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THE *NE BIS IN IDEM* PRINCIPLE AND THE DMA – AFTER BPOST AND NORDZUCKER CASES

Fatma Ceren Morbel[1]

ABSZTRAKT ■ Az elmúlt néhány évben a digitális technológiák megjelenése megváltoztatta a gondolkodásmódunkat és azt, amit korábban lehetségesnek tartottunk. Mivel a digitális piacok is megváltoztak, szükség volt egy szabályozási keretre. A digitális piacokról szóló törvény ("DMA") az egyik legújabb példája az EU azon törekvéseinek, hogy tisztességes és nyitott piacokat biztosítson a digitális térben. A DMA vitát váltott ki az EUMSZ 101. és 102. cikkének a digitális platformokra való alkalmazásával kapcsolatos jelenlegi szabályokról. A DMA hatályba lépése óta és az elfogadásának folyamata során aggályok merültek fel a versenyszabályokhoz való hasonlóságával kapcsolatban. Bár a DMA és a trösztellenes jogérvényesítés kiegészítik egymást, az EU-ban a digitális platformokra többféle szabályozási keretet kell alkalmazni. Így valószínű, hogy a *ne bis in idem* elve a DMA és az uniós versenyjog párhuzamos alkalmazásaként fog érvényesülni. E tanulmány célja a *ne bis in idem* elv elemzése a DMA alapján, különös tekintettel a bpost és a Nordzucker ügyekre.

ABSTRACT ■ Over the past few years, the advent of digital technologies has changed how we think as well as what we once considered possible. As digital markets have also changed, there was a need for a regulatory framework. The Digital Markets Act ("DMA") is one of the recent examples of the EU's efforts to ensure fair and open markets in the digital realm. The DMA sparked a debate regarding the current rules regarding the application of Articles 101 and 102 TFEU to digital platforms. Since the DMA entered into force and throughout its adoption process, concerns have arisen about its similarities to competition rules. Although the DMA and antitrust enforcement are complementary, multiple regulatory frameworks will apply to digital platforms in the EU. Thus, it is likely that the *ne bis in idem* principle will arise as a parallel application of both the DMA and EU competition law. The purpose of this paper is to analyse the *ne bis in idem* principle under the DMA with a particular focus on bpost[2] and Nordzucker[3] cases.

Keywords: *ne bis in idem* principle, digital markets, Digital Markets Act, Competition Law, antitrust, duplicate proceedings

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[2] C-117/20 *bpost* [2022]. ECLI:EU:C:2022:202.

[3] C-151/20 *Nordzucker and Others* [2022]. ECLI:EU:C:2022:203.

1. Introduction

The digital age has brought a number of benefits, including increased accessibility to information and improved communication between people around the globe. However, some concerns exist, including data theft and loss of privacy, the replacement of labour by machines, the dominance of a few ecosystems and platforms, and the reinforcement of economic inequality.[4] Competition law regulates and contributes to several benefits for consumers in order to address concerns regarding the dominance of some platforms, including reduced prices, efficiency, innovation, and more choices.[5]

The purpose of EU competition law is to ensure that businesses are treated fairly and equally, and in a level playing field, while ensuring choice and fair pricing for conditions. Although, there was also a discussion of whether the existing EU competition law was sufficient to deal with the current and changing digital word problems.

Due to the lengthy and complicated ex post enforcement procedures associated with Article 102 TFEU, it faces several challenges currently despite its broad substantive scope. Since it can cause a lack of timely intervention and the absence of effective remedies, the DMA[6] was introduced as a new ex-ante tool to complement EU competition law.[7]

Following the adoption of the Digital Services Package by the European Parliament in July 2022, the Council of the European Union adopted both the Digital Services Act and the Digital Markets Act. As of November 1, 2022, the DMA has come into effect and the DMA rules became effective in May 2023.

According to Regulation 1/2003,[8] it is possible to conduct parallel proceedings in the area of competition law.[9] In addition, since the DMA states that its application is without prejudice to the enforcement of competition law, it is

4 Jacques Crémer – Yves-Alexandre de Montjoye – Heike Schweitzer: Competition policy for the digital era. Luxembourg, Publications Office of the European Union, 2019. 2.

5 European Commission, Why is competition policy important for consumers? https://competition-policy.ec.europa.eu/about/why-competition-policy-important-consumers_en.

