 'What Is "Competition Law"? – Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements" (2020) 39 Yearbook of European Law 320; J Franck & M Peitz, 'The Digital Markets Act and the Whack-A-Mole Challenge' (2024) 61 *Common Market Law Review* 299.

88 Federal Cartel Office, 22 December 2015, Case B9–121/13 https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B9-121-13.html. OLG Düsseldorf, 4 June 2019, Case VI-Kart 2/16(V) – *Enge Bestpreisklausel II* http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2019/Kart_2_16_V_Beschluss_20190604.html; See also, F E Beneke Avila, The German Federal Supreme Court's Judgment in *Booking.com* as a Case Study of the Limitations of Competition Law (2022) 53 *IIC – International Review of Intellectual Property and Competition Law* 1373 < https://doi.org/10.1007/s40319-022-01253-z > all last accessed 26 January 2025.

89 CNMC, CNMC fines Booking.com 413.24 million for abusing its dominant position over the last 5 years – Press release, 6 August 2024 < https://portal-cec.consumo.gob.es/en/comunicacion/noticias/2024/cnmc-fines-bookingcom-41324-million-abusing-its-dominant-position-over > last accessed 26 January 2025; Frank & Stock (n 87) 320.

90 Case C-264/23, *Booking.com* (n 13).

91 ibid, para. 66.

92 S Heinz, 'Dutch Torpedo at Work – AG Collins' Opinion in the Booking Case' (2024) Kluwer Competition Law Blog < https://competitionlawblog.kluwercompetitionlaw.com/2024/06/27/dutch-torpedo-at-work-ag-collins-opinion-in-the-booking-case/ > (accessed 24 November 2024).

93 ibid.

94 Colangelo (n 48), 597.

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complicating the regulatory landscape. Therefore, in the following subsection, we will look to see if the DMA includes any reconciling mechanisms.

3.4. RECONCILING MECHANISMS UNDER THE DMA

To prevent market fragmentation in the digital sector, the Commission exclusively enforces the DMA.[95] National competent authorities can support the Commission in various capacities, such as participating in interviews and inspections or requesting market investigations.[96] The Commission also has the authority to liaise with national courts and provide observations in DMA-related national proceedings,[97] with Member States offering limited advisory input through the Digital Markets Advisory Committee.

Unlike the initial DMA proposal, the final DMA text includes provisions for coordination between the EC, NCAs, and national courts. Article 38 of the DMA provides for the enforcement of the DMA by the Commission within the ECN to ensure cooperation and information exchanges. However, within the scope of Articles 1(5) and (6) DMA, NCAs can still act on the basis of any national rules applicable to gatekeepers in their territories.[98]

The DMA also sets up a communications channel – 'the high-level group' – between the ECN and regulatory experts in data protection, consumer protection, electronic communications and audiovisual media.[99] Cappai and Colangelo state that including the DMA enforcement in the ECN seems to comply with the CJEU's considerations in *bpost* and *Nordzucker*.[100] According to the ECN, the experience gathered by the EC and NCAs regarding digital platforms can contribute to successful DMA enforcement.[101] 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.[102]

Interestingly, during the process of DMA adoption, the heads of the NCAs published a joint statement titled: *Joint paper of the heads of the national competition authorities of the European Union. How national competition agencies can strengthen the DMA.* In this statement, they emphasise:[103]

> that the way forward to ensure an effective and quick implementation of the DMA should include the primary application of the DMA by DG COMP at the European Commission, a complementary possibility of enforcement of the DMA by national competition authorities and the establishment of a mechanism for close coordination and cooperation between these agencies.

This illustrates that complementarity is not only relevant in the application of the *ne bis in idem* test, but also maps out the scope of Article 102 TFEU and the DMA to divide the tasks between the EC and the NCA in terms of enforcement.[104]

Moreover, it is indicated that the enforcement of the DMA requires collaboration between the European Commission (DG COMP) and NCAs to ensure effective oversight across Member States. The statement stresses that national authorities bring valuable expertise in the digital

95 Explanatory Memorandum – Digital Markets Act: COM(2020) 842 final, 5; Chirico (n 44), 493; Van den Boom (n 44), 57.

96 Articles 21(5), 22(2), 23(3) and 41 DMA.

97 Article 39 DMA; as a regulation, the DMA has direct effect according to Article 288 TFEU.

98 Graef (n 72), 167.

99 Article 40 DMA; Recital 93 DMA.

100 Cappai & Colangelo (n 33), 431.

101 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 > (last accessed 26 January 2025).

102 Beems (n 57), 1.

103 Joint paper of the heads of the national competition authorities of the European Union, How national competition agencies can strengthen the DMA, (endorsed by national competition authorities at the ECN Directors-General's meeting of 22 June 2021) < https://www-concurrences-com.utrechtuniversity.idm.oclc.org/IMG/pdf/dma_-_joint_eu_ncas_paper-2.pdf?70170/9c530b250dbd8d1910f06be3eace0109e89d3c18e7aff1b299c17257a7e4005c > p.1.

