

Importance Of Robust Application Of The Ne Bis In Idem Principle In Competition Enforcement And Regulation

Patrick Harrison & Monika Zdzieborska¹

16 March 2022

¹ Patrick Harrison is a partner in the EU/UK Competition team at Sidley Austin LLP. Monika Zdzieborska is a managing associate in the EU/UK Competition team at Sidley Austin LLP. The authors are also grateful to Bethany Wise for her contributions. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP or its partners. This article has been prepared for informational purposes only and does not constitute legal advice.

1. EXECUTIVE SUMMARY

- (1) The *ne bis in idem* principle (the prohibition of double jeopardy) is a fundamental protection under EU law.² It has long been of particular importance in the decentralised system of EU competition law enforcement brought about by Regulation 1/2003 (**Reg 1/2003**).
- (2) While the mechanism for cooperation between the European Commission (**Commission**) and national competition authorities (**NCAs**) provided for in Reg 1/2003 had tended to work well in the past, recent shortcomings in cooperation have led to inefficient and inconsistent enforcement, especially in the tech sector.
- (3) The Digital Markets Act proposal³ (**DMA**) risks similar shortcomings in cooperation between the Commission (charged with enforcing the DMA) and a number of national authorities (charged with enforcement of national DMA-like tech regimes).
- (4) What is more, in addition to the potential for overlap and inconsistency in enforcement between the DMA and the DMA-like obligations at national level, the promulgation of the DMA creates an additional layer of potential overlap and inconsistency – between enforcement under competition law-derived regulation (in the form of the DMA and its national equivalents) on the one hand and competition rules on the other hand.
- (5) In view of the above (i.e., (i) shortcomings in cooperation under Reg 1/2003; (ii) overlaps between the DMA and equivalent national tech-focused regimes; and (iii) overlaps between the DMA (and equivalent national tech-focused regimes) and competition rules), double jeopardy concerns for tech companies have become of heightened importance.
- (6) This paper makes the following points:
 - a. *Ne bis in idem* is critical to effective, proportionate and efficient EU competition law enforcement. Conduct that is inherently cross-border (or EU-wide) in nature should not be investigated (and sanctioned) *both* by the Commission on an EU-wide basis, *and* nationally by one or more Member State(s). Equally, the Commission and NCAs should not seek to avoid the reach of the *ne bis in idem* principle by applying different labels to what is, in reality, parallel enforcement in relation to the same conduct.
 - b. Recent shortcomings in cooperation within the European Competition Network (**ECN**) are contrary to Reg 1/2003 and undermine the legal certainty that used to exist for companies under investigation. The ECN and the Commission must therefore act to ensure consistent application of case allocation rules and uphold *ne bis in idem* protection in line with the underlying objectives of Reg 1/2003.

² See Case C-17/10, *Toshiba Corporation and Others*, paragraph 940: “that principle thus precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision...”

³ See Articles 1(5)-1(7) of the draft DMA as well as a new Article 31(d) proposed by the European Parliament. Amendments adopted by the European Parliament, including revised Articles 1(5)-1(7) and the new Article 31d, are available here: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html.

- c. In order to avoid the kinds of shortcomings that have arisen in relation to the application of Reg 1/2003, the DMA should provide for a clear case allocation mechanism and should clarify the relationship between the DMA, equivalent national tech-focused regimes, and competition law enforcement. As currently drafted, the DMA enables Member States to enact (and/or maintain in force) national rules overlapping with, or going beyond, the DMA. The DMA also prohibits some forms of conduct that would breach EU and national competition laws that pursue very similar (if not the same) objectives and that lead to the same outcomes as the DMA. Legislators should therefore improve the DMA in order to define appropriate limits to enforcement and to prevent a proliferation of parallel and/or overlapping investigations relating to the same conduct.

