

## Abuse of Dominance and the Digital Markets Act

### Big Tech companies at risk of double jeopardy

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The proposed Digital Markets Act (DMA) is introducing strict obligations for some large digital companies. These aim to ensure that digital markets are contestable and fair. According to the wording of the DMA – that it is “without prejudice” to EU competition rules –, Big Tech companies such as Google or Facebook are at risk of double jeopardy, i.e. being tried and punished twice in the event of infringements.

#### Key propositions

- ▶ The European Commission uses the diverging regulatory objectives of the DMA and EU competition law to justify their parallel application. This nevertheless contradicts the principle of double jeopardy which precludes being tried and punished twice (“ne bis in idem”).
- ▶ Based on its earlier case law, the European Court of Justice (ECJ) is likely to rule that trying a defendant twice is lawful. This should be rejected. The ECJ should abandon its previous case law.
- ▶ According to the ECJ, it is unlawful to punish a defendant twice. Any fine imposed in the first proceedings must therefore be taken into account in the second proceedings. The European Parliament should – following the ECJ – amend the Commission’s draft law accordingly.

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## 1 Introduction

On 15 December 2020, the European Commission submitted its [Proposal](#)<sup>1</sup> for a law on digital markets (Digital Markets Act, hereinafter: DMA) (see on this [cepPolicyBrief No. 14/2021](#) and [cepPolicyBrief No. 15/2021](#)). The proposal aims to ensure contestable and fair digital markets by imposing strict obligations on major platforms such as Facebook, Google Search, Amazon Marketplace and YouTube. Where, for instance, these so-called gatekeepers<sup>2</sup> have, through the activities of business users on their platforms, obtained data that is not publicly available, they will be prohibited from using such data in competition with these users. Similarly, business users will be permitted to offer their products under different conditions via other – e.g. smaller – online platforms. Breaching the obligations could be costly for gatekeepers as the DMA provides for fines of up to 10% of annual turnover [Art. 26 (1) DMA].

The Commission has to a large extent used ongoing or finalised legal proceedings relating to the abuse of a dominant position in a market [Art. 102 TFEU] as a basis for the proposed obligations for gatekeepers proposed in the DMA.<sup>3</sup> As a result, it is possible that a company's conduct could be in breach of both the DMA and European competition law.<sup>4</sup> This could mean that companies are at risk of being tried, and possibly punished, twice over for the same conduct. The following table sets out examples of this:

**Tab. 1: Examples of conduct that is problematic under competition law and is to be prohibited under the DMA**

Conduct	Competition law case	DMA
Contractual ban on offering goods and services via other online intermediation services under different conditions	Amazon E-book MFNs <sup>5</sup>	Art. 5 (b)
Limiting communication between app providers and their customers	Apple App Store Practices <sup>6</sup>	Art. 5 (c)
Use of user data in competition with the user	Amazon Buy Box, <sup>7</sup> Facebook leveraging <sup>8</sup>	Art. 6 (1) (a)
Preventing the deinstallation of preinstalled apps	Google Android <sup>9</sup>	Art. 6 (1) (b)
Preferencing own products and services in rankings	Google Shopping <sup>10</sup>	Art. 6 (1) (b)

This cepInput therefore examines whether companies can be tried and, where applicable, punished twice for the same conduct under both Art. 102 TFEU and the DMA. Basis for the study is the case law of the European Court of Justice (ECJ) and the General Court (GC) as well as the decision-making

<sup>1</sup> Proposal COM(2020) 842 of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector.

<sup>2</sup> Art. 3 (1) DMA defines when a company is a gatekeeper and Art. 3 (2) DMA when a company is presumed to be a gatekeeper. Central to this are user numbers and turnover resp. market capitalisation.

<sup>3</sup> Cafarra, C. / Scott Morton, F. (2021), [The European Commission Digital Markets Act: A translation](#).

<sup>4</sup> Likewise Fernandez, C. (2021), A New Kid on the Block: How Will Competition Law Get along with the DMA? *Journal of European Competition Law & Practice*, Vol. 12, p. 1-2 (1). The requirement is that a gatekeeper has a dominant market position, which is not necessarily the case.

<sup>5</sup> Case [AT.40153](#). The proceedings concluded with commitments being made by Amazon.

<sup>6</sup> Case [AT.40716](#), Case [AT.40437](#), Case [AT.40652](#). All proceedings are pending at the Commission.

<sup>7</sup> Case [AT.40703](#). The proceedings are pending at the Commission.

<sup>8</sup> Case [AT.40684](#). The proceedings are pending at the Commission.

<sup>9</sup> Case [AT.40099](#). Google's appeal against the decision is the subject of Case T-604/18.

