FACULTY OF LAW

LUND UNIVERSITY

Emilia Holmberg

Ne Bis In Idem in EU Competition Law

The Application of the Principle on the Relationship Between Article 102 TFEU and the Digital Markets Act

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Supervisor: Xavier Groussot

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Summary

During and after the adoption of the Digital Markets Act (DMA), concerns have been raised regarding the regulation's relationship with the prohibition on abuse of dominant position in Article 102 TFEU. One possible concern regards the principle of *ne bis in idem*. The DMA is to be applied without prejudice to Article 102 TFEU. It is thus possible for an undertaking to be subject to obligations imposed by both Article 102 TFEU and the DMA. The aim of this thesis is therefore to examine how the principle of *ne bis in idem* is applied in EU competition law and how it will be applied on the relationship between Article 102 TFEU and the DMA. In order to fulfil this aim, a legal dogmatic method and an EU legal method are used.

The case law from the CJEU regarding the application of the *ne bis in idem* principle in competition law cases has been criticised by Advocate Generals and legal scholars. In March 2022, the CJEU delivered two judgments that fundamentally altered the principle's application in competition law. From the new case law, it follows that the objectives of Article 102 TFEU and the DMA will be of great importance when determining if there has been a violation of the *ne bis in idem* principle. If Article 102 TFEU and the DMA pursue different objectives, a limitation of the *ne bis in idem* principle might be justified in accordance with Article 52(1) of the Charter. However, if they pursue the same objective, a limitation can never be justified.

The objective of Article 102 TFEU is to ensure that competition is not distorted in the internal market, whereas the objective of the DMA is to ensure a contestable and fair digital sector where gatekeepers are present. The objective of the DMA is thus complementary to, but different from, the objective of Article 102 TFEU. However, the objective of the DMA has been contested in the doctrine and it has been argued that the objective of the DMA includes the objective of Article 102 TFEU and competition law. It is therefore unclear whether the regulation pursues a different objective than Article 102 TFEU.

The CJEU has been restrictive in finding the *ne bis in idem* principle applicable in competition law. It has also considered sector-specific regulation with the purpose of promoting competition to pursue a different objective than competition law. The court has, however, not provided further guidance on how to differentiate objectives.

Given the restrictive approach of applying the *ne bis in idem* principle in competition law cases, this thesis concludes that parallel proceedings under the DMA and Article 102 TFEU will, in accordance with the current case law, likely constitute a justified limitation if the *ne bis in idem* criteria are found fulfilled. However, it falls within the jurisdiction of the CJEU to determine the objective of the DMA. Further litigation in the area is therefore needed and expected.

Sammanfattning

Under processen före och efter antagandet av Digital Markets Act (DMA) har det uppstått diskussioner om förordningens förhållande till förbudet mot missbruk av dominerande ställning i artikel 102 FEUF. Ett orosmoln är tillämpligheten av principen om *ne bis in idem*. DMA ska tillämpas utan att det påverkar tillämpningen av artikel 102 FEUF, vilket innebär att ett företag kan omfattas av skyldigheter enligt både artikel 102 FEUF och DMA. Syftet med denna uppsats är därför att undersöka hur *ne bis in idem*-principen tillämpas inom konkurrensrätten och hur den kommer att tillämpas på förhållandet mellan artikel 102 FEUF och DMA. För att uppfylla detta syfte används en rättsdogmatisk metod och en EU-rättslig metod.

EU-domstolens rättspraxis gällande tillämpningen av *ne bis in idem* inom konkurrensrätten har blivit kritiserad av generaladvokater och forskare. I mars 2022 meddelade EU-domstolen två domar som fundamentalt ändrade principens tillämpning inom konkurrensrätten. Av den nya rättspraxisen följer att syftena för artikel 102 FEUF och DMA kommer att vara av stor betydelse i bedömningen av om det har skett en överträdelse av *ne bis in idem*. Om artikel 102 FEUF och DMA har olika syften kan en begränsning av *ne bis in idem* vara motiverad i enlighet med artikel 52(1) i EU:s stadga om de grundläggande rättigheterna. Om de däremot har samma syfte kan en begränsning aldrig vara motiverad.

Syftet med artikel 102 FEUF är att säkerställa att konkurrensen på den inre marknaden inte snedvrids, medan syftet med DMA är att säkerställa att marknader där det finns så kallade grindvakter är och förblir öppna och rättvisa. DMA:s syfte är ett komplement till, men skiljer sig från, syftet med artikel 102 FEUF. DMA:s syfte har dock diskuterats i doktrinen och det har hävdats att DMA:s syfte omfattar syftet för artikel 102 FEUF och konkurrenslagstiftningen. Det är därför oklart om DMA har samma syfte som artikel 102 FEUF eller ej.

EU-domstolen har varit restriktiv när det gäller att finna *ne bis in idem* tilllämplig inom konkurrensrätten. EU-domstolen har i sin praxis angett att sektorspecifik reglering i syfte att främja konkurrensen har ett annat syfte än konkurrenslagstiftningen. Domstolen har dock inte gett någon ytterligare vägledning om hur syften ska åtskiljas.

Vid beaktande av EU-domstolens restriktiva tillämpning av *ne bis in idem* i praxis som rör konkurrensrätt, finner uppsatsen att separata förfaranden enligt DMA och artikel 102 FEUF sannolikt kommer att utgöra en motiverad begränsning, förutsatt att *ne bis in idem* anses vara tillämplig. Det faller dock inom EU-domstolens jurisdiktion att fastställa syftet med DMA. Ytterligare rättspraxis på området behövs och är därmed att förvänta.

Förord

Denna uppsats är det sista jag gör på juristprogrammet och därmed är min tid på juristprogrammet avklarad. Nu är det dags för mig att lämna universitetslivet och bege mig ut i arbetslivet.

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Abbreviations

Charter	The Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
DMA	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)
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
EU	European Union
Evaluation	Commission staff working document – Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997, 12 July 2021, SWD(2021) 199 final
NCA	National Competition Authority
Notice	Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)
Proposed DMA	Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, COM(2020) 842 final, 15 December, 2020
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The rise of digital technologies has changed our way of thinking and what we used to think was possible.[1] In 2019, Crémer, de Montjoye and Schweitzer published their report 'Competition policy for the digital era', which was prompted by an assignment from Commissioner Vestager[2] to explore competition policy with regard to the digital age.[3] There are several benefits of the digital era, i.a. increased accessibility of information and communication with anyone in the world. However, there are a few apprehensions, e.g. fears that a few platforms will dominate the economy and that the digital sector will favour the growth of such platforms.[4] The European Union (EU) aims to make the digital technologies work for businesses and people by ensuring a 'Europe fit for the digital age'.[5] Adapting to the digital age is one of the European Commission's (Commission) priorities for 2019–2024.[6]

The rules on competition contribute to several benefits for consumers. Some of these are lower prices, improved quality of goods and services, innovation and further choices.[7] The EU has stated that the rules on competition are 'designed to ensure fair and equal conditions for businesses, while leaving space for innovation, unified standards, and the development of small businesses'.[8] There have been discussions on whether the existing competition policy, i.a. Article 102 of the Treaty on the Functioning of the European Union (TFEU), is an appropriate tool to deal with competition in the digital market.[9] Article 102 TFEU prohibits abuse of a dominant position and enforcement under the Article occurs *ex post*.[10] The article does not prohibit the existence of a dominant position, only the abuse of such a position. It follows from the wording

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[1] European Commission, *Shaping Europe's Digital Future*, 19 February 2020, <https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf>, p. 14, visited 2023-03-13.

[2] Commissioner Margrethe Vestager is Executive Vice-President for A Europe Fit for the Digital Age and Competition.

[3] Crémer, de Montjoye and Schweitzer, *Competition policy for the digital era, Final report* (2019), p. 2.

[4] Ibid, p. 12.

[5] European Commission, *A Europe fit for the digital age*, < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en>, visited 2023-03-13.

[6] Von der Leyen, *Political Guidelines for the Next European Commission 2019-2024*, p. 4, <https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf>, visited 2023-03-13.

[7] European Commission, *Why is competition policy important for consumers?*, <https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en>, visited 2023-03-13.

[8] EU, *Competition*, <https://european-union.europa.eu/priorities-and-actions/actions-topic/competition_en>, visited 2023-05-10.

[9] Crémer, de Montjoye and Schweitzer, *Competition policy for the digital era, Final report* (2019).

[10] Cf. Recital 5 of the DMA.

of Article 102 TFEU that the article is non-exhaustive, it provides examples of different types of abuse. The different types of abuse are applicable on the digital market.[11] The existence of dominant positions in the digital market have also resulted in new forms of abuse.[12]

According to the Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997 (Evaluation) there is a need for vigilance in competition enforcement in digital markets. This need is due to the high level of concentration of economic power that exists in digital markets. Five of the ten largest companies in the world by market capitalisation are the so-called Big Five tech giants: Apple, Microsoft, Alphabet (Google), Amazon and Meta Platforms (Facebook). These are all digital conglomerates.[13] The European Commission has issued large fines on i.a. Google[14] and Microsoft[15].

A part of the EU's strategy for a Europe fit for the digital age is the Digital Markets Act (DMA)[16]. The DMA serves as a tool to ensure fair and open

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[11] Cf. Article 102 TFEU; Gerbrandy, 'General Principles of European Competition Law, in: Bernitz, Groussot, Paju & de Vries (Ed.), *General Principles of EU Law and the EU Digital Order* (2020), p. 310; Crémer, de Montjoye and Schweitzer, *Competition policy for the digital era, Final report* (2019), p. 3.

[12] Cf. Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, EU:T:2021:763.

[13] Gerbrandy, 'General Principles of European Competition Law, in: Bernitz, Groussot, Paju & de Vries (Ed.), *General Principles of EU Law and the EU Digital Order* (2020), p. 309; European Commission, *Commission staff working document – Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997* (2021), p. 13; Statista, *The 100 largest companies in the world by market capitalization in 2022*, <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/>, visited 2023-05-06.

[14] Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)); the decision was largely upheld in Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, EU:T:2021:763; on appeal, Case C-48/22 P, not yet decided; Commission Decision C(2018) 4761 final of the European Commission of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android); the decision was largely upheld in Case T-604/18, *Google Alphabet v Commission (Google Android)*, EU:T:2022:541; on appeal, C-738/22 P, not yet decided; Commission Decision of 20 March 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40411 – Google Search (AdSense)); on appeal Case T-334/19, not yet decided.

[15] Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 – Microsoft); the decision was largely upheld in Case T-201/04, *Microsoft v Commission*, EU:T:2007:289.

[16] 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).

digital markets.[17] According to Engel and Groussot, the DMA has the potential to revolutionise the framework for EU competition law.[18] The regulation was adopted in the autumn of 2022 and shall apply from 2 May 2023.[19] The DMA applies to gatekeepers that provide core platform services.[20] Gatekeepers are undertakings that have a significant impact on the internal market, provide a core platform service and have an entrenched and durable position.[21] As opposed to Article 102 TFEU, the DMA has an *ex ante* approach.[22]

One gatekeeper under the DMA will be Google.[23] Google has already gotten significant fines under Article 102 TFEU for abusing its dominant position on different occasions.[24] Since Google will be a gatekeeper, it will fall under the scope of the DMA and be subject to more regulations than dominant undertakings who do not qualify as gatekeepers. Google, as well as other gatekeepers who have a dominant position, will be subject to the DMA as well as Article 102 TFEU.[25]

When enforcement occurs under Article 102 TFEU as well as the DMA, the enforcers must respect fundamental rights.[26] According to Engel and Groussot, the DMA further has the potential to transform the application of fundamental rights in the digital sphere.[27] One of the fundamental rights in the EU is the right to not be prosecuted twice for the same offence. This right is known as the principle of *ne bis in idem* which translates literally from Latin to 'not twice about the same'.[28] The principle of *ne bis in idem* has a long history. Demosthenes reasoned in circa 355 BC that 'the laws forbid the same man to be tried twice on the same issue'. Now, the principle of *ne bis in idem* constitutes a fundamental principle of law and it can be found in several international law instruments and almost in every domestic legal order.[29]

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[17] European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>, visited 2023-03-13.

[18] Engel & Groussot, *The Digital Markets Act: A New Era for Competition Law and Fundamental Rights in the EU Digital Single Market*, (2022), p. 2.

[19] Cf. Article 54 DMA.

[20] Cf. Article 1(2) DMA.

[21] Article 3(1) DMA.

[22] Cf. Recitals 8, 73 and 76 of the DMA.

[23] Cf. Article 3 DMA.

[24] See footnote 14.

[25] Cf. Recital 10 of the DMA.

[26] Cf. Article 51 of the Charter.

[27] Engel & Groussot, *The Digital Markets Act: A New Era for Competition Law and Fundamental Rights in the EU Digital Single Market*, (2022), p. 2.

[28] Geiß and Bäumler, *Ne bis in idem* (2022), para. 2.

[29] See e.g. Article 14(7) of the 1966 International Covenant on Civil and Political Rights and Article 20 of the Statute of the International Criminal Court; Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 2 and 10; Geiß and Bäumler. *Ne bis in idem* (2022), para. 2.

The *ne bis in idem* principle was originally aimed at sanctions that are criminal.[30] However, the Court of Justice of the European Union (CJEU) has developed the application of the principle regarding competition law in its case law[31] and the CJEU now finds the *ne bis in idem* principle fully applicable in competition law cases.[32] The case law regarding the *idem* criteria (the same facts) in competition law has in the doctrine been considered less clear and precise compared to case law in other areas of law.[33] It can be noted that so far, the CJEU has rejected all arguments regarding the application of the *ne bis in idem principle* in competition law cases since it has not found the criteria for the application of the principle to be fulfilled.[34] The CJEU delivered two new cases[35] in March 2022 on the application of the *ne bis in idem* principle in competition law and hence, these have not been taken into consideration in the previous literature.