2. THE DECENTRALISED SYSTEM OF EU COMPETITION LAW ENFORCEMENT CALLS FOR ROBUST *NE BIS IN IDEM* PROTECTION

- (7) As observed by Advocate General (AG) Kokott in *Toshiba*⁴, *ne bis in idem* – which prohibits double prosecution or punishment for the same offence – is “a founding principle of EU law which enjoys the status of a fundamental right”.⁵ Indeed, the principle is critical to effective, proportionate and efficient EU law enforcement and constitutes a key element of the EU’s constitutional framework. It is recognised in both the EU Charter of Fundamental Rights (*ECFR*) (Article 50) and the European Convention on Human Rights (Article 4 of Protocol no. 7).
- (8) Adequate *ne bis in idem* protection is imperative in the context of the competition law enforcement regime.
 - a. First, antitrust proceedings can be considered as equivalent criminal in nature for purposes of Article 6 (right to a fair trial) of the European Convention on Human Rights.⁶
 - b. Second, NCAs and the Commission have concurrent jurisdiction to apply Articles 101 and 102 TFEU. Indeed, Reg 1/2003 does not itself explicitly prohibit parallel proceedings – or limit the scope of the infringements that can be investigated and punished – by the Commission and NCAs.
 - c. Third, EU and national competition laws have largely converged. As recently noted by AG Bobek in *Nordzucker*, there is: (a) “a full substantive overlap” between EU and national competition rules in relation to situations falling under Article 101 TFEU (where Member States cannot adopt any stricter rules); and (b) “large” overlap in relation to situations falling under Article 102 TFEU (where Member States may adopt stricter rules).⁷
- (9) As rightly observed by AG Wahl in *PZU*, under the decentralised system of enforcement established by Reg 1/2003, “the risk of several competition authorities instigating proceedings against the same undertaking for the same action [...] seems

⁴ Case C-17/10, *Toshiba Corporation and Others*.

⁵ Advocate General Opinion in Case C-17/10, *Toshiba Corporation and Others*, paragraph 117.

⁶ See e.g., Case C-235/92 P, *Montecatini Spa*, paragraphs 175-176.

⁷ Advocate General Opinion in Case C-151/20, *Nordzucker*, paragraph 51.

to be inherent”.⁸ Indeed, the EU competition enforcement system is, by its very design, conducive to multiple (potentially overlapping) proceedings and multiple (potentially diverging) decisions. This characteristic caused widespread concern during Reg 1/2003’s legislative process,⁹ ultimately resulting in the implementation of an enforcement cooperation mechanism¹⁰ and the establishment of the ECN, the role of which is to identify the authority best placed to act on a given case. These measures were an attempt to embody the *ne bis in idem* protection provided for in the ECFR and to underpin a fundamental premise of Reg 1/2003¹¹ to ensure (pursuant to the EU Courts’ case law) that the decentralised system of competition law enforcement does not operate unfairly to the detriment of companies under investigation.¹²

- (10) *Ne bis in idem* protection is, therefore, a cornerstone of EU competition law enforcement and critical to ensure its robust and coherent application. Indeed, its importance is such that, in the words of Advocate General Wahl in *PZU*, “the application of the principle of *ne bis in idem* should not [...] be made subject to overly cumbersome criteria”.¹³ Instead, the Commission and NCAs must ensure that the general purpose and spirit of the principle is adequately preserved. Crucially, this means protection not only against parallel conflicting decisions, but also against parallel proceedings which might lead to such conflicting decisions. The Commission and NCAs need to assure themselves *proactively* and *prospectively* that – as emphasised, for example, in the Dutch *Silverskin Onions* case¹⁴ – their actions do not result in

⁸ Advocate General Opinion in Case C-617/17, *PZU*, paragraph 47.

⁹ See, e.g., the Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty)", available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001AE0410>, which explicitly states that the new regime must be “complemented by the principle of protecting the rights of those affected by the new, decentralised system (businesses and consumers)” (para. 2.10.1.1). The Opinion also emphasises that “it is important to ensure that powers and responsibilities are not confused within the network but are clearly determined and understood by the companies” (para. 2.10.1.3). The EU Council raised similar concerns, emphasising the importance of a clear allocation of cases within the ECN (both when it comes to the vertical allocation between the European Commission and Member States, but also horizontally, between the Member States themselves) (see Draft of a progress report from the Presidency to COREPER and the Council on the proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82, p. 7; available at: <https://data.consilium.europa.eu/doc/document/ST-7692-2001-INIT/en/pdf>).

¹⁰ See Articles 11 and 13-15 in Reg 1/2003. Article 11(6) is of particular importance as it relieves NCAs of their competence when the Commission initiates proceedings.