<sup>10</sup> Case [AT.39740](#). Google's appeal against the decision is the subject of Case T-612/17.

practice of the Commission since the Commission rules on both the application of the DMA and – in conjunction with Member State authorities – on the application of Art. 102 TFEU. The affected companies can bring an action for annulment in the GC against decisions of the Commission [Art. 256 (1), Art. 263 TFEU] and have a right to appeal to the ECJ on points of law only against decisions of the GC [Art. 256 (1) AEUV]. It is presumed that the ECJ will follow the Commission’s doctrine which says that the DMA is not a competition law measure but serves to harmonise the internal market [Recitals 7 et seq.]. The study will first set out the envisaged relationship between the DMA and Art. 102 TFEU (Section 2) and how – particularly in competition law – the EU law ban on trying a defendant twice [Art. 50 CFR] has been further defined by the ECJ (Section 3). These principles will then be applied to the relationship between Art. 102 TFEU and the DMA (Section 4). The results arising from the cepInput are summarised in the conclusion (Section 5).

## 2 DMA’s definition of its relationship with Art. 102 TFEU

The DMA expressly stipulates [Art. 1 (6), Recital 10] that it is “without prejudice” to the application of Art. 102 TFEU because according to the Commission, the two laws have different regulatory objectives: whilst the objective of Art. 102 TFEU is to ensure undistorted competition in the internal market, the DMA aims to ensure that markets where gatekeepers are present are and remain contestable and fair. The DMA should therefore have no influence on the application of competition law. Practices that were previously punishable as an abuse of dominance should remain punishable and be prosecuted even where there is a breach of the DMA, and vice versa.<sup>11</sup>

## 3 Prohibition on being tried and punished twice (“ne bis in idem”) under EU law

### 3.1 General rule

The principle of “ne bis in idem” is codified in Art. 50 of the Charter of Fundamental Rights of the EU (CFR). According to this provision, no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the EU.

The fundamental rights under the Charter are binding on institutions, bodies and other agencies of the EU as well as Member States when they are implementing EU law [Art. 51 (1) CFR]. Proceedings under Art. 102 TFEU may be brought both by the Commission and by Member States, proceedings under the DMA, on the other hand, can only be brought by the Commission. However, the Charter of Fundamental Rights applies in all cases where there is interaction between Art. 102 TFEU and the DMA.

Although the wording of Art 50 CFR refers to an “offence” and “criminal proceedings”, these terms are not restricted to proceedings in the criminal courts but also include administrative penalties insofar as they are criminal in nature.<sup>12</sup> Whether a penalty is criminal in nature is determined according to the legal classification of the offence under the applicable law, the nature of the offence, and the nature

<sup>11</sup> See also Breton, T. (2021), [DSA/DMA Myths – Will the EU regulation create legal uncertainty?](#), stating that the DMA will not limit the EU's ability to intervene via the enforcement of competition rules.

<sup>12</sup> ECJ, Case C-617/10 (Åkerberg Fransson), Judgement of 26 February 2013, [ECLI:EU:C:2013:105](#), para. 34.

and severity of the possible penalty.<sup>13</sup> The legal classification refers to whether or not the infringement is officially designated as a criminal offence under the applicable law. As regards the nature of the offence, the ECJ asks, in particular, whether the penalty imposed has a punitive purpose.<sup>14</sup> According to the ECJ, this is not the case where the recipient of aid, who has given false information in their aid application, is temporarily banned from other subsidies, because the purpose of such a penalty is to protect the management of EU funds.<sup>15</sup> Typically, however, a financial penalty which goes beyond the compensation of loss does have a punitive purpose.<sup>16</sup> It is undisputed that penalties under competition law are covered by Art. 50 CFR.<sup>17</sup> The same must apply to the DMA considering the severity of the possible fines – up to 10% of annual turnover. It is likewise undisputed that Art. 50 CFR also protects legal persons from being tried or punished twice.<sup>18</sup>

In terms of content, Art. 50 CFR prohibits “a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person”.<sup>19</sup> It therefore not only prohibits a duplication of punishment, but also, following a final ruling in the proceedings, any further prosecution for the same act. According to the ECJ, an “act” in this regard is “a set of concrete circumstances which are inextricably linked together”.<sup>20</sup> Art. 50 therefore prohibits further prosecution of the same defendant based on identical facts, following a final ruling in the proceedings. By contrast, there is no breach of Art. 50 CFR where two criminal proceedings based on identical facts are brought at the same time. If one of these proceedings is subject to a final ruling, however, the other proceedings cannot be continued.<sup>21</sup>

### 3.2 Distinctive features of competition law

In cases where both proceedings relate to competition law, however, the settled case law of the European courts takes a different approach.<sup>22</sup> In this case, it focuses on the “threefold identity”: in

<sup>13</sup> ECJ, Case C-489/10 (Bonda), Judgement of 5 June 2012, [ECLI:EU:C:2012:319](#), para 37; Case C-617/10 (Åkerberg Fransson), Judgement of 26 February 2013, [ECLI:EU:C:2013:105](#), para. 35; Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 26; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 28.