Following the adoption of the DMA, as well as during the process of its adoption, concerns have risen regarding the new regulation's similarities with the already existing Article 102 TFEU and the interaction between the two instruments. According to Regulation 1/2003[36] it is possible to have parallel proceedings in competition law.[37] Furthermore, according to the DMA, it is possible to have parallel proceedings with Article 102 TFEU.[38] The relationship between Article 102 TFEU and the DMA is however not thoroughly explained in the regulation. A possible concern regards the principle of *ne bis in idem*. It has been discussed whether the two instruments are of a resemblance that will make the principle of *ne bis in idem* applicable.[39] Due to these

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[30] Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013), p. 404.

[31] See e.g. Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, EU:C:1969:4, Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and Others v Commission (PVC II),* EU:C:2002:582, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6 and Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72.

[32] Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013), p. 404.

[33] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 41 and 233.

[34] See e.g. Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72; Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013), p. 404.

[35] Case C-117/20, *bpost*, EU:C:2022:202 and Case C-151/20, *Nordzucker and Others*, EU:C:2022:203.

[36] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[37] Cf. Recital 22 of Regulation 1/2003; Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, paras 81 and 82.

[38] Cf. Recital 10 of the DMA.

[39] See e.g. Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets*

existing concerns and new case law from the CJEU, it is of interest to examine how the *ne bis in idem* principle is applied in EU competition law and if the principle would be applicable on the relationship between Article 102 TFEU and the DMA.

1.2 Aim and Research Questions

In light of the above, the aim of this thesis is to examine how the principle of *ne bis in idem* is applied in EU competition law. This thesis will further examine this application with regard to the relationship between the abuse of dominant position in Article 102 TFEU and the DMA and answer if it is possible for an undertaking to infringe both these regulations and, if that is the case, if the principle of *ne bis in idem* will prevent double penalties.

To fulfil the aim of this thesis, the following research questions will be answered:

- How is the *ne bis in idem* principle applied in EU competition law?
- What is the objective of Article 102 TFEU?
- What is the objective of the DMA?
- What is the relationship between Article 102 TFEU and the DMA?
- Can the *ne bis in idem* principle be applied to the relationship between Article 102 TFEU and the DMA, and if not, should the *ne bis in idem* principle be applied to the relationship between Article 102 TFEU and the DMA?

1.3 Delimitations

With regard to the limited scope and the aim of this thesis, this thesis will focus on the principle of *ne bis in idem* in EU competition law. How the principle is applied in other fields of law will thus not be examined. This thesis is further delimited to the principle as established in the Charter and the ECHR. Hence, cases from courts other than CJEU and ECtHR will not be presented.

This thesis will only broadly describe the relationship between the Charter and the ECHR. Furthermore, only a brief history and a few *rationale* of the principle will be presented to give an introductory view to the reason for the existence of the principle. There are many aspects of the assessment under Article 102 TFEU, many of which have already been the subject of entire, in-depth works. Therefore, and in light of the aim and the research questions, this thesis will only give an overview of the application process. Instead, the focus will be on the objective of the article. For the same reasons, this thesis will focus on the objective of the DMA and provide an overview of the application of the regulation. Lastly, this thesis will focus on the relationship

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(2022); Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022); Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023).

between Article 102 TFEU and the DMA. The relationship between the DMA and other parts of EU competition law falls outside the scope of this thesis. When examining this relationship, the focus will be on the applicability of the *ne bis in idem* principle.

1.4 Methods and Materials

To fulfil the aim of this thesis, a legal dogmatic method and an EU legal method have been used. The legal dogmatic method aims at investigating *lex lata* by searching for answers in the accepted sources of law. These sources consist of legislation, preparatory works, case law, and doctrine.[40] The legal dogmatic method has been criticised for only describing the existing law and not how the law is applied in practice.[41] However, according to Kleineman, the legal dogmatic method includes a critical analysis of the law.[42] This approach will be used in this thesis. Thus, the legal dogmatic method will also be used for a critical analysis of the law. This thesis focuses on EU law and an EU legal method has therefore been used as a complement to the legal dogmatic method. The EU legal method can be seen as an approach to deal with EU legal sources and it is important when interpreting and applying EU legal sources.[43] The CJEU has developed a method to interpret EU legal sources. In particular, the CJEU uses a teleological interpretation and largely considers the context and purpose of the legislation and does not interpret it solely on its wording.[44]

The materials used for this thesis are legislation, doctrine and case law. Primary law, secondary law and case law are all a part of the EU legally binding sources.[45] Primary law consists of the treaties[46], including Article 102 TFEU. The Charter of Fundamental Rights of the European Union (Charter) has the same legal value as the treaties and thus, is included in the primary law.[47] Secondary law consists of the legal sources that can be adopted on the basis

[40] Kleineman, 'Rättsdogmatisk metod', in: Nääv & Zamboni (Ed.), *Juridisk metodlära* (2018), p. 21; Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (2021), p. 51 f.

[41] Kleineman, 'Rättsdogmatisk metod', in: Nääv & Zamboni (Ed.), *Juridisk metodlära* (2018), p. 24.

[42] Ibid, p. 33 ff.; Cf. for a different opinion Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (2021), p. 53 f.

[43] Reichel, 'EU-rättslig metod', in: Nääv & Zamboni (Ed.), *Juridisk metodlära* (2018), p. 109.

[44] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 34 ff.; 158; Reichel, 'EU-rättslig metod', in: Nääv & Zamboni (Ed.), *Juridisk metodlära* (2018), p. 122.

[45] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 40.

[46] Consolidated version of the Treaty on European Union and Consolidated version of the Treaty on the Functioning of the European Union.

[47] See Article 6(1) of TEU; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

of the treaties.[48] Binding secondary law includes regulations, directives and decisions.[49] In regard to secondary law, the DMA is of relevance for this thesis. Primary law is given greater value than secondary law and case law. The foundations of the EU are built on its primary law and its validity cannot, in principle, be questioned by the EU institutions or the CJEU. However, the CJEU has interpreted provisions in the treaties in a way that is not compliant with their wording.[50]

Regarding case law, it is also a legally binding source and the CJEU chooses the interpretation that it considers to be the most favourable for the development of EU law. In situations where a provision is vague and provides no or little guidance of its application, case law has a great impact on the interpretation of the law.[51] The CJEU is divided into two courts, the *Court of Justice* and the *General Court*. The General Court rules on actions for annulments. Competition law is one of the areas the General Court mainly deals with. The Court of Justice deals with certain actions for annulment, appeals and requests for preliminary rulings. In this thesis, CJEU will be used as a collective term when presenting and discussing cases from the courts. The role of CJEU includes ensuring that EU law is interpreted and applied the same in every EU member state and ensuring abidance by EU law.[52] The EU has exclusive competence regarding 'the establishing of the competition rules necessary for the functioning of the internal market'.[53] Hence, the case law from the CJEU is of great importance in establishing such competition rules.

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a treaty with its own court.[54] The European Court of Human Rights (ECtHR) was established to ensure the observance of the engagements undertaken by the parties to the ECHR. The judgments from ECtHR are binding on the contracting parties, which includes all EU member states.[55] As of now, the EU is not an official party to the ECHR, but the EU will accede to the convention.[56] Additionally, the fundamental rights guaranteed by the

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[48] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 42.

[49] Article 288 TFEU.

[50] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 42.

[51] Ibid, p. 49.

[52] Article 19 TEU; EU, *Court of Justice of the European Union (CJEU)*, <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en>, visited 2023-04-04.

[53] Article 3(1)(b) TFEU.

[54] European Court of Human Rights; Article 19 ECHR.

[55] Articles 19 and 46 ECHR; Cf. Council of Europe, *46 Member States*, <https://www.coe.int/en/web/portal/46-members-states>, visited 2023-04-10.

[56] Cf. Article 6(2) TEU; Negotiations are in process for EU's accession to the ECHR, see Council of Europe, *EU accession to the ECHR*, < https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:[0]}>, visited 2023-03-24.

ECHR are general principles of EU law.[57] Article 52(3) of the Charter states that when the Charter and the ECHR contain corresponding rights, the scope and meaning of those rights shall be the same as the ones in the ECHR and thus connecting the Charter to the ECHR. The article further states that this shall not prevent more extensive protection being provided by EU law. According to Groussot and Stavefeldt, Article 52(3) of the Charter creates an informal accession to the ECHR.[58]

The relationship between the Charter and the ECHR have been discussed in the literature.[59] It can be noted that the CJEU and ECtHR have impacted each other's case law.[60] Andersson has stated that the Charter provides the maximum level of protection for fundamental rights if the ECHR is to be seen as providing the minimum level of protection for those rights.[61] The CJEU has not used the ECHR, as binding rules, but rather as inspiration in its case law. However, this approach may change based on the discussion above.[62]

Case law from the ECtHR and, especially, the CJEU have been of great importance in establishing the *ne bis in idem* principle's application in EU competition law. To interpret these cases, comments about them in the doctrine have been used. Doctrine from leading scholars in the field such as van Bockel, Groussot and Andersson have been of great importance regarding the *ne bis in idem* principle and its *rationale*. Furthermore, doctrine from i.a. Andreangeli, Brammer, Cappai and Colangelo, Devroe, Luis and Accardo, Nazzini, Harrison, Zdzieborska and Wise have been important when examining the case law from the CJEU. The doctrine examines the consequences of the case law and possible changes that may be needed as well as questions that may still exist or arise from the case law.

The DMA started to apply on 2 May 2023.[63] Hence, there is no existing case law on the DMA and its relationship with Article 102 TFEU regarding the

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[57] Article 6(3) TEU.

[58] Groussot and Stavefeldt*, 'Accession of the EU to the ECHR: A Legally Complex Situation',* in: Nergelius and Kristoffersson (Ed.), Human Rights in Contemporary European Law (2015), p. 14.

[59] See e.g. Groussot and Stavefeldt*,* 'Accession of the EU to the ECHR: A Legally Complex Situation'*,* in: Nergelius and Kristoffersson (Ed.), *Human Rights in Contemporary European Law* (2015), Groussot and Ericsson, 'Ne bis in idem in the EU and ECHR legal orders: a matter of uniform interpretation?' in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017), chapter 4 and Arold Lorenz, Nina-Louisa, Petursson, Gunnar Thor & Groussot, Xavier, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (2013).

[60] Geiß and Bäumler. *Ne bis in idem* (2022), para. 35; see e.g. Case C-489/10, *Bonda*, EU:C:2012:319.

[61] Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017), p. 111.

[62] Ibid, p. 117.

[63] Cf. Article 54 DMA.

application of the *ne bis in idem* principle. However, there is existing case law regarding the applicability of the *ne bis in idem* principle in other areas of EU competition law, which can be of guidance for the relationship between Article 102 TFEU and the DMA. The most relevant cases will be presented in the second chapter. The cases presented were chosen based on their influence on the application of the *ne bis in idem* principle in EU competition law. In order to determine their influence, their occurrence in the legal doctrine was given great significance. *Engel and Others v The Netherlands*[64] is presented due to its importance for determining the meaning of 'criminal'. The old case law regarding the application of the *ne bis in idem* principle in competition law cases consisting of *Walt Wilhelm*[65], *PVC II*[66], *Aalborg Portland A/S*[67] and *Toshiba Corporation*[68] is presented briefly whereas the recent judgments in *bpost*[69] and *Nordzucker*[70] are given a more thorough presentation and examination due to their influence on the case law and their relevance for this thesis.

Opinions of Advocate Generals have been cited when they have contributed to a discussion in the doctrine.[71] Opinions of Advocate Generals are not in themselves legally binding and hence, they do not constitute a source of law. However, if the CJEU refers to the Opinion, the Opinion can be used as a legal source. Even if Opinions of Advocate Generals are not legally binding, they can still have a great impact in practice. The reasons for this are many. The Opinions of Advocate Generals are traditionally more thoroughly explained and contain a deeper analysis and argumentation of all aspects regarding the case at hand. The Opinions may also contain reference to doctrine, practical implications of the judgment and reasons for and against a certain decision. Some Advocate Generals are even critical to the existing case law

[64] *Engel and Others v The Netherlands*, App 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgement of 8 June 1976 (cit. *Engel and Others v The Netherlands*).

[65] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, EU:C:1969:4.

[66] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and Others v Commission (PVC II),* EU:C:2002:582.

[67] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6.

[68] Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72.

[69] Case C-117/20, *bpost*, EU:C:2022:202.

[70] Case C-151/20, *Nordzucker and Others*, EU:C:2022:203.

[71] These are Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Case C-217/00 P, *Buzzi Unicem v Commission*, EU:C:2003:83; Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, EU:C:2011:552; Opinion of Advocate General Wahl delivered on 29 November 2018 in Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2018:976; Opinion of Advocate General Tanchev delivered on 26 September 2019 in Case C-10/18 P, *Marine Harvest v Commission*, EU:C:2019:795; Opinion of Advocate General Bobek delivered on 2 September 2021 in Case C-117/20, *bpost*, EU:C:2021:680.

in their Opinions.[72] An Opinion can, thus, be used for a greater understanding of the CJEU's judgment in the case.[73]

In the chapters on Article 102 TFEU and the DMA, doctrine from Nazzini and Whish and Bailey have been of great importance. Nazzini has published an in-depth examination of the objective of Article 102. Whish and Bailey have published a thorough review of EU competition law, including a brief section on digital markets and the DMA. The recent adoption of the DMA results in there being little doctrine available regarding the regulation and its relationship with other legal sources, including Article 102 TFEU. The regulation itself has therefore been an important source for establishing the objective, the application, and the relationship with Article 102 TFEU. When examining the relationship between Article 102 TFEU and the DMA and the application of the *ne bis in idem* principle on the relationship, doctrine from Andreangeli, Harrison, Zdzieborska and Wise and Cappai and Colangelo have further been of great importance.