6 Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Explanatory Memorandum, COM(2020) 842 final 2020/0374(COD).

7 Francesco Ducci: Gatekeepers and Platform Regulation Is the EU Moving in the Right Direction? *SciencesPo Chair Digital, Governance and Sovereignty*, 2021, 4.

8 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.

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

also possible to have parallel proceedings with Article 101 and Article 102 TFEU according to the DMA.

As parallel proceedings may be pursued both under EU competition law and under the DMA, the *ne bis in idem* principle emerges, which translates from Latin as *"not twice about the same".* This principle appears in Article 50 of the Charter of Fundamental Rights and as a result, under this provision, no one shall be subject to retrial or punishment for an offense for which he or she has already been convicted or acquitted in the EU.

This paper examines the purpose of the DMA in Section II, and then describes how the ne bis in idem principle has evolved in competition law with a focus on the bpost and Nordzucker cases in Section III. Finally, Recital 86 of the DMA is discussed in relation to a potential duplication of proceedings in Section IV.

2. The purpose of the DMA

Article 114 TFEU provides the legal basis for the DMA in order to contribute to the proper functioning of the internal market by ensuring contestability and fairness for all market players in the digital sector.

The European Commission stated the purpose of the DMA as:

"The objective of the proposal is therefore 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 the digital economy at large, in a contestable and fair environment."[10]

It is evident from the text of the DMA that the terms contestability and fairness are used extensively. Also, it is possible to see how these terms relate to each other in the DMA as follows:

"Contestability and fairness are intertwined. The lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the possibility of business users or others to contest the gatekeeper's position. A particular obligation in this Regulation may, therefore, address both elements."[11]

Contestability is defined as the ability to overcome entry barriers, whereas fairness is defined as the ability to challenge the imbalance between the rights

[10] Proposed DMA. https://publications.europa.eu/resource/cellar/2c2bf2fb-3f85-11eb-b27b-01aa75ed71a1.0001.03/DOC_1.

[11] Recital 34, DMA.

and obligations of gatekeepers and business users by enabling the latter to benefit from innovation.[12]

As the purpose of the DMA (contestability and fairness) differs from that of the competition law (protection of undistorted competition), it is important to distinguish it from competition law implementation. The DMA's provisions are applicable without prejudice to Articles 101 and 102 TFEU. Therefore, digital platforms are subject to both Article 102 TFEU and the DMA. Accordingly, the DMA imposes obligations on gatekeepers and Article 102 TFEU imposed on dominant undertakings. Since it is possible that these two could be the same, the principle of *ne bis in idem* is invoked.

3. The evolution of the *ne bis in idem* principle in Competition Law

The *ne bis in idem* principle is based on *res judicata*, that requires that a person can not be prosecuted more than once for the same (criminal) behaviour.[13] It is a fundamental right that enshrined in Article 50 of the Charter and in Article 4 of Protocol No 7 to the ECHR.

According to Article 50 of the Charter:

"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."

Therefore, under this provision, no person shall be subject to a retrial or punishment for an offense for which he or she has already been convicted or acquitted in the EU.[14] The ne bis in idem principle is not limited to proceedings described as criminal in national law, but includes administrative penalties that are criminal in nature. It is based on what is known as the Engel criteria.[15]

To decide the criminal in nature, the following criteria should be considered:[16]

[12] Christophe Carugati: The Digital Markets Act is about enabling rights, not obliging changes in market conditions, 6 September 2023. https://www.bruegel.org/analysis/digital-markets-act-about-enabling-rights-not-obliging-changes-market-conditions.

[13] Martin Wasmeier: The principle of ne bis in idem. *Revue internationale de droit pénal*, 1-2/2006 , 121–130.

[14] Hans-Jurgen Bartsch: Council of europe ne bis in idem. The european perspective. *Revue internationale de droit pénal,* 3-4/2002, 1163–1171.

[15] Judgment of the ECtHR of 8 June 1976, Engel and Others v. Netherlands (CE:ECHR:1976:0608JUD000510071).

[16] The Platform Law Blog, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I', 2022. https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/.

"(i) the legal classification of the offence under national law;
(ii) the intrinsic nature of the offence;
(iii) the degree of severity of the penalty which the person concerned is liable to incur."

Consequently, an administrative penalty imposed under competition law may be considered criminal.