<sup>14</sup> ECJ, Case C-489/10 (Bonda), Judgement of 5 June 2012, [ECLI:EU:C:2012:319](#), para 39; Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 31; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 33.

<sup>15</sup> ECJ, Case C-489/10 (Bonda), Judgement of 5 June 2012, [ECLI:EU:C:2012:319](#), para 40.

<sup>16</sup> See ECJ, Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 32; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 34.

<sup>17</sup> E.g. Jarass, H. (2021), Charta der Grundrechte der Europäischen Union, 4<sup>th</sup> Edn., Art. 50, para. 5; Folz, H.-P., in: Vedder, C. / Heintschel von Heinegg, W. (Hrsg), Europäisches Unionsrecht, 2nd Edn. 2018, Art. 50 CFR, para. 3; Yomere, A. (2010), Die Problematik der Mehrfachanktionierung von Unternehmen im EG-Kartellrecht, p. 218 et seq.

<sup>18</sup> E.g. Jarass, H. (2021), Charta der Grundrechte der Europäischen Union, 4<sup>th</sup> ed., Art. 50, para. 7; Lemke, S., in: von der Groeben, H. / Schwarze, J. / Hatje, A. (Hrsg), Europäisches Unionsrecht, 7<sup>th</sup> ed. 2015, Art. 50 CFR, para. 6; Streinz, R. (2018), EUV/AEUV, 3<sup>rd</sup> ed., Art. 50 CFR, para. 11; Yomere, A. (2010), Die Problematik der Mehrfachanktionierung von Unternehmen im EG-Kartellrecht, p. 198.

<sup>19</sup> ECJ, Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 25; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 27.

<sup>20</sup> ECJ, Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 35; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 37.

<sup>21</sup> Cf. facts in UCJ, Case C-398/12 (M), [ECLI:EU:C:2014:1057](#).

<sup>22</sup> On all of this see e.g. Yomere, A. (2010), Die Problematik der Mehrfachanktionierung von Unternehmen im EG-Kartellrecht; di Federico, G. (2011), EU Competition Law and the Principle of *Ne Bis in Idem*, European Public Law, Vol. 17, p. 241-260; Brammer, S. (2013), Ne bis in idem im europäischen Kartellrecht – Neue Einsichten zu einem alten Grundsatz, Europäische Zeitschrift für Wirtschaftsrecht, Vol. 16, p. 617-622; Zelger, B. (2021), The Principle of ne bis in idem in EU Competition Law, Wirtschaft und Wettbewerb, Vol. 71, p. 261-268; Petr, M. (2008), The Ne Bis In Idem Principle in Competition Law, European Competition Law Review, Vol. 29, p. 392-400; Nazzini, R. (2016), Parallel Proceedings in EU Competition Law: *Ne Bis in Idem* as a Limiting Principle, in: van Bockel (ed.), Ne Bis in Idem in EU Law, p. 131-166; Raisch, P.

addition to identity of the defendant and identity of the facts, identity of the protected legal interest is required for application of the “ne bis in idem” principle.<sup>23</sup> This means that prosecuting the same person twice is only prohibited where the criminal provisions being applied in each case have the same protective purpose. In this regard, the European courts take the position that European competition law and national competition law have differing protective purposes<sup>24</sup> because European competition law protects European competition, whereas national competition law protects competition at national level.<sup>25</sup> This means that there is no breach of the “ne bis in idem” principle where a company is penalised twice for the same conduct due to a breach of both European competition law and a breach of national competition law.<sup>26</sup> In such cases, the fine already imposed just has to be taken into account.<sup>27</sup> The ECJ continued to uphold case law on the requirement of identity of the protected legal

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(1979), „Ne bis in idem“ bei Sanktionen nach deutschem und europäischem Kartellrecht, in: Sandrock, O. (ed.), Festschrift für Günther Beitzke, p. 965-977; Lillich, K. (1978), Das Doppelstrafverbot bei Kartelldelikten im deutschen Recht und im Recht der Europäischen Gemeinschaft.