Documents from the Commission have further been presented. These documents are considered to be soft law. Soft law is not a legally binding source.[74] Over time, however, these documents have gotten greater significance.[75] The CJEU stated in *Louwage*[76] that the Commission must follow its own guidelines in order to uphold the principle of equality of treatment.[77] Regarding competition law, the Commission can use soft law to explain how its discretionary powers will be used in making decisions. The CJEU will then assess if the Commission has followed its own guidelines which results in soft law from the Commission being legally binding in certain cases.[78]

1.5 State of the Art

The state of the art regarding the *ne bis in idem* principle in EU competition law is well developed prior to *bpost* and *Nordzucker*.[79] Literature from van

[72] Cf. i.a. Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, EU:C:2011:552; see section 2.4.1.

[73] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 117 f.

[74] Cf. Article 288 TFEU.

[75] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 46 f.

[76] Case C-148/73, *Louwage v Commission*, EU:C:1974:7.

[77] Ibid, para. 12.

[78] Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 48.

[79] See i.a. Wils, *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis* (2003); Brammer, *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law* (2009); Louis & Accardo, *Ne Bis in Idem, Part 'Bis'*, (2011); Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013); Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017).

Bockel is well recognised and mentioned among legal scholars. In *The Ne Bis In Idem Principle in EU Law* (2010) and *Ne Bis in Idem in EU Law* (2016) van Bockel and other legal scholars i.a. Groussot, Ericsson, Nazzini and Wattel discuss the *rationale* of the principle, the relationship and interaction between the Charter and the ECHR and the application of the principle in different areas of EU law, including competition law. The recent judgments in *bpost* and *Nordzucker* are just over one year old and since their publication, they have been examined in several articles.[80] However, the new cases have not yet been a part of any extensive literature.[81]

The state of the art regarding Article 102 TFEU is well developed. There is extensive doctrine on the objective and application of the article. Nazzini has analysed the objective and application of Article 102 TFEU in *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011). Whish and Bailey have given a thorough review of EU competition law in *Competition Law* (2021). This edition contains a short presentation on the Proposed DMA.

Regarding the DMA, the state of the art is not as well developed due to the recent adoption of the regulation (the first proposal was presented in 2020). However, several articles have been published that address the DMA. Some of the articles that have been published have focused on the relationship between the DMA and competition law as well as the application of the *ne bis in idem* principle.[82] This thesis will provide a compilation of the current state of the art, something that cannot be found in the doctrine.

1.6 Outline

After this introductory chapter, the second chapter of this thesis presents the principle of *ne bis in idem* in EU competition law. The presentation includes the *rationale* of the principle as well as an overview of relevant case law from the CJEU and ECtHR. The third chapter focuses on Article 102 TFEU; the objective and the application of the article are presented. The DMA, its objective and application are presented in the fourth chapter of this thesis. The

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[80] See i.a. Andersson, *Ne bis in idem – Hur tillämpas principen inom konkurrensrätten? Bis i domar från EU-domstolen* (2022); Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022); Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022); Cappai & Colangelo, *The Long Road to a Unified Test for the European Ne Bis In Idem Principle* (2022); Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023).

[81] The new case law is briefly mentioned in Turmo, *Res Judicata in European Union Law: A Multi-faceted Principle in a Multilevel Judicial System* (2022).

[82] See i.a. Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022); Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022); Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023).

fifth chapter investigates the relationship between Article 102 TFEU and the DMA and the application of the *ne bis in idem* principle on this relationship. The sixth and final chapter of this thesis presents an analysis and conclusion that answers the research questions presented above in section 1.2.

2 The Principle of *Ne Bis In Idem* in EU Competition Law

2.1 Introduction and *Rationale*

The principle of *ne bis in idem* protects the defendant against being prosecuted more than once for the same act, facts, or offence.[83] When establishing if there has been a violation of the *ne bis in idem* principle, two questions are of importance: (i) 'when is there a *second trial*?' (*bis*) and (ii) 'when are the facts *the same*?' (*idem*). Van Bockel stated that determining the *idem* criteria has been more difficult than determining the *bis* criteria.[84]

There are different *rationale* for the *ne bis in idem* principle. These can be associated with the society as a whole or as a right for individuals. Regarding the society as a whole, *ne bis in idem* plays an important part in the upholding of the principle of legality, meaning prosecution must be based on pre-existing legislation. The principle of legality would be just an illusion if a defendant could continually be troubled for various aspects of the same act, facts or offence.[85]

Ne bis in idem further ensures the rule of law and the legitimacy of the state. The state must respect the outcome of the initiated proceeding in its jurisdiction. In order for the state's legitimacy not to be undermined, *res judicata*, the finality of judgements, must be respected and upheld.[86] The *ne bis in idem* principle ensures that *res judicata* is respected and protected since it does not allow double proceedings. *Ne bis in idem* and *res judicata* serve similar goals within the EU legal order but they have never been conflated by the CJEU. *Res judicata* prevents final judgments from being called into question and a new judgment with a different outcome compared to the first one being decided. With its prohibition on double punishment, the *ne bis in idem* principle goes further than *res judicata*.[87] *Ne bis in idem* further works as an incentive for efficient law enforcement. The authorities have only one chance for the proceeding, resulting in a sanction against any occurring negligence from the authorities. The risk of being wrongfully convicted increases with multiple proceedings. Furthermore, multiple proceedings can be expensive. Hence, *ne*

[83] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 2.

[84] Ibid, p. 41.

[85] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 25 and 27; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 13.

[86] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 27; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 13 f.

[87] Turmo, *Res Judicata in European Union Law: A Multi-faceted Principle in a Multilevel Judicial System* (2022), p. 41 f.

bis in idem can also be seen as reducing costs, both for the society and the individual.[88]

As to protecting the individual's right, *ne bis in idem* has different *rationale*. *Ne bis in idem* protects the individual from abuse of *ius puniendi*, the state's right to punish. The right to a fair trial[89] is linked to the principle of *ne bis in idem*. Van Bockel has stated that it could be argued that a court cannot be impartial unless its decisions are binding also on other courts as well as other organs of the state. Lastly, *ne bis in idem* is an important assurance for legal certainty and proportionality. According to van Bockel, assuring legal certainty is an important and self-evident *rationale*.[90] The principle of proportionality aims at ensuring that measures taken do not go beyond what is necessary.[91] According to van Bockel, defining proportionality in general terms is difficult.[92]

2.2 *Ne Bis In Idem* in the EU Legal Order

In the EU legal order, the *ne bis in idem* principle constitutes a fundamental right[93] that can be found in Article 50 of the Charter and in Article 4 of Protocol No 7 to the ECHR.[94] Article 50 of the Charter states the following:

> 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 Union in accordance with the law.

Article 4(1) of Protocol No 7 to the ECHR reads as follows:

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The *ne bis in idem* principle is not absolute, and it can be subject to limitations if certain criteria are fulfilled.[95] According to Article 4(2) of Protocol No 7 to

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[88] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p 27 f.; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 13.

[89] The right to a fair trial is established in Article 6(1) of the ECHR and Article 47 of the Charter.

[90] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 25 ff.; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 13 f.

[91] Cf. Article 5(4) TEU; Hettne and Otken Eriksson (Ed.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 81.

[92] Van Bockel, *The Ne Bis In Idem Principle in EU Law* (2010), p. 27.

[93] See the preamble to the Charter of Fundamental Rights of the European Union.

[94] The principle of *ne bis in idem* can also be found in Articles 54–58 of the Convention Implementing the Schengen Agreement.

[95] Article 52(1) of the Charter; Article 4(2) of Protocol No 7 to the ECHR.

the ECHR, a case can be reopened if there has been a fundamental defect in the previous proceeding or if there is evidence of new or newly discovered facts. These circumstances must have the possibility to have affected the outcome of the proceeding. Furthermore, the reopening of the case must be in accordance with the law of the State concerned. Article 52(1) of the Charter provides the possibility of a permitted limitation if such a limitation is provided by law, respects the essence of the rights and freedoms limited and simultaneously respects the principle of proportionality. Regarding the principle of proportionality, the article states that 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

2.3 The Principle's Applicability in EU Competition Law

The *ne bis in idem* principle in the Charter and the ECHR was originally aimed at criminal proceedings.[96] Fines under EU competition law are not a criminal sanction,[97] which raises concerns of the principle's applicability in EU competition law. The ECtHR addressed the meaning of 'criminal' in the case of *Engel and Others v The Netherlands*.[98] The case was i.a. about the applicability of the right to a fair trial established in Article 6(1) of the ECHR.[99] This right is linked to the *ne bis in idem* principle[100] and the word 'criminal' has the same meaning in both Article 6(1) of the ECHR and Article 4 of Protocol No 7 to the ECHR.[101]

The applicants in the case were soldiers in the Netherlands armed forces who had been imposed various penalties on separate occasions for offences against military discipline. According to the law in the Netherlands, some offences against military discipline were not of a criminal character.[102] The ECtHR started by establishing that Article 6 of the ECHR is applicable to any

[96] Cf. Article 50 of the Charter; Article 4 of Protocol No 7 to the ECHR. These articles are presented in section 2.2.

[97] Article 23.5 in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[98] *Engel and Others v The Netherlands*, App 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgement of 8 June 1976 (cit. *Engel and Others v The Netherlands*). This case has become settled case law, see Brammer, *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law* (2009), p. 346, footnote 11.

[99] *Engel and Others v The Netherlands*, para. 78.

[100] See section 2.1.

[101] Brammer, *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law* (2009), p. 346; Wattel, '*Ne Bis in Idem* and Tax Offences in EU Law and ECHR Law', in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 185; *Sergey Zolotukhin v Russia*, Judgment of 10 February 2009, Application no 14939/03 (cit. *Sergey Zolotukhin v Russia*).

[102] *Engel and Others v The Netherlands*, paras. 12 and 15.

'criminal offence' and thus, it is important to investigate if the proceedings in the case concerned a 'criminal charge'.[103]

The court raised the question of whether Article 6 of the ECHR was not applicable due to the classification of the Contracting State, in this case the Netherlands, or if the article applies notwithstanding the national classification. The court then established that Contracting States are allowed to distinguish between disciplinary law and criminal law. However, the court has jurisdiction under Article 6 of the ECHR to determine whether the disciplinary improperly encroaches upon the criminal. The court stated that the meaning of criminal is autonomous. If the Contracting States, at their discretion, could classify an offence as disciplinary instead of criminal, it could lead to results incompatible with the object and purpose of the ECHR.[104]

The ECtHR established three criteria to determine the meaning of 'criminal', later referred to as the *Engel* criteria. Firstly, as a starting point, the legal definition of the offence under national law is considered. Secondly, the very nature of the offence is examined. This factor is of greater importance than the national legal definition of the offence (i.e. whether it belongs to criminal law or disciplinary law). Thirdly, the degree of severity of the penalty that the person risks incurring is taken into consideration. The court then used the three criteria it set up to ascertain whether the applicants were subject of a 'criminal charge'.[105] The CJEU explicitly refers to the *Engel* criteria in the case of *Bonda*[106] and has later in its case law referred to the *Bonda* case instead of the *Engel* case.[107]

Neither the *Engel* case nor the *Bonda* case concerned competition law. However, in *A. Menarini Diagnostics S.R.L. v Italy*[108], the ECtHR found that a fine imposed under competition law was a criminal penalty resulting in the applicability of Article 6(1) of the ECHR.[109] The CJEU avoided mentioning the *Engel* criteria in three judgments that followed the ECtHR's judgment in *A. Menarini Diagnostics S.R.L. v Italy*.[110] In its two recent judgments, *bpost* and

[103] Ibid, paras. 78–79.

[104] Ibid, para. 80–81.

[105] Ibid, paras. 82–83; cf. Wattel, '*Ne Bis in Idem* and Tax Offences in EU Law and ECHR Law', in; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 185.

[106] C-489/10, *Bonda*, EU:C:2012:319, para 37.

[107] See e.g. Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, at para. 35 and Case C-117/20, *bpost*, EU:C:2022:202, at para. 25.

[108] *A. Menarini Diagonstics S.R.L. v Italy*, Judgment of 27 September 2011, Application no 43509/08.

[109] Ibid.

[110] Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815; Case C-272/09 P, *KME v Commission*, EU:C:2011:810 and Case C-389/10 P, *KME v Commission*, EU:C:2011:816; Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017), p. 175 f.

Nordzucker, the CJEU refers to the *Bonda* case.[111] Hence, it can be concluded that the CJEU finds competition law sanctions as sanctions of criminal character and that the *ne bis in idem* principle is applicable in competition law cases.[112] The following section will present and examine case law from the CJEU that is of importance for the application of the *ne bis in idem* principle in EU Competition Law.