104 See in this regard: V Robertson, 'The Complementary Nature of the Digital Markets Act and Articles 101 and 102 TFEU' (2024) 12 *Journal of Antitrust Enforcement* 325.

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economy, are more accessible to smaller market players, and can act as a first filter for cases, easing the Commission's workload. This cooperation, along with the role of national courts and established mechanisms like the ECN, strengthens the DMA's implementation, leveraging shared resources and knowledge to preserve the integrity of the internal market.[105]

Moreover, the NCAs can support the EC in the following ways. To maximise the effectiveness of the DMA, enforcement powers should be coordinated between the European Commission, which will oversee the framework, and NCAs, which can extend the DMA's reach. They propose to build an *integrated* system with the clear leadership of the Commission, supported actively by the NCAs. Within this proposal, the Commission retains sole authority over critical functions, such as designating gatekeepers and granting exemptions, while selectively sharing enforcement powers with NCAs. According to them, the ECN provides a strong precedent for coordination, with mechanisms for early communication and mutual support that prevent contradictory decisions. This tested framework allows the Commission to maintain oversight while benefiting from NCAs' local expertise and investigative capacity.[106] Under the DMA, safeguards should ensure that the Commission retains leadership, while NCAs can play complementary roles when appropriate. These NCAs could initiate or support enforcement proceedings, conduct investigations at the Commission's request, or assist in dawn raids and data collection. Additionally, they should have the ability to request the Commission to open proceedings and participate systematically in the Advisory Committee. Such an integrated approach would allow the DMA to leverage national authorities' resources and insights while maintaining consistency and avoiding market fragmentation.[107] To strengthen enforcement, they propose that the Commission should also involve other specialised regulators when their expertise is relevant, further enhancing the DMA's scope and precision.[108]

This proposal is interesting from the perspective of avoiding *ne bis in idem* issues as it clearly provides for leadership by the Commission with the active participation of the NCAs and clear definition of their roles. The example of the MFN saga clearly showed that lack of such clear delineation and leadership can lead to conflicting decisions and judgements that create legal uncertainty for long time. In Section 4 we analyse further possible cooperation and allocation mechanisms.

4. THE NEED TO STRENGTHEN COOPERATION AND ALLOCATION MECHANISMS

Recital 91 of the Preamble to the DMA and Article 38(7) recognise potential *ne bis in idem* issues, and empower NCAs to investigate gatekeepers after notifying the EC. As illustrated by *Booking.com*, coordination among enforcement bodies is essential to address *ne bis in idem* concerns.[109]

The example of the *Booking.com* saga shows that, 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 or to improve coordination between NCAs. For example, the ECN could be used to allocate all gatekeeper-related competition cases to the Commission to create a one-stop-shop for gatekeepers, thus applying the DMA as a *lex specialis* to Article 102 TFEU. 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 of investigation and enforcement. The objective of this allocation mechanism would be to avoid overlap, to efficiently allocate enforcement resources and to create legal certainty for gatekeepers. In this scenario, duplicated enforcement vis-*à*-

105 Joint paper ECN (n 103), paras. 19–26.

106 ibid, paras. 28–29.

107 ibid, paras. 30–34.

108 ibid, paras. 35–36.

109 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 the Italian Competition and Markets Authority was not included in the Eurojust coordination mechanism: see Case C-27/22 *Volkswagen* (n 10), paras. 100–101.

vis gatekeepers and restrictions of *ne bis in idem* are avoided, assuming that the Commission would not initiate parallel proceedings under both the DMA and traditional competition law.

Another possible solution could be an *integrated* approach – as proposed by NCAs – to delegate to the Commission sole authority over critical functions and then enable it to share enforcement powers with NCAs, making use of their specific knowledge as to what is happening at national level. In this way, a actually sincere cooperation mechanism can be introduced, making the whole network more efficient while respecting NCAs' autonomy, experience and know-how. In this light, it makes sense to bundle together the resources for the DMA enforcement and those for competition enforcement and to attribute the leadership competencies exclusively to the Commission to share those later on with NCAs, because it is not always clear 'from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation [the DMA], the competition rules which the national competent authority is empowered to enforce, or both'.[110] In addition, a one-stop-shop for gatekeepers at EU level is in line with the cross-border business model because, for gatekeepers, it is virtually impossible to divide their business models.[111] Another benefit of an integrated approach, compared with the coordination of two proceedings, is that it would be capable of avoiding duplication of proceedings targeted at gatekeepers altogether. On the one hand, coordination resulting in the allocation of cases to one enforcement authority could avoid duplication altogether. On the other hand, coordination and cooperation between enforcement authorities involved in parallel procedures could minimise the impact of the duplication from the perspective of the defendant.

As a consequence, the proportionality review would only have to be used as a backup, or an additional check in case allocation has not been successful and *ne bis in idem* issues arise. However, this scenario would exclude NCAs from enforcing Article 102 TFEU in relation to gatekeepers while retaining investigatory powers. Stripping away the enforcement competences of NCAs could turn out to be ineffective because there are also overlapping competences between, more specifically, the gatekeeper obligations relating to data in Article 5(2) of the DMA, and national data protection authorities' competences under the General Data Protection Regulation.[112] Therefore, instead of excluding NCAs, workable cooperation mechanisms need to be put in place to avoid situations like *Booking.com*. 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.[113] Applying this, by analogy, to the multilevel enforcement of the DMA could streamline the enforcement efforts and avoid undue accumulation of (sanctioning) procedures.