- <sup>23</sup> ECJ, Joined Cases C-204/00 P et al. (Aalborg Portland et al. v. Commission), Judgement of 7 January 2004, [ECLI:EU:C:2004:6](#), para. 338; Joined Cases C-101/07 P and C-110/07 P (Coop de France bétail et viande et al. v. Commission), Judgement of 18 December 2008, [ECLI:EU:C:2008:741](#), para. 127 et seq.; Case C-17/10 (Toshiba Corporation et al.), Judgement of 14 February 2012, [ECLI:EU:C:2012:72](#), para. 97; Case C-857/19 (Slovak Telekom), Judgement of 25 February 2021, [ECLI:EU:C:2021:139](#), para. 43; GC, Joined Cases T-236/01 et al. (Tokai Carbon et al. v. Commission), Judgement of 29 April 2004, [ECLI:EU:T:2004:118](#), para. 134; Case 322/01 (Roquette Frères v. Commission), Judgement of 27 September 2006, [ECLI:EU:T:2006:267](#), para. 278; Case T-329/01 (Archer Daniels Midland v. Commission), Judgement of 27 September 2006, [ECLI:EU:T:2006:268](#), para. 290; Case T-38/02 (Groupe Danone v. Commission), Judgement of 25 October 2005, [ECLI:EU:T:2005:367](#), para. 185; Case T-59/02 (Archer Daniels Midland v. Commission), Judgement of 27 September 2006, [ECLI:EU:T:2006:272](#), para. 61; Case T-161/05 (Hoechst v. Commission), Judgement of 30 September 2009, [ECLI:EU:T:2009:366](#), para. 149; Case T-24/07 (ThyssenKrupp Stainless v. Commission), Judgement of 1 July 2009, [ECLI:EU:T:2009:236](#), para. 179; Case T-235/07 (Bavaria v. Commission), Judgement of 16 June 2011, [ECLI:EU:T:2011:283](#), para. 186; T-343/08 (Arkema France v. Commission), Judgement of 17 May 2011, [ECLI:EU:T:2011:218](#), para. 81.
- <sup>24</sup> ECJ, Case 14/68 (Walt Wilhelm et al. v. Bundeskartellamt), Judgement of 13 February 1969, [ECLI:EU:C:1969:4](#), para. 11; GC Case T-149/89 (Sotralentz v. Commission), Judgement of 6 April 1995, [ECLI:EU:T:1995:69](#), para. 29; T-223/00 (Kyowa Hakko Kogyo/Commission), Judgement of 9 July 2003, [ECLI:EU:T:2003:194](#), para. 100; Joined Cases T-236/01 et al. (Tokai Carbon et al. v. Commission), Judgement of 29 April 2004, [ECLI:EU:T:2004:118](#), para. 133; Case 322/01 (Roquette Frères v. Commission), Judgement of 27 September 2006, [ECLI:EU:T:2006:267](#), para. 279. By contrast, Advocate General Ruiz-Jarabo Colomer, Case C-213/00 P (Italcementi v. Commission), Opinion of 11 February 2003, [ECLI:EU:C:2003:84](#), para. 91, expressly took the view that European and national competition law protect the same legal interest. Soltesz, U. / Marquier, J. (2006), Hält „doppelt bestraft“ wirklich besser? - Der ne bis in idem-Grundsatz im Europäischen Netzwerk der Kartellbehörden, Europäische Zeitschrift für Wirtschaftsrecht, Vol. 9, p. 102-107 (103), cite this when they argue that the ECJ no longer assumes any difference between the legal interests in these cases. This cannot be inferred from the judgement however.
- <sup>25</sup> Yomere, A. (2010), Die Problematik der Mehrfachsanktionierung von Unternehmen im EG-Kartellrecht, p. 83; Tomkins, J., in: Peers, S. et al. (ed.), The EU Charter of Fundamental Rights (2014), Art. 50 CFR para. 50.73. Cf. in the context of decisions by non-European authorities ECJ, Case C-289/04 P (Showa Denko v. Commission), Judgement of 29 June 2006, [ECLI:EU:C:2006:431](#), para. 28 et seq.; Case C-308/04 P (SGL Carbon v. Commission), Judgement of 29 June 2006, [ECLI:EU:C:2006:433](#), para. 52 et seq.; GC, Case T-223/00 (Kyowa Hakko Kogyo v. Commission), Judgement of 9 July 2003, [ECLI:EU:T:2003:194](#), para. 101; Case T-224/00 (Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission), Judgement of 9 July 2003, [ECLI:EU:T:2003:195](#), para. 90. Against the presumption of different objectives: Ziele Streinz, R. (2018), EUV/AEUV, 3<sup>rd</sup> ed., Art. 50 CFR, para. 8; van Bockel, W.B. (2012), The *ne bis in idem* principle in the European Union legal order: between scope and substance, ERA Forum, Vol. 13, p. 325-347 (p. 345 et seq.); Brammer, S. (2009), Co-operation between National Competition Agencies in the Enforcement of EC Competition Law, p. 388 et seq.; Zelger, B. (2021), The Principle of ne bis in idem in EU Competition Law, *Wirtschaft und Wettbewerb*, Vol. 71, p. 261-268; Lo Schiavo, G. (2018), The principle of ne bis in idem and the application of criminal sanctions: of scope and restrictions, *European Constitutional Law Review*, Vol. 14, p. 644-663 (654) and – in the context of Art. 101 TFEU – AG Bobek, Case C-151/20 (Nordzucker et al.), [ECLI:EU:C:2021:681](#), para. 3.
- <sup>26</sup> GC, Case T-141/89 (Tréfileurope v. Commission), Judgement of 6 April 1995, [ECLI:EU:T:1995:62](#), para. 191; Case T-149/89 (Sotralentz v. Commission), Judgement of 6 April 1995, [ECLI:EU:T:1995:69](#), para. 29; Case T-224/00 (Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission), Judgement of 9 July 2003, [ECLI:EU:T:2003:195](#), para. 87; Joined Cases T-236/01 et al. (Tokai Carbon et al. v. Commission), Judgement of 29 April 2004, [ECLI:EU:T:2004:118](#), para. 132.
- <sup>27</sup> ECJ, Case 14/68 (Walt Wilhelm et al. v. Bundeskartellamt), Judgement of 13 February 1969, [ECLI:EU:C:1969:4](#), para. 11; Case 7/72 (Boehringer Mannheim v. Commission), Judgement of 14 December 1972, [ECLI:EU:C:1972:125](#), para. 3; GC,