2.4 Case Law from the CJEU

2.4.1 The Development from *Walt Wilhelm* to *Toshiba Corporation*

The first case where the CJEU looked at parallel proceedings and the *ne bis in idem* principle in competition law was *Walt Wilhelm*[113].[114] The court was asked whether it was possible or prohibited to have two parallel proceedings, one being national and the other being on a Community (now Union) level in cartel cases (under what is now Article 101 TFEU).[115] In its judgment, the court did not explicitly mention the principle of *ne bis in idem*. Instead, the court referred to 'natural justice'.[116]

The CJEU stated that the possibility of concurrent sanctions did not mean that it was unacceptable with parallel proceedings that pursue different ends. According to the court, Community law and national law considered cartels from different points of view. The court further stated that acceptance of parallel proceedings followed from the shared jurisdiction between the Community and the Member States. However, if the sanctions following from these proceedings were consecutive, a general requirement of natural justice demands that previous punitive decisions be taken into consideration when determining the sanction that is to be imposed.[117]

The approach set up by the CJEU in *Walt Wilhelm* has been applied in several other judgments.[118] However, the same approach may not be accepted today. Article 3(1) of Regulation 1/2003 states that when Member States apply

[111] Case C-117/20, *bpost*, para. 25; Case C-151/20, Nordzucker and Others, para 30.

[112] Cf. Brammer, *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law* (2009), p. 347; Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017), p. 174.

[113] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, EU:C:1969:4.

[114] Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 34.

[115] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, p. 3 f.

[116] Ibid, para. 11; Groussot and Ericsson, 'Ne bis in idem in the EU and ECHR legal orders: a matter of uniform interpretation?' in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 58.

[117] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, paras. 3 and 11.

[118] See e.g. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6 and Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72.

national competition law to any abuse prohibited by Article 102 TFEU, the Member States shall also apply Article 102 TFEU. Article 3(1) of Regulation 1/2003 further provides the same prerequisite for Article 101 TFEU. Hence, it is difficult to argue that national competition law pursues a different objective than EU competition law.[119]

The CJEU's judgment in *PVC II*[120] is connected to a separate case where the CJEU annulled a decision adopted by the Commission.[121] After the annulment of its decision, the Commission adopted a new decision which imposed fines of the same amount as in the annulled decision. The new decision was aimed at the majority of the undertakings who were subject to the first decision.[122] In the pleas for the annulment of the second decision, infringement of the *ne bis in idem* principle was mentioned to support such annulment.[123]

In its *PVC II* judgment, the CJEU explicitly acknowledged that the *ne bis in idem* principle is a fundamental principle of Community law and that the principle, in competition matters, precludes an undertaking from being found guilty and proceedings being brought against it a second time if the undertaking has already been penalised or declared not liable for the conduct by a previous unappealable decision. The court thereafter stated that a ruling given on the question whether an offence has been committed or the legality of the assessment thereof has been reviewed is a prerequisite for the *ne bis in idem* principle to apply.[124]

In its judgment on annulment of the first decision, the CJEU annulled the Commission decision without ruling on the substantive pleas. An annulment cannot, according to the court, be regarded as an acquittal within the penal meaning when the annulment was made with regard to procedural reason without ruling having been given on the substance of the facts. Under circumstances like these and in the case concerned, the penalties in the new decision replaced the penalties in the annulled decision. Therefore, the Commission had not initiated a second proceeding against the undertakings nor penalised

[119] For the same conclusion see Brammer, *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law* (2009), p. 374 f.; Nazzini, 'Parallel Proceedings in EU Competition Law: *Ne Bis in Idem* as a Limiting Principle', in: Van Bockel, Bas (Ed.), *Ne Bis in Idem in EU Law* (2016), p. 159; Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 500.

[120] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and Others v Commission (PVC II)*, EU:C:2002:582.

[121] Case C-137/92 P, *Commission v BASF and Others*, EU:C:1994:247.

[122] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and Others v Commission (PVC II)*, para. 11.

[123] Ibid, paras. 24 and 31.

[124] Ibid, paras. 59–60.

them twice based on the same facts.[125] Hence, there was no infringement of the *ne bis in idem* principle.[126]

According to Wils, the CJEU's wording in the *PVC II* case suggests that if the first decision had been annulled due to lack of evidence it would have constituted an acquittal. The second decision would then have resulted in a second trial and an infringement of the *ne bis in idem* principle. However, the Charter and the ECHR provide limitations to the *ne bis in idem* principle under certain circumstances, one being new evidence.[127] Wils further discussed that the accessibility of such evidence and the possibility to, with reasonable diligence, have used such evidence should be important when determining whether it is a permitted limitation or an infringement of the principle.[128]

In *Aalborg Portland A/S*[129], the Commission had, after it carried out investigations, adopted a decision which imposed fines on several undertakings and associations.[130] Some of the undertakings had already been subject to a decision from the Italian national competition authority (NCA). According to the undertakings, a reiteration of the objections in the Commission decision resulted in a double liability for the same conduct, one on the national level and one on the Community level. Thus, the undertakings plead that this was a violation of the *ne bis in idem* principle.[131]

The CJEU established, in accordance with the Opinion of the Advocate General, that the application of the *ne bis in idem* principle is subject to a threefold condition of 'identity of the facts, unity of offender and unity of the legal interest protected'.[132] According to the Advocate General there is a unity of the legal right protected. The Advocate General argued that the EU competition rules do not allow a distinction between national and Community areas. The legislation of the Member States must, therefore, properly transpose EU competition law.[133] The CJEU did, however, not confirm this in its judgment. The court pointed out that the national decision and the Commission decision pursued different objectives. The court further stated that the facts were not

[125] Ibid, paras. 62–63.

[126] Ibid, para. 69.

[127] See section 2.2.

[128] Wils, *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis* (2003), p. 142.

[129] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6.

[130] Ibid, paras. 2 and 11.

[131] Ibid, para. 316.

[132] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Case C-217/00 P, *Buzzi Unicem v Commission*, EU:C:2003:83, para. 171; Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, para. 338.

[133] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Case C-217/00 P, *Buzzi Unicem v Commission*, EU:C:2003:83, para. 173.

identical and therefore, there was no infringement of the *ne bis in idem* principle.[134]

Louis and Accardo discussed how the court reached its conclusion. The national cartels were at first subject to parallel investigations. However, the Commission had earlier dropped its objections that were related to the national cartels. Louis and Accardo argued that the Commission's decision to drop these objections is the reason why the court found there to be no identity of facts and no infringement of the *ne bis in idem* principle.[135]

In *Toshiba Corporation*[136], the Commission and the Czech NCA had imposed fines on several undertakings. The applicants claimed that Regulation No 1/2003 did not allow a proceeding on a national level to be implemented after the Commission had initiated a proceeding at the European level. Since the national proceeding was initiated after the Commission's, there was, according to the applicants, an infringement of the *ne bis in idem* principle.[137]

The CJEU first stated that the *ne bis in idem* principle 'must be observed in proceedings for the imposition of fines under competition law'.[138] Thereafter the court stated that the *ne bis in idem* principle does not preclude an NCA from applying national competition law. The court referred to *Aalborg Portland A/S* and the threefold condition of the same facts, same offender and the same legal interest protected for the *ne bis in idem* principle to apply. The court then found that the *ne bis in idem* principle was not applicable since identity of facts did not exist.[139] The Commission's decision regarded anti-competitive consequences after the Czech Republic's accession to the EU whereas the decision from the Czech NCA regarded such consequences prior to the accession. Thus, due to the different time aspects, there was no identity of facts.[140]

In her Opinion[141], Advocate General Kokott was critical to the threefold condition used by the court in competition law cases and suggested a different applicability of the *ne bis in idem* principle in competition law. The Advocate General stated that the CJEU had not applied the third criteria, unity of the

[134] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, paras. 339–340; Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 36.

[135] Louis & Accardo, *Ne Bis in Idem, Part 'Bis'*, (2011), p. 102.

[136] Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72.

[137] Ibid, paras. 19 and 29.

[138] Ibid, para. 94.

[139] Ibid, paras. 96–98.

[140] Ibid, paras. 102–103.

[141] Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, EU:C:2011:552.

legal interest protected, in other areas of EU law and that the same criteria should apply in all areas of EU law[142]:

> To interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order. The crucial importance of the *ne bis in idem* principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned.[143]

According to the Advocate General, there was no objective reason for having a different applicability of the *ne bis in idem* principle in competition law cases.[144] The Advocate General further discussed the relationship between the Charter and the ECHR, stating that Article 4(1) of Protocol No 7 to the ECHR 'describes the minimum standard that must be guaranteed in the interpretation and application of the *ne bis in idem* principle in EU law'.[145] In its landmark judgment *Sergey Zolotukhin v Russia*, the ECtHR stated that the *idem* criteria 'must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same'.[146] The ECtHR also stated that it cannot limit itself to take into consideration the legal classification, the court must only regard whether the facts are identical or not.[147] Upholding the threefold condition would, according to the Advocate General, have the consequences of not providing the minimum standard as laid down in Article 4(1) of Protocol No 7 to the ECHR.[148] However, as presented above, in its judgment, the CJEU still stated that the application of the *ne bis in idem* principle is subject to a threefold condition in competition law cases.[149]

Before the judgment was presented, there were discussions about how the *Toshiba Corporation* case could provide clarity, and maybe even a turning point for the application of the *ne bis in idem principle* in competition law.[150] However, Devroe argued that the judgment was flawed and that there was a

[142] Ibid, paras. 115–117.
[143] Ibid, para. 117.
[144] Ibid, para. 118.
[145] Ibid, para. 120.
[146] *Sergey Zolotukhin v Russia*, para. 82; Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, para. 121.
[147] *Sergey Zolotukhin v Russia*, para. 81; Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, para. 121.
[148] Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10, *Toshiba Corporation and Others*, para. 123.
[149] Case C-17/10, *Toshiba Corporation and Others*, para. 97.
[150] Louis & Accardo, *Ne Bis in Idem, Part 'Bis'*, (2011), p. 112.

need for a more thorough motivation.[151] After the Opinion of Advocate General Kokott and the CJEU's judgment, other Advocate Generals have suggested a possible change of the threefold condition set up by the CJEU in the application of the *ne bis in idem* principle in competition law cases.[152] In the doctrine, similar concerns to those of the Advocate Generals have been presented.[153] Nazzini argued that the case law from the CJEU on the application of the *ne bis in idem* principle in competition law is in need of urgent review.[154] Furthermore, Devroe has stated that a more clear ruling from the CJEU regarding the application of the *ne bis in idem principle* in competition law would be well received.[155] Despite the criticism presented, the CJEU once again confirmed the threefold condition in *Slovak Telekom*.[156]

2.4.2 The Recent Judgments in *bpost* and *Nordzucker*

In March 2022 the CJEU presented two judgments regarding the *ne bis in idem* principle in competition law, *bpost*[157] and *Nordzucker*[158], where the CJEU overruled its previous case law.[159]

In 2010, bpost, a postal services provider in Belgium, adopted a new tariff system which was found to be discriminatory in relation to the rules on tariffs by the Postal Regulator. The decision was annulled by the Court of Appeal of Brussels and the judgment became final. During this time, the Belgian NCA adopted a decision stating that bpost had abused its dominant position by adopting the new tariff system. When calculating the fine, the NCA considered the fine previously imposed by the Postal Regulator. The Court of Appeal of Brussels annulled the NCA's decision because the court found it to be an infringement of the *ne bis in idem* principle.[160] The Court of Cassation in

[151] Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013), p. 432.

[152] Opinion of Advocate General Wahl delivered on 29 November 2018 in Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2018:976, paras. 45 and 49; Opinion of Advocate General Tanchev delivered on 26 September 2019 in Case -C10/18 P, *Marine Harvest v Commission*, EU:C:2019:795, para. 95, footnote 34.

[153] Sarmiento, 'Ne Bis in Idem in the Case-Law of the European Court of Justice', in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 130; Nazzini, 'Parallel Proceedings in EU Competition Law: Ne Bis In Idem as a Limiting Principle', in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 143 ff.

[154] Nazzini, 'Parallel Proceedings in EU Competition Law: Ne Bis In Idem as a Limiting Principle', in: Van Bockel, *Ne Bis in Idem in EU Law* (2016), p. 166.

[155] Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law', in: Bernitz, Groussot & Schulyok (Ed.), *General Principles of EU Law and European Private Law* (2013), p. 442.

[156] Case C-857/19, *Slovak Telekom v Commission*, EU:C:2021:139, para. 43.

[157] Case C-117/20, *bpost*, EU:C:2022:202.

[158] Case C-151/20, *Nordzucker and Others*, EU:C:2022:203.

[159] See Turmo, *Res Judicata in European Union Law: A Multi-faceted Principle in a Multilevel Judicial System* (2022), p. 43.

[160] Case C-117/20, *bpost*, paras. 8–13.