The proportionality principle requires accumulated procedures to be coordinated to diminish the impact of the accumulation from the perspective of the undertaking involved. Previously, the ECN has shown that it can distribute cases among the NCAs,[114] and can be effective in case allocation and information exchange.[115] The proposed integrated approach could help to overcome the existing inefficiencies but requires changes in the cooperation model strengthening it. The recent case-law on *ne bis in idem*[116] emphasises the importance of coordination between polycentric enforcement authorities beyond merely having coordination mechanisms in place. It requires actual coordination in specific cases and probably puts more scrutiny on the ECN.

5. CONCLUSIONS

The Commission's enforcement of Article 102 TFEU against Big Tech highlights the inherent challenges in addressing the complexities of digital markets dominated by gatekeepers. The

110 Recital 91 DMA.

111 Cappai & Colangelo (n 33), 431; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (n 65); *Nordzucker* judgment (n 10), para. 41; Van den Boom (n 44), 57; Chirico (n 44), 493.

112 See for example the legislative advice provided by the Netherlands Council of State on the DMA execution act: https://www.raadvanstate.nl/adviezen/@138507/w18-23-00218-iv/.

113 Van den Boom (n 44), 57; Bania (n 52).

114 Beems (n 57), 1.

115 Beems et al. (n 84), 51; Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II (n 65); Kozak (n 12).

116 Case C-117/20 *bpost* (n 10); Case C-151/20 *Nordzucker* (n 10); Case C-27/22 *Volkswagen* (n 10).

DMA, as an *ex ante* framework, represents a significant shift to prevention of anti-competitive behaviour before it can distort market dynamics. However, the overlapping enforcement competencies of the DMA, Article 102 TFEU, and national legislation like Germany's Article 19a GWB pose risks leading to duplicated enforcement actions and potential breaches of the *ne bis in idem* principle. The consequences of the existence of multiple legal bases at the EU level and national level, such as the DMA, Article 19a GWB, EU competition law and national competition law, are unclear. Moreover, Articles 1(5) and (6) DMA fail to delineate the relationship between these sources of law clearly. This ambiguous relationship between the gatekeeper obligations in the DMA, competition law and national digital sector regulation does not contribute to the predictability of duplication. Instead, it creates a regulatory minefield for gatekeepers.

While recent case law has clarified the proportionality and restriction-justification framework for addressing such issues, practical concerns remain, particularly in maintaining a balance between robust enforcement and respecting fundamental rights.

In this article we set out that the multilevel enforcement structure requires greater coordination. It can help prevent inefficiencies and legal uncertainties as well as possible infringement of the *ne bis in idem* principle. The ECN has historically played a role in fostering cooperation among NCAs and the Commission. However, instances like the MFN clause saga illustrate gaps in this coordination, resulting in conflicting decisions and delayed resolution. Strengthening the ECN's role and mechanisms, or adopting a more centralised enforcement model, is essential to align enforcement strategies and minimise risks of procedural overlap or conflicting rulings.

To streamline enforcement and guard against *ne bis in idem* violations, an integrated approach combining the leadership of the Commission with the active participation of NCAs could be the way forward. This model would leverage the Commission's overarching authority while utilizing the localised expertise and investigative capabilities of NCAs. Clear allocation of cases, improved coordination mechanisms, and adherence to the principles of proportionality and loyal cooperation would enhance the efficacy of enforcement, ensure legal predictability for market participants, and safeguard the integrity of the internal market.

As we have shown, the CJEU requires actual cooperation and actual exchange of information between enforcement agencies. The mere existence of a provision prescribing coordination does not suffice.[117] The distinction between the two procedures has to be limited from the perspective of the person or undertaking involved.[118] In *Volkswagen*, the CJEU rejected the plea that verifying whether the overall sanction is not manifestly disproportionate to the infringements should suffice and that coordination is not necessary for fulfilling the proportionality requirement. Moreover, a lack of coordination cannot be justified by practical difficulties or constraints for coordination caused by the cross-border context of the case.[119] In other words, coordination is vital, and a lack of coordination is fatal.

COMPETING INTERESTS

Małgorzata Kozak was an editor of the Utrecht Law Review at the moment of submission and managing editor for this Special Issue. Therefore the review process was carried by guest editors outside of the ULR system.

AUTHOR INFORMATION

Veerle Peters

This paper reflects her own personal views.

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117 Case C-117/20 *bpost* (n 10), para. 55; Case C-27/22 *Volkswagen* (n 10), para. 98; Cappai & Colangelo (n 33), 431.

118 Rizzuto (n 30), 154.

119 Case C-27/22 *Volkswagen* (n 10), paras. 102–103.

Malgorzata Kozak

(Used ChatGPT for the editing of a draft version of this paper). The notion of the integrated approach is part of a theory that is the subject of broader research by Dr. Małgorzata Kozak.

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