interest – despite calls to the contrary from numerous Advocate Generals<sup>28</sup> and criticism in academic literature<sup>29</sup> – even after the Charter of Fundamental Rights came into force, most recently in a Judgement in 2021.<sup>30</sup>

## 4 How the principle applies to the relationship between the DMA and Art. 102 TFEU

In the case of breaches of the DMA and Art. 102 TFEU, it is necessary to distinguish between being tried twice and being punished twice.

### 4.1 Being tried twice

#### 4.1.1 Position of Commission and ECJ

As stated, the DMA is to be without prejudice to the application of competition law. The fact that proceedings on imposing a fine under the DMA have already been concluded should not therefore prevent the institution of proceedings on imposing a fine under Art. 102 TFEU, based on the same circumstances, and vice versa, because, if the conclusion of proceedings under one of these laws meant that proceedings under the other law were no longer permitted, it would not be possible to say that the DMA is without prejudice to the application of competition law. In principle, Art. 50 CFR prohibits trying the same defendant again, based on the same circumstances, after he or she has already been finally acquitted or convicted. Apparently, however, in the Commission's view, ECJ case law on "threefold identity" applicable in competition law cases, which also requires the protected legal interest to be identical in order to prohibit a second trial, also applies to the relationship between the DMA and Art. 102 TFEU, i.e. to a scenario where European competition law is dealing not with competition law in the Member States, but with European internal market law. Two arguments support this:

Firstly, the Commission emphasises that competition law and the DMA protect different legal interests: Art. 102 TFEU aims to protect undistorted competition in the internal market; the DMA, on the other hand, aims to ensure that markets where gatekeepers are present are and remain contestable and

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Case T-141/89 (*Tréfileurope v. Commission*), Judgement of 6 April 1995, [ECLI:EU:T:1995:62](#), para. 191; Case T-149/89 (*Sotralentz v. Commission*), Judgement of 6 April 1995, [ECLI:EU:T:1995:69](#), para. 29; Case T-223/00 (*Kyowa Hakko Kogyo v. Commission*), Judgement of 9 July 2003, [ECLI:EU:T:2003:194](#), para. 98; Case T-224/00 (*Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*), Judgement of 9 July 2003, [ECLI:EU:T:2003:195](#), para. 87; Joined Cases T-236/01 et al. (*Tokai Carbon et al. v. Commission*), Judgement of 29 April 2004, [ECLI:EU:T:2004:118](#), para. 132; Case 322/01 (*Roquette Frères v. Commission*), Judgement of 27 September 2006, [ECLI:EU:T:2006:267](#), para. 279.

<sup>28</sup> AG Kokott, Case C-17/10 (*Toshiba Corporation et al.*), Opinion of 8 September 2011, [ECLI:EU:C:2011:552](#), para. 111 et seq.; AG Wahl, Case C-617/17 (*Powszechny Zakład Ubezpieczeń na Życie*), Opinion of 29 November 2018, [ECLI:EU:C:2018:976](#), para. 45 et seq. See also AG Sharpston, Case C-467/04 (*Gasparini et al.*), Opinion of 28 September 2006, [ECLI:EU:C:2006:406](#), para. 101 et seq. and AG Campo Sanchez-Bordona, Case C-524/15 (*Menci*), Opinion of 12 September 2017, [ECLI:EU:C:2017:667](#), para. 103, who also plead in favour of a uniform interpretation of *idem* but without calling for a departure from the ECJ's case law on competition law.