Belgium referred the case back to the Court of Appeal of Brussels who requested a preliminary ruling from the CJEU.[161]

The CJEU started by acknowledging that the *ne bis in idem* principle is a fundamental principle of EU law that can be found in Article 50 of the Charter. Thereafter, the CJEU stated that Article 50 of the Charter contains a right corresponding with the right provided in Article 4 of Protocol No 7 to the ECHR. According to Article 52(3) of the Charter, the meaning and scope of rights in the Charter shall be the same as the rights in the ECHR provided that these rights are corresponding. The court further stated that it is therefore necessary to take account of the ECHR when interpreting the Charter.[162] When determining the meaning of 'criminal', the CJEU stated that it is the referring court that must determine if the sanction is considered criminal by using the criteria established in *Bonda*.[163]

The CJEU found the *bis* criteria, a prior final decision, to be fulfilled since the judgement on annulment of the Postal Regulator's decision had acquired *res judicata*.[164] Regarding the *idem* criteria, the same facts, the court first stated that the two different proceedings were directed at the same legal person, bpost.[165] According to the court, the legal classification under national law and the legal interest protected are not relevant for establishing the existence of the same offence. Otherwise, the protection provided by Article 50 of the Charter would vary from one Member State to another. The court further asserted that this is also true regarding the application of the *ne bis in idem* principle in competition law since the scope of protection in Article 50 of the Charter cannot vary from one field of EU law to another (unless otherwise provided by EU law).[166] Then, the CJEU stated that the *idem* condition requires the material facts to be identical and if the facts are not identical but merely similar, the *ne bis in idem* principle is not intended to be applied.[167] The court referred to *Sergey Zolotukhin v Russia* when stating that 'identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space'.[168] It is for the referring court to determine if the facts are identical and if it finds that the facts are identical, it would constitute a limitation of the *ne bis in idem* principle.[169]

[161] Ibid, paras. 14, 16 and 20.
[162] Ibid, paras. 22–23.
[163] Ibid, para. 25.
[164] Ibid, paras. 28 and 30.
[165] Ibid, paras. 28 and 32.
[166] Ibid, para. 34–35; this was also noted in the Opinion of Advocate General Bobek delivered on 2 September 2021 in Case C-117/20, *bpost*, EU:C:2021:680, paras. 95 and 122.
[167] Case C-117/20, *bpost*, para. 36.
[168] Ibid, para. 37.
[169] Ibid, para. 38–39.

According to Article 52(1) of the Charter, a limitation may be justified if the limitation is provided by law and respects the essence of the rights and freedoms as well as the principle of proportionality.[170] The possibility of multiple proceedings and sanctions respects the essence of the *ne bis in idem* principle in Article 50 of the Charter if the possibility for duplication is provided under different legislations. The CJEU noted that competition law and the sectoral rules at hand pursue distinct legitimate objectives: ensuring that competition is not distorted in the internal market on the one hand and the liberalisation of the internal market for postal services on the other.[171] The court used the objective established in Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, without further discussing the objective.[172] The court stated that due to the different objectives, it is legitimate for a Member State to punish infringements of both competition law and sectoral rules concerning the liberalisation of the relevant market.[173]

The limitation must further be in compliance with the principle of proportionality. The different proceedings cannot exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by the different legislations. The CJEU stated that if the accumulated legal responses do not represent an excessive burden for the individual; public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures that address different aspects of the social problem involved.[174] An assessment of the necessity of multiple proceedings must be done by the referring court and this assessment can only be done *ex post*. When conducting such an assessment the court has listed different factors to take into consideration. The first factor is whether there are clear and precise rules resulting in the possibility to predict when multiple proceedings may occur and if there will be coordination between different authorities. It is further important to determine if such coordination actually took place. The second factor is whether the two proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe. In the case at hand, the first decision was adopted on 20 July 2011 and the second decision was adopted on 10 December 2012. Given the complexity of competition investigations, the CJEU found that the two decisions were sufficiently closely connected in time. The third and last factor is whether the second proceeding has taken into account any sanction imposed in the first proceeding, which is important in order for the penalties to not go beyond what is strictly necessary. The court pointed out that the fact that the second fine is

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[170] Article 52(1) of the Charter; Case C-117/20, *bpost*, paras. 40 and 41.

[171] Case C-117/20, *bpost*, paras. 43–46.

[172] Cf. Rectials 8 and 41 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service without further discussing the objective; Case C-117/20, *bpost*, paras. 3–4 and 45.

[173] Case C-117/20, *bpost*, para. 47.

[174] Ibid, para. 48–49.

larger than the first fine is not in itself an indication of the penalties being disproportionate.[175] The CJEU concluded that, provided that the factors mentioned above are fulfilled:

> Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market […].[176]

In *Nordzucker*, Nordzucker submitted leniency[177] applications to the German and Austrian NCAs who then initiated investigation procedures against three major sugar producers, including Nordzucker and Südzucker.[178] In 2010, the Austrian NCA, seeking declaration that Nordzucker and Südzucker had infringed Article 101 TFEU and the national Austrian law, brought an action before an Austrian court. The evidence used included a telephone conversation where Südzucker's sales director called the sales director of Nordzucker to inform about deliveries to Austria and their consequences for the German sugar market.[179] The German NCA adopted a decision, which became final, in 2014 where it found that the three major sugar producers, including Nordzucker and Südzucker, had infringed Article 101 TFEU and German national law. Of the facts used by the German NCA, the telephone conversation was the only fact that concerned the Austrian market. Otherwise, the decision only penalised anticompetitive effects in Germany.[180]

Since the telephone conversation used as evidence by the Austrian NCA had already been subject to a different penalty, the Austrian court dismissed the action brought by the Austrian NCA in 2019 on the ground that an imposition of a penalty would violate the *ne bis in idem* principle. The Austrian NCA appealed the judgment to the Supreme Court of Austria, who requested a preliminary ruling from the CJEU.[181] The referring court sought clarification for assessing if two different NCAs have ruled on the same facts.[182] The preliminary observations from the CJEU were similar to the ones presented in *bpost*.[183] The court stated that the *ne bis in idem* principle is a fundamental

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[175] Ibid, paras. 51–57.

[176] Ibid, *bpost*, para. 58.

[177] Under the Commission's leniency programme, undertakings may receive immunity from fines if they provide sufficient information about cartels they have participated in. Such immunity may be full or partial. See European Commission, *Leniency*, <https://competition-policy.ec.europa.eu/cartels/leniency_en>, visited 2023-05-18.

[178] Case C-151/20, *Nordzucker and Others*, paras. 9 and 15.

[179] Ibid, paras. 14 and 16.

[180] Ibid, paras. 17 and 23.

[181] Ibid, paras. 18–19.

[182] Ibid, para. 27.

[183] See ibid, paras. 28–33.

principle of EU law, that the *Bonda* criteria are relevant in order to determine whether a sanction is criminal and that the application of the *ne bis in idem* principle is subject to a twofold condition, *bis* and *idem*.[184]

The CJEU stated that the *bis* criteria was fulfilled since the German decision constituted a prior and a final decision. With regard to the *idem* criteria, the court first stated that the different proceedings were directed against the same legal persons, Nordzucker and Südzucker.[185] The CJEU referred to its judgment in *bpost* regarding the relevant criteria to assess *idem*, being the identity of the material facts.[186] It is for the referring court to determine if there is identity of the facts but the CJEU can provide help with the interpretation of EU law. When determining the identity of the facts, the territory, the product market and the time period during where and when the conduct had anticompetitive objects or effects must be examined.[187]

The proceedings in Austria are based on facts that have already been used in the German proceedings, i.e. the telephone conversation. The CJEU stated that in order for identity of facts to be found, it is insufficient that the fact has given rise to the proceedings or was found to be one of the elements that was constituent of the infringement. It must further be ascertained whether the NCA regarded the facts as encompassing the territory of the Member State in question. According to the court, it is thus of importance for the assessment whether the German NCA only considered the German sugar market or if the NCA also considered the Austrian sugar market. If the turnover used by the German NCA to calculate the fines only considered the turnover in Germany or also the turnover in Austria is also of importance for this assessment.[188]

If the referring court is to find that the German decision included a penalisation of the cartel's anticompetitive object or effect in the Austrian territory, a second proceeding and penalisation in Austria would violate the *ne bis in idem* principle. However, a limitation of the principle may be justified.[189] Article 101 TFEU has the objective of ensuring that competition is not distorted in the internal market. A duplication of criminal proceedings and penalties may be justified when the proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct at issue. The CJEU noted that national competition law and EU competition law are closely linked together. Article 3(1) of Regulation 1/2003 requires Member States to apply Article 101 TFEU in parallel with national competition law when the national competition law contains provisions corresponding with Article 101 TFEU.[190] The court stated that the application of national competition law

[184] Ibid, paras. 28, 30 and 33.
[185] Ibid, paras. 35–37.
[186] Ibid, paras. 38 and 40.
[187] Ibid, paras. 41–42.
[188] Ibid, paras. 43–46.
[189] Ibid, paras. 48–49.
[190] Ibid, paras. 51–53.

and the application of Article 101(1) TFEU cannot result in different outcomes. The court further stated that a duplication of proceedings and penalties that do not pursue complementary aims relating to different aspects of the same conduct can never be justified under Article 52(1) of the Charter.[191] The CJEU concluded that:

> Article 50 of the Charter must be interpreted as not precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and, as the case may be, fined for an infringement of Article 101 TFEU and the corresponding provisions of the national competition law, on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, even though that conduct has already been referred to by a competition authority of another Member State, in a final decision adopted by that authority in respect of that undertaking following infringement proceedings under Article 101 TFEU and the corresponding provisions of the competition law of that other Member State, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State.[192]

In other words, the CJEU has now established an outer limit for when a limitation of the *ne bis in idem* principle never can be justified.[193]Andersson has described *bpost* and *Nordzucker* as being of fundamental importance and stated that the judgments have provided clarity on the legal situation.[194] Andreangeli has concluded that an interpretation in line with the judgment in *bpost* will likely respect the integrity of the *ne bis in idem* principle while simultaneously maintaining the effectiveness of regulations that govern certain markets for public interest reasons.[195]

Harrison, Zdzieborska and Wise argued that even though the judgments provided clarity, the cases were highly fact-specific and the CJEU left several important questions unanswered. The CJEU did not set out any principles or guidance on how to differentiate legal interests and objectives. The distinction between the objectives established in *bpost*, is according to Harrison, Zdzieborska and Wise not self-evident since the postal sector rules were

[191] Ibid, paras. 55 and 57.

[192] Ibid, para. 58.

[193] Andersson, *Ne bis in idem – Hur tillämpas principen inom konkurrensrätten? Bis i domar från EU-domstolen* (2022), p. 379.

[194] Ibid, p. 369 and 380.

[195] Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 504; for a similar conclusion see Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 455.

introduced to promote competition in postal services. These concerns will likely result in more litigation in this area.[196]

Cappai and Colangelo stated that the CJEU has finally adopted a unified test for the *ne bis in idem* principle and the court's reasoning deserves full support. It can however not be assumed that *bpost* and *Nordzucker* solve all issues.[197] They further discussed that the court seems to have replaced the criteria of legal interest protected when assessing the applicability of the principle with pursuing different objectives when determining if there is a justified limitation in accordance with Article 52(1) of the Charter.[198]

Cappai and Colangelo further argued that CJEU probably attached too much importance to the objectives of the different legislations but concluding that the court has simply moved the criteria of legal interest protected from one stage to another seems too harsh. There are additional criteria to consider when determining if the limitation is justified and if these are not fulfilled; the criteria of different objectives will not matter since the limitation will not be justified. The different proceedings must also be closely connected in both substance and time and the second sanction must take into account the first one. The CJEU did, however, not provide satisfying guidance in relation to the different criteria. The court merely noted that the time period in *bpost*, approximately seventeen months, fulfilled the criteria of closely connected in time.[199] The criteria for a justified limitation must be further specified – if they are too broad the exception might instead become the rule.[200]

To conclude, there are different criteria when establishing if there has been a violation of the *ne bis in idem* principle and if a limitation can be justified. The objectives of Article 102 TFEU and the DMA will be of great importance in determining if a limitation can be justified. Thus, the following chapters will present the objectives and applications of Article 102 TFEU and the DMA.

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[196] Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022), p. 56 f.

[197] Cappai & Colangelo, *The Long Road to a Unified Test for the European Ne Bis In Idem Principle* (2022), p. 489 and 510.

[198] Ibid, p. 512.

[199] Ibid, p. 512 f.

[200] Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 451.

3 Article 102 TFEU

3.1 The Objective of Article 102 TFEU

The prohibition on abuse of a dominant in position in Article 102 TFEU reads as follows:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The objective and the scope of the article is undefined.[201] This has resulted in the CJEU adopting a teleological approach to its interpretation of the article. According to Nazzini, the only way to assure a non-arbitrary application is by using a teleological interpretation.[202] Determining the objective has been legally complex and politically difficult, especially regarding the determination of the objective within the wider context of the Treaties. The Commission has adopted a consumer welfare approach to Article 102 TFEU, which raises problems since it is neither based on a teleological interpretation nor follows from case law from the CJEU.[203] The CJEU has stated that the objective of Article 102 TFEU is to ensure that competition is not distorted in the internal market.[204] According to Article 26(2) TFEU, the internal market shall 'comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. The internal market shall, according to Article 3(3) TEU, i.a.

[201] For a thorough examination of the objective and scope of Article 102 TFEU, see Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011).

[202] The application of Article 102 TFEU is presented in section 3.2.

[203] Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011), p. 1 f.

[204] See e.g. Case C-117/20, *bpost*, para. 46.

'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress'.

Nazzini argued that the objective of Article 102 TFEU cannot change over time. If the Commission and the CJEU's different approaches are not found to be coexisting, one must be determined to be the correct one. In order to determine the objective, Nazzini stated that it 'depends on the correct interpretation of the rules given their literal, contextual, and teleological dimension'.[205] If the existing objective is not considered to be the most suitable one, the only way to change the objective is through a legal reform even if that may appear unrealistic.[206] The CJEU has rejected claims that harm to consumer welfare is the only factor to take into consideration under Article 102 TFEU.[207] This has caused doubts as to whether consumer welfare is an objective of Article 102 TFEU.[208]

The objective of Article 102 TFEU must be determined with regard to the internal market and its objectives due to the explicit mentioning of the internal market in Article 102 TFEU. Not all objectives of the internal market are compatible with all areas of EU law. The economic objective of the internal market is the most relevant here, given the economic nature of competition law. Nazzini has stated that the economic objective of the internal market, using a literal interpretation of Article 3(3) TEU, is to maximise long-term social welfare through productivity growth. Hence, maximising long-term social welfare through productivity growth shall also be an objective of Article 102 TFEU.[209] Social welfare is, according to Nazzini, 'the sum of the surplus of suppliers and consumers reflecting the values and preferences of the model of society envisaged in the Treaties'.[210] The case law from the CJEU regarding the objective of Article 102 TFEU is compatible with this objective. Effective competition results in higher productivity and social welfare. The case law is however not compatible with the consumer welfare objective.[211] Recital 11 of the DMA explicitly mentions the objective of Article 102 TFEU as the protection of undistorted competition, the same objective as stated by the CJEU.[212] The CJEU has stated that the objective of ensuring undistorted competition is indispensable for the functioning of the internal market.[213] In conclusion, the objective of Article 102 TFEU is, according to the case law

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[205] Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011), p. 11.