The *ne bis in idem* principle serves both as a guarantee against the prosecution of the same individual for the same facts in multiple instances and contributes to the stability of the legal system by ensuring that judicial decisions are final.[17]

Two factors are important when determining whether the *ne bis in idem* principle has been violated: (i) *"whether a second trial or punishment is involved"* (bis condition) and (ii) *"whether the facts are the same"* (idem condition).[18]

As compared to the determination of bis condition, idem condition could be more challenging and also it raised controversy. The CJEU applied different idem criteria that can be classified as *idem factum* and *idem crimen*.

Double proceedings that fall outside of the scope of the EU competition law were assessed using an *idem factum* approach. As a result of this approach, it was only important whether the two proceedings concerned the same persons and facts, while the legal characterisation of the facts is irrelevant.[19] In this regard, the *idem factum* approach might be viewed as a broader application of the *ne bis in idem* principle. The CJEU hold this approach in Menci[20] case. In its judgment, the CJEU acknowledged that duplication of proceedings is a limitation of the right guaranteed by Article 50 of the Charter, but such a restriction may be justified on the basis of Article 52(1) of the Charter.[21]

Article 52(1) of the Charter states that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect their essence. A limitation to those rights and freedoms may be made only in accordance with Article 52(1) thereof, provided it is necessary and genuinely meets objectives of general interest recognised by the Union or the need to protect other people's rights and freedoms.[22]

17 Araceli Turmo: Ne bis in idem in European Law. A Difficult Exercise in Constitutional Pluralism. *European Papers*, 3/2020, 1341–1356. 1344.

18 Annegeret Engel – Xavier Groussot – Emilia Holmberg: The Digital Markets Act and the Principle of Ne Bis in Idem. A Revolution in the Enforcement of EU Competition Law? In: Annegret Engel – Xavier Groussot – Gunnar Thor Petursson (ed.): *New Directions in Digitalisation. Perspectives from EU Competition Law and the Charter of Fundamental Rights*. Springer, Open-Access, 2023. 187-218. 192.,

19 The Platform Law Blog 2022.

20 C-524/15 *Menci* [2018]. ECLI:EU:C:2018:197.

21 Ibid.

22 Ibid.

But on the other hand, the CJEU adopted also the *idem crimen* approach in several cases[23], that requires not only the same person and facts, but also the same protected legal interest. Since *idem factum* can be considered as a double identity of the facts, *idem crimen* can be viewed as a triple identitiy of facts that also refers to the same protected legal interest.

The principle of *ne bis in idem* has been narrowed under the *idem crimen* approach.

Depending on the field of EU law in which it was applied, the *ne bis in idem* principle has been implemented differently. Although the CJEU had adopted a broad view of *ne bis in idem* in all other areas of EU law, it had adopted a narrow view in the area of EU competition law, consequently, it sparked controversy and criticism.

In March 2022, the CJEU ended this controversy with its two judgments, bpost and Nordzucker.

A postal services provider in Belgium, bpost, adopted a new tariff system in 2010 which the Postal Regulator found to be discriminatory in relation to tariff rules. After that, in July 2011, bpost was fined by the postal regulator.

The Court of Appeal of Brussels annulled the decision and the judgment was subsequently rendered final. At this time, the Belgian Competition Authority ruled that bpost had abused its dominant position in breach of Article 102 TFEU by implementing the new tariffs and imposed a fine.

In its appeal, bpost argued that the decision of the Belgian Competition Authority was incompatible with the *ne bis in idem* principle, since it was based on the same tariff system for which the Belgian postal regulator had already fined it. In contrast, the Authority claimed that each decision was adopted in accordance with a variety of rules protecting different legal interests, therefore, the *ne bis in idem* principle was not applicable. It was referred to the CJEU for a preliminary ruling following an appeal process.

As a first step, the CJEU recognised that Article 50 of the Charter contains the *ne bis in idem* principle as a fundamental principle of EU law, that is also enshrined in the ECHR.[24] Consequently, it assessed the criminal nature of both sets of proceedings and concluded that they were criminal in nature.[25]

The CJEU found that the bis criteria were satisfied, as the judgement on annulment of the Postal Regulator's decision had become final.[26]

[23] C-204/00 *P Aalborg Portland and Others v Commission* [2004] ECLI:EU:C:2004:6, C-17/10 *Toshiba Corporation e.a* [2012] ECLI:EU:C:2012:72, C-857/19 *Slovak Telekom* [2021] ECLI:EU:C:2021:139.