<sup>29</sup> E.g. Van Bockel, W.B. (2009), *The ne bis in idem principle in EU law*, p. 245 et seq.; Zeder, F. (2015), *Ne bis in idem als (ältestes) Grundrecht: Kritischer Blick auf die Judikatur des EuGH im Wettbewerbsrecht und bei bestimmten Sanktionen*, in: Hochmayr, G. (ed.), "Ne bis in idem" in Europa, p. 145 (155 et seq.); Nehl, H. P., in: Heselhaus, S. / Nowak, C. (eds.), *Handbuch der Europäischen Grundrechte*, 2<sup>nd</sup> ed. (2020), § 62 *Ne bis in idem* (Doppelbestrafungsverbot), para. 24; Rosanò, A. (2017), *Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice*, *German Law Journal*, Vol. 18, pp. 39-58 (51 et seq.); Brammer, S. (2013), *Ne bis in idem im europäischen Kartellrecht – Neue Einsichten zu einem alten Grundsatz*, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 16, p. 617-622 (619).

<sup>30</sup> ECJ, Case C-857/19 (*Slovak Telekom*), Judgement of 25 February 2021, [ECLI:EU:C:2021:139](#).

fair. This difference in the protected legal interests is, as stated, at the heart of the competition case law of the ECJ and GC relating to the “ne bis in idem” principle, which is based on “threefold identity”. Presumably, the Commission is also<sup>31</sup> emphasising the difference between the protected legal interests to keep open the possibility of trying a defendant twice.

Secondly, the Commission has in the past already imposed a competition law fine on a company which had already been punished in national proceedings not related to competition law: In 2011, it fined *Telekomunikacja Polska* for breaching Art. 102 TFEU<sup>32</sup> after the Polish telecommunications authorities had already convicted and fined *Telekomunikacja Polska* for a breach of Polish telecommunications law – i.e. provisions not related to competition law. The Commission rejected the company’s argument that this was a breach of the “ne bis in idem” principle. In doing so, it expressly cited the fact that competition case law required identity of the protected legal interest, which was lacking in this case.<sup>33</sup> The logical conclusion from this is that the Commission wants to apply the case law on “threefold identity” to the relationship between the DMA and Art. 102 TFEU so that the legal principle of “ne bis in idem” will not apply and trying a defendant twice will be unproblematic.

The Commission's arguments in the *bpost* case point in the same direction as the decision against *Telekomunikacja Polska*. In *bpost*, the Belgian postal regulator and then the Belgian competition authority conducted proceedings against *bpost* that were based on the same facts. The competition authority imposed a fine for, inter alia, a violation of Article 102 TFEU. In its arguments before the ECJ, the Commission advocated the application of the criterion of the identity of the protected legal interest as applied in competition law.<sup>34</sup>

The ECJ has not yet expressed an opinion on the application of the “ne bis in idem” principle in cases where competition law and another area of law coincide. Although the Commission’s decision in *Telekomunikacja Polska* was challenged, the plaintiff did not apparently cite any violation of the “ne bis in idem” principle. In any event, the European courts did not comment on this issue.<sup>35</sup> As Advocate General Kokott indicated in another case,<sup>36</sup> the ECJ has only focussed on identity of the protected legal interest in competition law cases. In all the corresponding cases, both relevant sets of proceedings related to competition law. In other areas of law – such as disciplinary law for EU officials,<sup>37</sup> evasion of value added tax,<sup>38</sup> insider trading and market manipulation,<sup>39</sup> cross-border drug trafficking<sup>40</sup> – the ECJ

<sup>31</sup> The primary reason is probably the choice of Art. 114 TFEU as legal basis. Classifying the DMA as a law which protects the same legal interests as competition law would raise the question of whether Art. 103 TFEU – rather than Art. 114 TFEU – was actually the correct legal basis. Under Art. 103 TFEU, the European Parliament would only have to be consulted; under Art. 114 TFEU, its approval within the ordinary legislative procedure is required.

<sup>32</sup> European Commission, Case COMP/39.525 (*Telekomunikacja Polska*), Decision of 22 June 2011.

<sup>33</sup> European Commission, Case COMP/39.525 (*Telekomunikacja Polska*), Decision of 22 June 2011, para. 135 et seq.

<sup>34</sup> AG Bobek, Case C-117/20 (*bpost*), Opinion of 2 September 2021, [ECLI:EU:C:2021:680](#), para. 30.

<sup>35</sup> GC, Case T-486/11 (*Orange Polska v. Commission*), Judgement of 17 December 2015, [ECLI:EU:T:2015:100](#); ECJ, Case C-123/16 P (*Orange Polska v Commission*), Judgement of 25 July 2018, [ECLI:EU:C:2018:590](#).

<sup>36</sup> AG Kokott, Case C-17/10 (*Toshiba Corporation et al.*), Opinion of 8 September 2011, [ECLI:EU:C:2011:552](#), para. 116

<sup>37</sup> ECJ, Joined Cases 18/65 and 35/65 (*Gutmann v. Commission of the E*), Judgement of 15 March 1967, [ECLI:EU:C:1967:6](#).

<sup>38</sup> ECJ, Case C-617/10 (*Åkerberg Fransson*), Judgement of 26 February 2013, [ECLI:EU:C:2013:105](#); Case C-524/15 (*Menci*), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#).