[206] Ibid, p. 12.

[207] Cf. e.g. Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166, paras. 103–108.

[208] Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011), p. 138.

[209] Ibid, p. 152 f.

[210] Ibid, p. 391.

[211] Ibid, p. 153; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83 paras. 20–22.

[212] See e.g. Case C-117/20, *bpost*, para. 46.

[213] Case C-117/20, *bpost*, para. 46.

from the CJEU, to ensure that competition is not distorted in the internal market. This objective contributes to maximising long-term social welfare through productivity growth which is the ultimate objective of Article 102 TFEU.

3.2 The Application of Article 102 TFEU

The application of Article 102 TFEU has been subject to several cases before the CJEU and in-depth works.[214] To determine the applicability of the article, certain steps are required. The first step is to assess whether the undertaking is dominant. In order to assess dominance, the relevant market, which consists of the relevant product market and the relevant geographic market, must first be defined.[215] In 1997, the European Commission issued a Notice on the definition of relevant market for the purposes of Community competition law (Notice) to guide how this assessment should be made.[216]

However, the way markets function has changed a lot since the Commission published its first Notice in 1997. One major change is the rise of digital platforms. Digital platforms, e.g. Google, mainly operates in two-sided or multi-sided markets.[217] A two-sided market is when users on one side do not pay a monetary fee to use the services provided. Rather than paying a monetary fee, the users on this side of the market are making personal data available to the platforms and making themselves available to see advertisements on the platform. The platforms get their revenue from the advertisers who may constitute the other part of the two-sided market. A market can further be multi-sided. A multi-sided market has more and different parties than a two-sided market.[218]

Two-sided markets are complex to investigate. Determining the relevant market in either a two-sided or a multi-sided market is more difficult than in a regular, one-sided market.[219] In 2021, the Commission therefore published an Evaluation of the Notice.[220] The Evaluation found the Notice to still be highly

[214] See e.g. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011), Whish & Bailey, *Competition Law* (2021), Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22, Case C-27/76, United Brands v Commission, EU:C:1978:22 and Case C-205/03 P, *FENIN v Commission*, EU:C:2006:453.

[215] Whish & Bailey, *Competition Law* (2021), p. 183 f.; European Commission, *Procedures in Article 102 Investigations*, <https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en#:~:text=Article%20102%20of%20the%20Treaty,position%20on%20a%20particular%20market.>, visited 2023-04-12.

[216] Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

[217] Whish & Bailey, *Competition Law* (2021), p. 23.

[218] Ibid, p. 35.

[219] Ibid.

[220] European Commission, *Commission staff working document – Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997* (2021).

relevant but that an update was needed to adapt the Notice to developments that have occurred since 1997. The Evaluation further stated that the principles to define the relevant market are the same but that those principles can be more difficult to apply in the digital context. Defining multi-sided markets is explicitly mentioned as a difficulty in the digital context. In order to adapt to changes in the market, the Evaluation stated that the Notice should reflect principles rather than compilations of existing case law and practice.[221] Since the publication, a draft for a revised Notice has been presented and put under review. Some of the suggested changes include guidance on defining the relevant market in digital markets. An updated version of the Notice will be published in the third quarter of 2023, at earliest.[222]

After determining the relevant market, the second part of the first step is to establish whether there is dominance in the relevant market. There are different indications used to determine if the undertaking is dominant in the established relevant market. A first useful indication is the undertaking's market shares in the relevant market. Market shares can be used as a presumption for dominance. However, market shares are not conclusive for establishing a dominant position and other factors thus need to be taken into consideration. Such other factors include barriers to entry, countervailing buyer power and the undertaking and its competitors' market positions.[223]

After assessing the undertaking's dominance, the second step is to determine if an abuse has occurred. Having a dominant position is not in itself prohibited by Article 102 TFEU. In *Michelin v Commission*[224], the CJEU stated that 'a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'.[225] According to Whish and Bailey this is a statement of the obvious since Article 102 TFEU imposes obligations on undertakings that are

[221] Ibid, p. 66 ff.

[222] European Commission, *Competition: Commission seeks feedback on draft revised Market Definition Notice*, <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528>, visited 2023-04-12.

[223] See European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02); Whish & Bailey, *Competition Law* (2021), p. 184 f.; European Commission, *Procedures in Article 102 Investigations*, <https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en#:~:text=Article%20102%20of%20the%20Treaty,position%20on%20a%20particular%20market.>, visited 2023-04-12.

[224] Case C-322/81, *Michelin v Commission*, EU:C:1983:313.

[225] Ibid, para. 57.

dominant, i.e. undertakings that do not fulfil the criteria for dominance do not have the same obligations.[226]

Article 102 TFEU provides examples of abuses.[227] The article is non-exhaustive[228], and an abuse may thus constitute a different type of behaviour than the ones explicitly listed in the article. Since markets change over time, it is important that Article 102 TFEU can adapt to such changes and new circumstances.[229] The article has done this when it comes to digital markets; the CJEU has established new forms of abuse in digital markets.[230] In *Google Shopping* the court confirmed that Google had abused its dominant position in national markets for general search services by favouring its own comparison shopping service on its search engine.[231] The judgment has been appealed.[232]

Enforcement of Article 102 TFEU occurs *ex post*. Enforcement of the article also requires extensive investigation of the facts on a case-by-case analysis, as the facts are often very complex.[233] This results in the enforcement processes taking a long time.[234] One question that arises regarding the enforcement of Article 102 TFEU in digital markets is therefore whether it is possible to accelerate the investigation. According to Whish and Bailey, 'there may be little point in pursuing a complicated Article 102 case, if by the time that a final decision is reached and the appeal process has been completed, the market has already tipped in favour of the firm under investigation'.[235]

[226] Whish & Bailey, *Competition Law* (2021), p. 197.; European Commission, *Procedures in Article 102 Investigations*, <https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en#:~:text=Article%20102%20of%20the%20Treaty,position%20on%20a%20particular%20market.>, visited 2023-04-12.

[227] Article 102 TFEU is cited at the beginning of this chapter.

[228] See e.g. Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22, para. 26, Case C-95/04 P, British Airways v Commission, EU:C:2007:166, para. 57 and Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, para. 173.

[229] Whish & Bailey, *Competition Law* (2021), p. 198.

[230] Cf. Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, EU:T:2021:763.

[231] See Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, paras. 339 and 703.

[232] Case C-48/22 P, *Google Alphabet v Commission (Google Shopping)*, not yet decided.

[233] Recital 5 of the DMA.

[234] Cf. the time period for Case T-612/17, *Google Alphabet v Commission (Google Shopping)*. The Commission adopted its decision on 27 June 2017 and the General Court delivered its judgment on 10 November 2021. This judgment has been appealed and the Court of Justice has not yet delivered its judgement.

[235] Whish & Bailey, *Competition Law* (2021), p. 1052.

4 Digital Markets Act

4.1 The Objective of the DMA

The DMA is a part of the EU's strategy for ensuring a Europe fit for the digital age.[236] The Commission presented its proposal for the DMA (Proposed DMA) on 15 December 2020[237] where it stated that regulation of digital markets is needed in order to avoid fragmentation of the internal market. Fragmentation of the internal market may occur since a few large platforms act as gatekeepers who enjoy major impact and control over the access to digital markets. This causes significant dependencies on such gatekeepers by business users and results in unfair behaviour and negative effects on the contestability. This may, in turn, lead to inefficient outcomes in the digital sector to the detriment of consumers, e.g. lower quality, higher prices and decreased innovation and choice.[238]

The Commission stated that the objective of the proposal is to 'allow platforms to unlock their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability so as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment'.[239] The Commission found that Article 102 TFEU is not sufficient to deal with problems caused by gatekeepers, since a gatekeeper may not be a dominant undertaking and its behaviour may not constitute an infringement of Article 102 TFEU. With regards to the application of Article 102 TFEU, the Commission further stated that it is currently not possible to intervene with the necessary speed to address such pressing practices in the most timely and effective manner.[240]

The DMA was adopted in September 2022 and started to apply on 2 May 2023.[241] The legal basis for the regulation is the internal market clause in

[236] European Commission, *A Europe fit for the digital age*, < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en>, visited 2023-03-13; European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>, visited 2023-03-13.

[237] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December, 2020.

[238] These are the opposite of what the rules on competition contribute to, cf. European Commission, *Why is competition policy important for consumers?*, <https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en>, visited 2023-03-13; Proposed DMA, p. 1; cf. Recital 4 of the DMA.

[239] Proposed DMA, p. 2 f.

[240] Ibid, p. 8; cf. Recital 5 of the DMA; cf. Whish & Bailey, *Competition Law* (2021), p. 1052.

[241] Article 54 DMA.

Article 114 TFEU meaning that it is not adopted as a competition law tool.[242] According to Article 1(1) DMA, the purpose of the regulation is to contribute to the proper functioning of the internal market. In order to achieve this, the regulation lays down harmonised rules ensuring contestable and fair markets for all businesses in the digital sector where gatekeepers are present. This will be to the benefit of business users and end users.[243]

In Recital 11 of the DMA, it is stated that the objective of the DMA is 'to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market'.[244] In Recital 107 of the DMA, the objective is formulated as 'to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector'. Recital 11 of the DMA further states that this objective is complementary to, but different from the objective of competition law being protection of undistorted competition in the internal market. Thus, the DMA protects a different legal interest than the one protected in competition law.

The DMA has been described as an *ex ante* mechanism for competition law.[245] Georgieva argued that the objective for intervention under the DMA is very similar to the objective for intervention under competition law, i.e. curbing undesirable behaviour by undertakings with market power. Georgieva further contended that the wide scope of the DMA – dealing with practices that are generally unfair to consumers – subsumes the rules on competition.[246] The objective of the DMA in relation to the objective of Article 102 TFEU is further discussed in the fifth chapter.

4.2 The Application of the DMA

The DMA applies to gatekeepers that provide or offer core platform services to business users or end users established or located in the EU. The gatekeepers' place of establishment or residence is irrelevant for the application of the regulation.[247] A gatekeeper is an undertaking that provides core platform

[242] Cf. Article 103 TFEU; Proposed DMA, p. 4; Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 446.

[243] Article 1(1) DMA; Recital 7 of the DMA.

[244] The same objective can be found in Recital 10 of the Proposed DMA.

[245] Engel & Groussot, *The Digital Markets Act: A New Era for Competition Law and Fundamental Rights in the EU Digital Single Market*, (2022), p. 3.

[246] Georgieva, *The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles* (2021), p. 27 f.

[247] Article 3(2) DMA.

services, e.g. online search engines, online social networking services, web browsers and online advertising services.[248]

An undertaking shall be designated as a gatekeeper if it fulfils three objective criteria.[249] The undertaking must (1) have a significant impact on the internal market, (2) provide a core platform service and (3) enjoy an entrenched and durable position in its operations. The core platform service provided must be an important gateway for business users to reach end users. If the undertaking does not enjoy an entrenched and durable position at the moment, it is sufficient that it is foreseeable that it will enjoy such a position in the near future.[250] In Article 3(2) DMA, objective presumptions of the criteria in Article 3(1) can be found. The presumptions take account of the undertaking's turnover as well as active business and end users.[251]

If an undertaking is designated as a gatekeeper, it will have to ensure and demonstrate compliance with certain obligations, without having been subject to an investigation or a decision.[252] Cappai and Colangelo argued that the obligations imposed, to a great extent, seem to be a compilation of competition cases, both final and ongoing.[253] According to Article 29 DMA, the Commission shall adopt a non-compliance decision if it finds that a gatekeeper does not comply with the obligations. In such a decision, the Commission may impose fines or periodic penalty payments on the gatekeeper.[254]

The burden of proof for applying the DMA is lower than the burden of proof under Article 102 TFEU.[255] The DMA is a regulatory tool enforced *ex ante*, before harm on the market takes place.[256] The *ex ante* approach adopted in the DMA was seen to be a more efficient way to deal with anti-competitive behaviour in digital markets due to the complex facts and extensive

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[248] Article 2(1) and 2(2) DMA.

[249] Recital 15 of the DMA; Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 496.

[250] Article 3(1) DMA.

[251] Article 3(2) DMA.

[252] Article 8(1) DMA which refers to Articles 5–7 DMA; Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 499.

[253] Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 445; see also Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 499; cf. Article 6(5) DMA and Case T-612/17, *Google Alphabet v Commission (Google Shopping)* which supports their conclusion.

[254] Articles 30–31 DMA.

[255] The criteria for designating a gatekeeper are objective, cf. section 3.2; Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 499.

[256] Georgieva, *The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles* (2021), p. 26.

investigation needed under Article 102 TFEU. Furthermore, the *ex ante* approach is important since it prevents competition from being distorted in the first place, something that has been difficult to restore.[257]

[257] Cf. Recital 5 of the DMA; Signoret, *Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants* (2020), p. 239 f.; Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 498.