[24] C-117/20 *bpost* [2022] paras. 22-23. ECLI:EU:C:2022:202.

[25] Ibid.

[26] Ibid.

Regarding the idem criteria, according to the CJEU, the two sets of proceedings at issue in the main action are directed against the same legal person, bpost.[27] Also, it was stated that *"the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned."* and the legal classification of the facts under national law and the legal interest protected are irrelevant.[28] Therefore, it adopted idem factum approach.

As part of its evaluation, the CJEU examined whether a limitation of the *ne bis in idem* is justified by Article 52(1) of the Charter. In accordance with Article 52(1) of the Charter, a limitation may be justified if it is provided by law and respects the essence of the rights and freedoms as well as the principle of proportionality.[29]

Accordingly, the CJEU concluded that, the listed factors are met:[30]

"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."

In the Nordzucker case, the undertaking filed leniency applications to the German and Austrian Competition Authorities by disclosing a cartel between Nordzucker and two other sugar producers. In 2010, the Austrian Competition Authority filed an action declaring Nordzucker and Südzucker to be in violation of Article 101 TFEU. A telephone conversation between the sales directors of Nordzucker and Südzucker was used as evidence.[31]

The German Competition Authority concluded in September 2014 that Nordzucker and Südzucker violated Article 101 TFEU and German law. The German Authority also referred to the content of the phone call, which was the only Austrian market-related fact.[32]

As the phone call used as evidence by the Austrian Authority had already been subject to another penalty, the Austrian Court dismissed the action brought by the Authority on the grounds that imposing a penalty would violate the principle of *ne bis in idem*. In response to the judgment, the Authority appealed

27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 C-151/20 *Nordzucker and Others* [2022] paras. 14-16.ECLI:EU:C:2022:203.
32 Ibid.

to the Supreme Court of Austria, which requested that the CJEU render a preliminary ruling.[33]

Briefly, the CJEU decided that proceedings initiated by two national competition authorities to prohibit anticompetitive agreements are meant to pursue the same legal interest. Moreover, the CJEU stated that a duplication of proceedings and penalties that do not pursue complementary aims relating to different aspects of the same conduct cannot be justified under Article 52(1) of the Charter, and it might be justified if their aims are complementary.[34]

4. Recital 86 of the DMA and the consideration of a duplication in proceedings

Recital 86 of the DMA explains how the ne bis in idem principle is implemented: *"The Commission and the relevant national authorities should coordinate their enforcement efforts in order to ensure that those principles are respected. In particular, the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed correspond to the seriousness of the infringements committed."*

Recital 86 is intended to facilitate the cooperation between the Commission and National Competition Authorities (NCAs). However, this provision remains problematic since it is possible to pursue parallel proceedings under both the DMA and competition law against the same undertaking as long as the duplication is complementary. While it is likely that the Commission would prefer to impose fines and remedies under the DMA as opposed to pursuing the longer route of enforcing competition law, NCAs can also apply competition law to conduct that has already been subject to DMA enforcement. Under Article 102 TFEU, NCAs may seek to achieve more ambitious results than the Commission achieved under the DMA.[35] Gatekeepers may be deprived of *ne bis in idem* protection since the Commission views the DMA as complementary to EU competition law. Thus, the duplication of sanctions and remedies may result in an increased burden on gatekeepers and a fragmentation risk.

[33] The Platform Law Blog 2022.

[34] Engel et al. 2023.

[35] Giorgio Monti: The Digital Markets Act – Institutional Design and Suggestions for Improvement. *TILEC Discussion Paper*, 4/2021. 15.

5. Conclusion

As a result of the bpost and Nordzucker judgments, the EU's approach to *ne bis in idem* has been further clarified. In brief, the Court adopted a broad interpretation of idem based on the identity of the offender and the facts, stressing the importance of proportionality.

In this approach, a balance is sought between the protection of Article 50 of the Charter and the effective enforcement of administrative regulations. Consequently, it is possible to duplicate proceedings under the DMA and EU competition law as well as national law against the same undertaking and based on the same facts, provided that the duplication serves complementary aims and follows proportionality principles. However, since the duplication of proceedings may increase the burden on gatekeepers, there needs to be more clarity in this area.

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