<sup>39</sup> ECJ, Case C-537/16 (*Garlsson Real Estate et al.*), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#); Joined Cases C-596/16 and C-597/16 (*di Puma*), Judgement of 20 March 2018, [ECLI:EU:C:2018:192](#).

<sup>40</sup> ECJ, Case C-436/04 (*van Esbroeck*), Judgement of 9 March 2006, [ECLI:EU:C:2006:165](#); Case C-150/05 (*van Straaten*), Judgement of 28 September 2006, [ECLI:EU:C:2006:614](#).

has never enquired about identity of the protected legal interest. In some cases, it has even expressly ruled it to be irrelevant.<sup>41</sup>

Nevertheless, a glance at the existing case law seems to indicate that the ECJ would permit the Commission to try a defendant twice because, as far as can be ascertained, the European courts have never yet annulled a fine, imposed by the Commission, due to a breach of the “ne bis in idem” principle. Furthermore, in its *Deutsche Telekom* case, the GC – fully in line with the decision in *Telekomunikacja Polska* - emphasised the extent to which telecommunications law differs in its objective from competition law.<sup>42</sup> In view of this basic tendency towards support for the Commission and for prosecuting defendants, it is likely that, when it comes to the relationship between the DMA and Art. 102 TFEU, the ECJ will also focus on the threefold identity criterion and permit defendants to be tried twice.<sup>43</sup>

#### 4.1.2 Assessment

The ECJ should refrain from extending the case law on threefold identity to the relationship between the DMA and Art. 102 TFEU. Even when applied to cases relating purely to competition law, the criterion of threefold identity is out of place because, as stated, in other areas of law, the ECJ only requires identity of defendant and identity of the facts. It has, in fact, expressly rejected the criterion of identity of the protected legal interest in those areas. For the sake of a uniform interpretation of the “ne bis in idem” principle, the criterion of identity of the protected legal interest should also be abandoned in the area of competition law.<sup>44</sup> In peripheral areas of the “ne bis in idem” principle, its interpretation may differ from one area of law to another, but in its core, its interpretation should not differ substantially depending on the area of law concerned.<sup>45</sup> The question of whether identity of the protected legal interest is a necessary criterion, falls within this core of the “ne bis in idem” principle.

Such coherence of interpretation could also be achieved if the ECJ made identity of the protected legal interest a requirement in other areas of law as well. This is prevented, however, by Art. 52 (3) CFR which states that fundamental rights under the Charter which correspond to rights under the ECHR have the same meaning and scope as the corresponding ECHR rights. The principle of “ne bis in idem”

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<sup>41</sup> ECJ, Case C-436/04 (van Esbroeck), Judgement of 9 March 2006, [ECLI:EU:C:2006:165](#), para. 32; Case C-524/15 (Menci), Judgement of 20 March 2018, [ECLI:EU:C:2018:197](#), para. 36; Case C-537/16 (Garlsson Real Estate et al.), Judgement of 20 March 2018, [ECLI:EU:C:2018:193](#), para. 38.

<sup>42</sup> GC Case T-271/03 (Deutsche Telekom v. Commission), Judgement of 10 April 2008, [ECLI:EU:T:2008:101](#), para. 113. The decision was upheld by the ECJ in Case C-280/08 P (Deutsche Telekom v. Commission), Judgement of 14 October 2010, [ECLI:EU:C:2010:603](#).

<sup>43</sup> Likewise regarding the admissibility of a second prosecution Monti, G. (2021), *The Digital Markets Act – Institutional Design and Suggestions for Improvement*, [TILEC Discussion Paper DP 2021-004](#), p. 14 et seq.; Schweitzer, H. (2021), [The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal](#).

<sup>44</sup> AG Kokott, Case C-17/10 (Toshiba Corporation et al.), Opinion of 8 September 2011, [ECLI:EU:C:2011:552](#), para. 117; AG Wahl, Case C-617/17 (Powszechny Zakład Ubezpieczeń na Życie), Opinion of 29 November 2018, [ECLI:EU:C:2018:976](#), para. 46 et seq.; Hochmayr, G., in: Pechstein, M. / Nowak, C. / Häde, U. (ed.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Vol. I, 2017, Art. 50 GRC, para. 13; Zelger, B. (2021), *The Principle of ne bis in idem in EU Competition Law*, *Wirtschaft und Wettbewerb*, Vol. 71, p. 261-268; Nazzini, R. (2016), *Parallel Proceedings in EU Competition Law: Ne Bis in Idem as a Limiting Principle*, in: van Bockel (Hrsg), *Ne Bis in Idem in EU Law*, p. 131-166.