5 The Relationship Between Article 102 TFEU and the DMA

As discussed in the previous chapter, Article 102 TFEU, as well as the DMA are applicable on digital markets. Whereas Article 102 TFEU imposes obligations on dominant undertakings, the DMA imposes obligations on gatekeepers. The DMA aims at complementing the enforcement of competition law and it is thus applied without prejudice to Article 102 TFEU.[258] If a conduct does not fall under the scope of the DMA, it may still fall under the scope of Article 102 TFEU due to the fact that Article 102 TFEU has the possibility to adapt to new situations, something that the DMA does not have.[259] However, a dominant undertaking may qualify as a gatekeeper, and a gatekeeper may qualify as a dominant undertaking. This results in those undertakings having double obligations and a possibility for parallel proceedings. When imposing several obligations, it is important to respect fundamental rights, i.a. the principle of *ne bis in idem*.[260]

There is no mention of the *ne bis in idem* principle in the Proposed DMA. In the adopted regulation, the *ne bis in idem* principle is however explicitly mentioned in Recital 86.[261] It is stated that the Commission and the NCAs should coordinate their enforcement and inform each other about their respective actions on enforcement to ensure and respect the *ne bis in idem* principle as well as the principle of proportionality.[262] The Commission should in particular take into account penalties previously imposed on the same undertaking for the same facts.[263]

The criteria for the application of Article 102 TFEU and the DMA are different: Article 102 TFEU investigations are extensive and require complex facts to be examined on a case-by-case analysis while the application of the DMA is subject to objective criteria. Apart from the Commission, Member States' NCAs have the power to enforce Article 102 TFEU.[264] Regarding the DMA, the Commission is the sole enforcer. Member States should however be able to support the Commission by empowering their NCAs to conduct

[258] Article 1(6) DMA; Recital 10 of the DMA.

[259] Cf. the wording of Article 3 DMA.

[260] Cf. Article 51 of the Charter.

[261] Considering the CJEU's judgment in *bpost* and *Nordzucker*, this is not surprising according to Cappai and Colangelo, see Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 445.

[262] Recital 86 cf. Articles 37–38 DMA.

[263] Recitals 86 and 109 of the DMA.

[264] Cf. Articles 4–5 of Regulation 1/2003.

investigations about possible non-compliance by gatekeepers. The NCAs should further report findings of possible non-compliance to the Commission.[265]

Some obligations in the DMA reflect abuses established in competition cases.[266] In *Google Shopping*, the CJEU confirmed that Google had abused its dominant position in national markets for general search services by favouring its own comparison shopping service on its search engine.[267] According to Article 6(5) DMA, a gatekeeper shall not in ranking treat services and products offered by the gatekeeper more favourably than similar services or products offered by a third party. Instead, the gatekeeper shall apply transparent, fair, and non-discriminatory conditions to such ranking.[268] The behaviour of Google established in *Google Shopping* would now fall under the DMA and the *ex ante* approach requires Google and other gatekeepers to not conduct such behaviour. The DMA would likely have prevented this behaviour as it is one of the obligations of the regulation. If, in this case, Google would not have followed its obligations it could be imposed fines under the DMA. The same non-compliance could also constitute an infringement of Article 102 TFEU. This example shows that there will in fact be situations where Article 102 TFEU and the DMA will be applicable to the same situations.[269]

Regarding the behaviour of big tech companies, the DMA is expected to be used more frequently than Article 102 TFEU due to the need for less extensive investigations including defining the relevant market. Article 102 TFEU will instead serve the purpose of catching cases that do not fall under the scope of the DMA e.g., where new behaviours that are not regulated by the DMA emerge.[270]

As the DMA does not prevent double proceedings, parallel proceedings will most likely occur.[271] The *ne bis in idem* principle will set the limits of such parallel proceedings. If there is a second proceeding directed at the same legal person as well as the same facts, there will be a limitation to the *ne bis in idem* principle.[272] However, such limitation may be justified, as established by the

[265] Recital 91 of the DMA.

[266] Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 445; see also Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 499.

[267] See Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, paras. 339 and 703. The judgment has been appealed, C-48/22 P, *Google Alphabet v Commission (Google Shopping)*, not yet decided.

[268] Article 6(5) DMA.

[269] Cf. Engel & Groussot, *The Digital Markets Act: A New Era for Competition Law and Fundamental Rights in the EU Digital Single Market* (2022), p. 3.

[270] Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022), p. 57.

[271] Cf. ibid.

[272] Cf. Case C-117/20, *bpost*, paras. 28, 32 and 39.

court in *bpost* and *Nordzucker*. This assessment can only be conducted *ex post*.[273] In order for a limitation to be justified, the limitation must be provided by law, respect the essence of the rights provided and respect the principle of proportionality.[274] The different legislations must pursue different objectives – if they pursue the same objective a limitation can never be justified.[275] Furthermore, it must be assessed if the legislation is clear and precise resulting in predictability when multiple proceedings may occur, if coordination have taken place between different authorities resulting in close connection in substance, if the different proceedings have been coordinated within a proximate timeframe, and if the second decision has taken account of the sanctions imposed by the first decision.[276]

Harrison, Zdzieborska and Wise argued that the judgment in *bpost* will be crucial for dealing with overlap between the DMA and Article 102 TFEU. Several key issues were, however, not addressed, which creates more questions on the application of the *ne bis in idem* principle. They found it surprising that the CJEU concluded that the postal sector rules and Article 102 TFEU pursued different objectives given the fact that the postal sector rules were introduced with the purpose of promoting competition in postal services. This conclusion is not self-evident and the CJEU did not provide any guidance on how to determine the objectives resulting in the need for further litigation.[277] They further stated that the DMA protects many of the same legal interests as Article 102 TFEU, which likely will result in significant overlap between the different legislations. This requires legislative guidance for the clarification of the interaction between the DMA and Article 102 TFEU and further litigation regarding how to differentiate legal interests. Harrison, Zdzieborska and Wise concluded that even if it is encouraging that the Recitals of the DMA explicitly mention the *ne bis in idem* principle, key issues regarding how the principle will be applied to the relationship between Article 102 TFEU and the DMA are left unaddressed. Thus, more litigation can be expected.[278]

Andreangeli argued that it is unclear if the DMA will be able to fulfil its stated objective without affecting the application of Article 102 TFEU, due to the DMA being deeply rooted in the EU competition law framework. It is hence destined to interact with Article 102 TFEU.[279] Andreangeli concluded that the DMA is novel since it addresses new challenges arising from digital markets

[273] Ibid, para. 52.

[274] Article 52(1) of the Charter.

[275] Case C-117/20, *bpost*, para. 43; Case C-151/20, *Nordzucker and Others*, para. 57.

[276] Case C-117/20, *bpost*, paras. 51 and 55.

[277] Harrison, Zdzieborska & Wise, *Navigating Ne bis in Idem: Bpost, Nordzucker and the Digital Markets Act* (2022), p. 56 f.

[278] Ibid, p. 58 f.

[279] Andreangeli, *The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets* (2022), p. 498.

ex ante and the regulation therefore marks a shift in the way of upholding competition in the internal market.[280]

Regarding the application of the *ne bis in idem* principle, Andreangeli stated that the CJEU provided a satisfactory approach in *bpost*. She concluded that an interpretation in line with the judgment in *bpost* will likely respect the integrity of the *ne bis in idem* principle while simultaneously maintaining the effectiveness of the regulations that govern certain markets for public interest reasons, i.a. the DMA. Andreangeli further suggested that the criteria for the *ne bis in idem* principle, as established in *bpost*, can provide an assessment of the circumstances while avoiding placing a disproportionate burden on the undertaking being investigated. It will however be critical as to how the CJEU will address the criteria of pursuing different objectives given the complementary aim of the DMA.[281]

If the DMA and Article 102 TFEU are found to pursue the same objectives by the CJEU, the principle will more likely be applicable since a limitation can never be justified if the different legislations pursue the same objective.[282] It will then be the *idem* criteria that determines if the principle is applicable. Given the similarities of the obligations under the DMA and abuses in competition cases, it can be assumed that the *idem* criteria will be fulfilled. However, as noted in *Nordzucker*, it will be of relevance which territories the different decisions concern. If a decision under the DMA does not take account of the entire EU, NCAs in territories that have not been included in the decision can adopt a decision based on Article 102 TFEU. However, NCAs in the territories that were in fact a part of the Commission's decision cannot do the same without violating the *ne bis in idem* principle. If an NCA has adopted a decision under Article 102 TFEU, the Commission may adopt a decision under the DMA concerning a different territory than the one already subject to a decision from the NCA. This approach has been criticised by Cappai and Colangelo who argued that such approach allows the enforcers to circumvent the *ne bis in idem* principle in Article 50 of the Charter by simply gerrymandering the territory where the conduct produces effects and exclude the territory already subjected to a decision.[283]

If the CJEU finds that the DMA pursues a different objective than Article 102 TFEU, it will be of importance to assess whether the other criteria for a limitation to be justified are fulfilled. Given the cooperation mechanism between the Commission and the NCAs established in the DMA, the regulation seems to fulfil the requirement of close connection in substance, provided that cooperation actually took place. It is however not clear what level of

[280] Ibid, p. 499.

[281] Ibid, p. 503 f.

[282] Cf. Case C-151/20, *Nordzucker and Others*, para. 57.

[283] Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 450.

cooperation is needed in order for the criteria to be fulfilled.[284] The decisions must further be closely connected in time. It is unclear as to what closely connected means since the CJEU did not clarify this in *bpost*. The court did take into account the complexity of competition investigations when determining that a period of seventeen months was closely connected in time.[285] It remains to be seen as to whether the court will establish a maximum time limit to this criterion.

The CJEU further stated that the second penalty must take into account the first penalty imposed on the undertaking. Like the other criteria, the court did not provide guidance on how to fulfil this criterion. Cappai and Colangelo argued that it is not sufficient that the prosecutor merely states that the first penalty has been taken into consideration when determining the second one. The prosecutor must further explain how this has been done, i.a. by identifying limits, ranges and thresholds governing the duplication.[286]

[284] For the same conclusion, see Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 451 f.

[285] Case C-117/20, *bpost*, para. 56.

[286] Cappai & Colangelo, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets* (2023), p. 454.

6 Analysis and Conclusion

6.1 Introduction

The aim of this thesis was to examine how the principle of *ne bis in idem* is applied in EU competition law and on the relationship between the abuse of dominant position in Article 102 TFEU and the DMA. The aim was further to answer if it is possible for an undertaking to infringe both these regulations and, if that is the case, if the principle of *ne bis in idem* will prevent double penalties.

This thesis has presented and examined case law, legislation, and doctrine in the previous chapters. In this concluding chapter, the different research questions will be answered and concluding remarks will be presented in section 6.6.

6.2 The *Ne Bis In Idem* Principle in EU Competition Law

The *ne bis in idem* principle has a long history and there are several *rationale* for the principle, i.a. protection of *res judicata*. The principle constitutes a fundamental right, and it can be found in Article 50 of the Charter and in Article 4 of Protocol No 7 to the ECHR. However, the principle is not absolute – it can, thus, be subject to limitations. The *ne bis in idem* provisions in the Charter and the ECHR explicitly mention the term 'criminal'. The ECtHR has established that the meaning of criminal shall be interpreted autonomously. It shall not be the definition as such that is of the greatest importance, but the nature of the offence and the severity of the penalty imposed. This was later confirmed by the CJEU with an explicit reference to the case law of the ECtHR.

The ECtHR have further stated that fines under competition law are of criminal character. Even if the CJEU did not explicitly use neither the *Engel* criteria nor the *Bonda* criteria at first, the court has applied the *ne bis in idem* principle in several cases. In the recent judgments *bpost* and *Nordzucker*, the CJEU explicitly refers to the Bonda criteria. Hence, it follows from the case law of the CJEU that the *ne bis in idem* principle is also applicable in EU competition law.

The CJEU has decided several cases regarding the *ne bis in idem* principle's application in competition law. The first case, *Walt Wilhelm*, dates back to 1969. Over time, the CJEU has developed its case law which has been restrictive in finding infringements of the *ne bis in idem* principle. Even if the court finds the *ne bis in idem* principle applicable in competition law, it has not found the criteria of the principle to be fulfilled in any case, either due to there

being no identity of facts as in *Toshiba Corporation* or a justified limitation as in *bpost*.

The previous case law from the CJEU was criticised in the doctrine and by Advocate Generals. The criticism was well founded due to the provisions of the Charter. In Advocate General Kokott's Opinion on *Toshiba Corporation*, she showed an interest to align the application of *ne bis in idem* in competition law with the application in other areas of law. However, the CJEU did not follow the Advocate General's lead. It was not until March 2022 that the CJEU aligned the case law in competition cases with the other areas of EU law, as originally suggested by General Advocate Kokott. In *bpost* and *Nordzucker*, the CJEU stated that the legal interests protected are not relevant for determining the application of the principle. The *idem* condition shall be assessed based on identity of facts and it is not sufficient that the facts are merely similar. This shows a turning point for the application of the *ne bis in idem* principle in competition law.

The judgments are welcomed as a step into the right direction of providing clarification of the application of the *ne bis in idem* principle in competition law. It can, however, be noted that if the CJEU in its previous case law would have adopted a twofold condition of *bis* and *idem*, where *idem* was to be determined due to the identity of facts as established in *bpost* and *Nordzucker*, there would still be no violation of the principle. This is the case since the CJEU found there to be no identity of facts and thus not reaching the third criteria of the legal interest protected.