<sup>45</sup> See GA Kokott, Case C-17/10 (Toshiba Corporation et al.), Opinion of 8 September 2011, [ECLI:EU:C:2011:552](#), para. 117; Sharpston, E. / Fernandez Martin, J. M. (2007-08), *Some Reflections on Schengen Free Movement Rights and the Principle of Ne Bis In Idem*, *Cambridge Yearbook of European Legal Studies*, Vol. 10, p. 413-448. See also AG Bobek, Case C-117/20 (bpost), Opinion of 2 September 2021, [ECLI:EU:C:2021:680](#), paras. 95, 132 et seq and Case C-151/20 (Nordzucker et al.), [ECLI:EU:C:2021:681](#), para. 39. While AG Bobek argues for a uniform interpretation, he supports extending the criterion of threefold identity to non-competition cases.

is contained in Art. 4 of Protocol No. 7 to the ECHR. The ECtHR has consistently ruled in this regard that identity of the protected legal interest is not necessary.<sup>46</sup> Therefore, when interpreting Art. 50 CFR, the focus should not be on the criterion of threefold identity but only on identity of the defendant and the facts.<sup>47</sup>

On that basis, we urge that the scope of the criterion of threefold identity not be extended to the relationship between the DMA and Art. 102 TFEU. In this case, the ECJ should focus solely on identity of the defendant and of the facts. Where both exist, a decision under the DMA should preclude proceedings under Art. 102 TFEU, and vice versa.

## 4.2 Being punished twice

On the question of whether it is permissible not only to try but also punish a defendant twice due to a breach of the DMA and of Art. 102 TFEU, the Commission is less clear. The statement that the DMA is “without prejudice” to the application of Art. 102 TFEU [Recital 10], i.e. that enforcing the DMA will have no effect on the enforcement of Art. 102 TFEU, indicates, if taken literally, that the Commission also considers it lawful to punish a defendant twice because otherwise enforcement of the DMA would influence the enforcement of Art. 102 TFEU in the area of sentencing. The DMA would influence enforcement of Art. 102 TFEU to the extent that when it came to sentencing, the Commission would have to take account of any fine imposed in the DMA proceedings. This result is supported by the decision in *Telekomunikacja Polska*. There, the EU Commission took account of the fine imposed by the national authority to avoid punishing the defendant twice but took the view that it was not obliged to do so.

In light of the case law, however, it may be assumed that such an offset is obligatory. Where fines are imposed by competition authorities in the Member States, the Commission is obliged to reduce the fines which it imposes by the amount imposed by the competition authority in the Member State based on the same facts. There is no reason to treat the relationship between the DMA and Art. 102 TFEU any differently. In both cases, the only reason why the ban on trying a defendant twice does not apply is the lack of identity of the protected legal interest. Both cases have as their subject matter the conduct of a company in the European market, and not, for example, conduct in the European and a third-country market. Where the DMA and Art. 102 TFEU coincide, it is frequently the same authority, namely the Commission, which imposes both fines; this fact is another argument supporting an obligation for the offsetting of fines because here the link between the two proceedings is even closer than where one set of proceedings takes place before the Commission and the other before an authority in a Member State.

The European Parliament should – following the ECJ – amend the Commission’s draft law accordingly.

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<sup>46</sup> E.g. ECtHR (GC), application no. 14939/03 (*Zolotukhin v. Russland*), Judgement of 10 February 2009, [ECLI:CE:ECHR:2009:0210JUD001493903](#), para. 82; application no. 24130/11 and 29758/11 (*A and B v. Norway*), Judgement of 15 November 2016, [ECLI:CE:ECHR:2016:1115JUD002413011](#), para. 108; application no. 54012/10 (*Mihalache v. Romania*), Judgement of 8 July 2019, [ECLI:CE:ECHR:2019:0708JUD005401210](#), para. 67.

<sup>47</sup> Likewise Brammer, S. (2013), *Ne bis in idem im europäischen Kartellrecht – Neue Einsichten zu einem alten Grundsatz*, Europäische Zeitschrift für Wirtschaftsrecht, Vol. 16, p. 617-622.

## 5 Conclusion

The proposed Digital Markets Act (DMA) is introducing strict obligations for some large digital companies. These aim to ensure that digital markets are contestable and fair. According to the wording of the DMA – that it is “without prejudice” to EU competition rules –, Big Tech companies such as Google or Facebook are at risk of double jeopardy, i.e. being tried and punished twice in the event of infringements.

The European Commission uses the diverging regulatory objectives of the DMA and EU competition law to justify their parallel application. This nevertheless contradicts the principle of double jeopardy which precludes being tried and punished twice (“ne bis in idem”).

Based on its earlier case law, the European Court of Justice (ECJ) is likely to rule that trying a defendant twice is lawful. This should be rejected. The ECJ should abandon its previous case law.

According to the ECJ, it is unlawful to punish a defendant twice. Any fine imposed in the first proceedings must therefore be taken into account in the second proceedings. The European Parliament should – following the ECJ – amend the Commission’s draft law accordingly.



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