Instead of applying a criterion of legal interest protected in the *idem* assessment, the CJEU has now established that in order for a limitation to be justified, the legislation must pursue different objectives. The outcome in *bpost* would have been the same based on the previous threefold condition of *idem*. It can thus be argued that the CJEU has moved the criterion from one step of the assessment to another. In practice these will result in the same outcome. However, if the CJEU would have adopted the threefold condition in *bpost*, it would not have to assess whether there was a justified limitation. If the court, on the other hand, would have found the objectives to be the same, it would have to assess whether such limitation can be justified. According to Article 52(1) of the Charter in conjunction with the case law, the court could never justify such a limitation since a limitation may never be justified if the legislation pursues the same objective. Hence, it can be concluded that it cannot be seen as the CJEU has simply moved the criterion to another part of the assessment. The criterion of pursuing different objectives would still exist in the assessment of a justified limitation even if the *idem* condition was subject to a threefold condition.

In *bpost*, the CJEU established different factors to take into consideration when determining if a limitation can be justified in accordance with Article

52(1) of the Charter. The first part of the assessment is to assert whether there are clear and precise rules resulting in the possibility to predict when multiple proceedings may occur. Further litigation is needed for more clarification of the remaining parts of the assessment as the CJEU left important questions unanswered. The court did not provide guidance on how to identify the objective but merely stated that the objectives were different in the case at hand. Given that the postal sector rules were introduced in order to promote competition, the conclusion of the CJEU is not self-evident. It may thus be difficult to determine objectives in future cases (as will be discussed in section 6.5).

The proceedings must also be closely connected in substance and time. The CJEU stated that a cooperation between the authorities must have taken place in order for the proceedings to be considered closely connected in substance. The court did, however, not further specify what this means or establish any minimum requirement of the cooperation needed. Regarding the criterion of closely connected in time, the court did not establish a maximum time limit – it is thus unclear what is actually meant by 'close in time'. The court only asserted that seventeen months, the time between the decisions in *bpost*, is considered closely connected in time due to the complexity of competition investigations.

In order for the penalties imposed on the undertaking to not go beyond what is strictly necessary, the second proceeding shall take into account the penalty imposed in the first proceeding. As has been argued in the doctrine, the prosecutor should not be able to simply state that it has taken into account the first penalty in order to fulfil this criteria. If a simple statement is enough, the purpose and substance of this part of the assessment would lose its meaning. The CJEU thus needs to clarify how this criteria is shown.

In conclusion, the *ne bis in idem* principle in competition law is subject to a twofold criterion of *bis* and *idem*. When determining idem, the identity of the facts is examined. The facts must be identical, and it is not enough that the facts are merely similar. A limitation of the principle may be justified, if there are clear and precise rules resulting in the possibility to predict when multiple proceedings may occur and if the different legislations pursue different objectives. A limitation can never be justified if the legislation pursues the same objective. In addition, there must have been a close connection between the different proceedings in both substance and time. Lastly, the second penalty must have taken into consideration the first penalty imposed on the undertaking. The different aspects of the assessment are not fully clear, resulting in there still being questions regarding the application of the *ne bis in idem* principle in competition law.

6.3 The Objectives of Article 102 TFEU and the DMA

Over the last few years, the Commission and other EU institutions have shown a desire to regulate the digital market more thoroughly. This is seen via the current priorities of the EU, the update of the Notice and the adoption of the DMA. The DMA is said to pursue a different objective than Article 102 TFEU. According to the case law from the CJEU, defining the objectives of the legislation is of great importance when determining if there has been a justified limitation of the *ne bis in idem* principle.

As found by Nazzini, one objective of Article 102 TFEU is maximising long-term social welfare through productivity growth. This objective is also an objective of the internal market. The CJEU has in several cases stated that the objective of Article 102 TFEU is to ensure that competition is not distorted in the internal market. This objective is also explicitly mentioned in the DMA and it is further compatible with the objective presented by Nazzini in his doctrine. Nazzini has rejected claims that the objective is to protect consumer welfare since there is no support for this objective in the case law from the CJEU.

According to the Recitals of the DMA, the objective of the regulation is complementary to but different from the objective of Article 102 TFEU. The objective is to ensure a contestable and fair digital sector, with a view to promote innovation, high quality of digital products and services and fair and competitive prices. This is independent from the actual, potential, or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition in a given market.

In the doctrine, the DMA has been treated as a competition law regulation and some legal scholars are sceptical as to whether the DMA actually pursues an objective different than that of competition law. However, the DMA applies without taking account of the competitive effects. With the DMA, competitive effects are not important whereas such effects are important for the application of Article 102 TFEU.

The DMA must be determined to have a broader objective than Article 102 TFEU. This objective may include the objective of competition law, especially since Article 102 TFEU is mentioned as an inadequate tool for digital markets where gatekeepers are present, which is one of the reasons for the adoption of the regulation. Given the fact the DMA has a broader objective, it has a different objective as established in the Recitals of the regulation. This conclusion is supported by the reasoning, or more correctly, the lack of reasoning, from the CJEU regarding the objectives in *bpost*. However, the objective of the DMA has not been confirmed by the CJEU and the CJEU may adopt a different approach than it did in *bpost*.

The CJEU found the objectives to be different in *bpost*. This was not self-evident, as argued, due to the postal sector rules' close connection with competition law. The DMA has, like the postal sector rules, a close connection to competition law but as shown by the case law, this does not prevent the regulation from pursuing a different legitimate objective. The different objective as well as the use of Article 114 TFEU as a legal basis for the regulation indicates that the DMA does not pursue the same objective as Article 102 TFEU.

In conclusion, the objective of Article 102 TFEU is to ensure that competition is not distorted in the internal market, whereas the objective of the DMA is to ensure a contestable and fair digital sector where gatekeepers are present.

6.4 The Relationship Between Article 102 TFEU and the DMA

While Article 102 TFEU imposes obligations on dominant undertakings, the DMA imposes obligations on gatekeepers. As discussed, sometimes a dominant undertaking is a gatekeeper, and a gatekeeper can be a dominant undertaking. This results in such undertakings having double obligations. In those cases, it is important to respect fundamental rights, including the *ne bis in idem* principle. If an undertaking is subject to more obligations, this increases the risk of being subject to more proceedings. As discussed in the fifth chapter, Google's behaviour in *Google Shopping* would now fall under the DMA, resulting in the actual possibility of double proceedings and penalties. This will also be true of other types of behaviour that fall under the scope of the DMA and Article 102 TFEU. As has been argued above, these behaviours will be many given the connection between the obligations in the DMA and competition cases.

Article 102 TFEU and the DMA are two independent legal instruments applied without prejudice to one another. The DMA is not competition law since it was not adopted as a competition legislation. In the doctrine, the DMA is, however, being treated as competition law. The DMA is often addressed together with Article 102 TFEU. The DMA has been said to be an *ex ante* Article 102 TFEU without the need to establish the relevant market, dominance, or abuse of dominance. Instead, the DMA has established objective criteria for the regulation to apply. Thus, it will be easier to apply the DMA and unlike Article 102 TFEU, there will not be a need for extensive investigations. The extensive and complex investigations needed for the application of Article 102 TFEU can be inefficient since the dominant undertaking may already have benefitted from the abuse and the competition may already have been distorted, which is difficult to restore.

According to Regulation 1/2003, both NCAs and the Commission have the possibility of enforcement under Article 102 TFEU. When it comes to

enforcement of the DMA, the Commission has exclusive competence. Given that the Commission is the sole enforcer of the DMA, the Commission will not likely start a proceeding under Article 102 TFEU if it has already started one under the DMA. A proceeding under Article 102 TFEU takes a long time and requires extensive investigation. However, the NCAs cannot enforce the DMA, meaning their choice of instrument to catch the same behaviour may have to be Article 102 TFEU (provided that the criteria for application are fulfilled).

The DMA provides a cooperation mechanism between the Commission and NCAs who are supposed to inform each other about their respective enforcement actions. There is no order of priority that decides if the DMA or Article 102 TFEU should be used first. However, it can be assumed it will be more efficient to apply the DMA since this requires neither a definition of the relevant market nor an established abuse to be found. If there is a process under DMA, the *ne bis in idem* principle could possibly prevent proceedings under Article 102 TFEU and the other way around. Hence, it is important for the Commission to choose which way it wants to go: Article 102 TFEU or the DMA.

In conclusion, Article 102 TFEU and the DMA apply without prejudice to one another. There is no legal order for when one should apply before the other, and the Commission and NCAs shall coordinate and inform each other of their enforcement actions. The limit for double proceedings as well as sanctions is the *ne bis in idem* principle. The following section will examine whether the *ne bis in idem* principle is applicable on the relationship between Article 102 TFEU and the DMA.

6.5 The Applicability of the *Ne Bis In Idem Principle* on the Relationship Between Article 102 TFEU and the DMA

Assessing the applicability of the *ne bis in idem* principle can only be done *ex post*, resulting in the principle not preventing double proceedings from actually taking place. Instead, the principle (if found applicable) will prevent double penalties from being imposed on undertakings. As discussed in section 6.2, there are different criteria established by the CJEU that need to be taken into consideration when determining whether there is an infringement of the *ne bis in idem* principle. It can first be noted that the obligations in Article 102 TFEU and the DMA are provided for by law and the rules are clear and precise regarding what is expected of undertakings who qualify as gatekeepers and dominant undertakings. The obligations thus fulfil the criteria in this part.

As argued in relation to the established objectives in *bpost*, it is not self-evident that the objectives of Article 102 TFEU and the DMA will be considered

different by the CJEU due to their close connection. Since the CJEU did not provide any clarification or guidance on how to differentiate the objectives, it is difficult to predict how the court will rule in future cases. This raises further questions and concerns.

It can first be noted that the objectives of Article 102 TFEU and the DMA are different based on their respective wording. However, it is unclear whether the objective of the DMA also includes the objective of Article 102 TFEU. When determining the identity of facts, the facts must be identical. It is not sufficient that they are similar. Using an analogous interpretation when determining the objective, this would result in the objectives being different and that there would be a justified limitation of the *ne bis in idem* principle, provided that the other criteria are fulfilled. However, the objective of the DMA is complementary to the objective of Article 102 TFEU. It is uncertain whether a complementary objective can be considered to be different. However, if the CJEU uses the approach used in *bpost* and establishes the objectives based on the Recitals, the objectives will be considered different. This is also supported by the fact that as of the existing case law, the CJEU has been restrictive when determining if there has been an infringement of the *ne bis in idem* principle in competition cases.

It must further be assessed if the criteria of close connection in substance and time are fulfilled. The DMA provides for cooperation between the Commission and NCAs, and it is not possible to foresee how this cooperation will function in practice. Since the DMAs provisions prescribes an obligation to cooperate, it can be assumed that such cooperation will take place. The CJEU has not established an outer limit for when two proceedings cannot be found closely connected in time. However, the court took into consideration the investigation process of competition law when determining that a period of seventeen months was closely connected in time. Given the *ex ante* approach in the DMA and the *ex post* approach in Article 102 TFEU, decisions based on the respective regulations may be adopted further apart. It is not possible to determine if these criteria will be fulfilled beforehand. The same conclusion can be drawn in regard to the criteria of the second penalty having to take the first one into consideration.

If the CJEU is to find that Article 102 TFEU and the DMA pursue the same objective, a limitation will never be justified. In order for the principle to apply, the conditions of *bis* and *idem* must be fulfilled. As argued in the fifth chapter, the *idem* criteria will likely be fulfilled unless the different decisions regard different territories. This has been criticised as a way of circumventing Article 50 of the Charter, but the critique expressed in the doctrine does not deserve support. This approach would be to the detriment of the objectives of the different legislations, resulting in them not being able to catch harmful behaviour. This could in turn lead to i.a. decreased innovation and lower quality. Decisions imposed on the same undertaking in different territories respect

the *ne bis in idem* principle by not imposing obligations other than what is necessary. It can further be noted that the Commission and the NCAs are supposed to coordinate and inform each other on their respective enforcement actions which, if it proves to function in practice, would result in fewer decisions imposed on the same undertakings.

The criteria established by the CJEU are satisfactory. However, the CJEU does not currently provide all the guidance needed in order to ascertain if the principle will be applicable on the relationship between Article 102 TFEU and the DMA. In the end, it is the CJEU that has the final say on the principle's application on the relationship between Article 102 TFEU and the DMA. As of the restrictive case law, and if the CJEU stays true to that, the principle will likely not be violated as a limitation will be justified.

6.6 Concluding Remarks

It is possible for an undertaking to infringe both Article 102 TFEU and the DMA; they are complementary to another, one not excluding the other. If the *ne bis in idem* principle is found applicable, it will prevent double sanctions from being imposed on the undertaking. In order to determine the applicability of the principle several criteria must be considered, one being the objectives of the different legislations. As stated above, Article 102 TFEU and the DMA pursue similar, yet different objectives. The CJEU has hitherto been restrictive in applying the *ne bis in idem* principle in competition law. This would likely result in the CJEU finding the objectives of Article 102 TFEU and the DMA to be different. This would, in turn, result in a justified limitation of the *ne bis in idem* principle, if the principle is found to be violated.

It falls within the jurisdiction of the CJEU to ultimately determine the objective of the DMA and its relationship with Article 102 TFEU, as well as the application of the *ne bis in idem* principle on this relationship. This is something that will probably be done in the future, based on the fundamental questions that have been raised in this thesis that cannot be answered without further rulings from the CJEU.

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