¹¹ See Reg 1/2003, recital 18: “If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.”

¹² See, e.g., Case T-410/18 *Silgan*, paragraph 20, where the General Court found that Article 11(6) of Reg 1/2003 “has the effect of protecting the applicants from parallel proceedings brought by those authorities” so that their legal interests are “not adversely affect[ed]”. The same principle was recently emphasised by the Court of Justice of the European Union in Case C-857/19 *Slovak Telekom*, which confirmed that the decentralised system of enforcement cannot be at the expense of companies (paragraph 32).

¹³ Advocate General Opinion in Case C-617/17, *PZU*, paragraph 47.

¹⁴ CBB Case 14/251, 14/252 and 14/253, NL:CBB:2016:56, in which the Dutch Court noted that the Authority for Consumers & Markets (ACM) had “verified that neither the Commission, nor other NCAs intended to act against

“situation[s] in which there could be double punishment for the same violation.”¹⁵ This is in line with the recent Opinion by AG Bobek in *Nordzucker* who stated that “initiating of second proceedings itself for the same matter constitutes [...] a breach of the guarantee enshrined in Article 50 of the Charter [i.e., ECFR]”,¹⁶ thus emphasising the necessity of a teleological interpretation of the *ne bis in idem* principle.

- (11) AG Bobek also confirmed in *Nordzucker* and *Bpost* that the “same matter” (i.e., the ‘*idem*’ condition) in this context requires that: (i) the facts; (ii) the offender; and (iii) the protected legal interest, must all be the same. In relation to the last of these (i.e., same legal interest), AG Bobek emphasised that the concept must be interpreted in line with the purpose and spirit of the *ne bis in idem* principle as a whole. In his view, the condition of the same “legal interest” focuses on whether – as a matter of fact – the laws at issue aim to protect the same “societal good or social value”¹⁷. In the words of the AG:

“[I]f a violent assault on another person results in his or her death, in order to identify the protected legal interest, it does not matter whether the respective national law defines that act [...] as murder, manslaughter, or merely serious bodily harm that causes death. The key point is that, by one violent action against another human being (identity of act), the same offender (identity of offender) has harmed the same type of protected legal interest, namely the life and bodily integrity of another person (identity of the protected legal interest)”.¹⁸

- (12) It follows that the Commission and NCAs should not be able to escape the reach of the *ne bis in idem* principle simply by applying a different (e.g., more narrowly-defined) label for what is, as a matter of fact, the same offence. In other words, abstract legal concepts cannot obfuscate a *de facto* “societal good or social value” that a given law aims to protect. To conclude otherwise would make the EU double jeopardy rules ineffective and expose companies to fragmented and inconsistent enforcement. Instead, as AG Bobek explained in *Nordzucker*, the focus must be on “the specific interest or purpose that the provision being applied pursues, what that provision penalises and why”.¹⁹
- (13) The same is true insofar as the geographical scope of the underlying laws is concerned. AG Bobek explained that he did “**not** believe that the mere (quantitative) difference in the territorial scope of the same infringement, and thus of the given rule, is *per se* indicative of a (qualitative) difference in the legal interest”.²⁰ As such, artificial territorial segmentations between regions covered by the same cross-border conduct cannot be used to deprive companies of *ne bis in idem* protection.

the allegedly infringing conduct, so that, as result, no situation has occurred in which there could be double punishment for the same infringement”.

¹⁵ *Ibid.*, paragraph 4.9.3.

¹⁶ Advocate General Opinion in Case C-151/20, *Nordzucker*, paragraph 90.

¹⁷ Advocate General Opinion in Case C-117/20, *Bpost*, paragraph 136.

¹⁸ *Ibid.*, paragraph 140.

¹⁹ Advocate General Opinion in Case C-151/20, *Nordzucker*, paragraph 44.

²⁰ *Ibid.*, paragraph 53.

Key takeaways:

- a. *Ne bis in idem* protection is a cornerstone of EU competition law enforcement and is critical to ensuring its robust and coherent application in line with the underlying objectives of Reg 1/2003.
- b. *Ne bis in idem* protection should apply not only to parallel decisions or sanctions, but also to parallel investigations.
- c. The analysis of whether the same conduct is targeted depends on the identity of: (i) the facts; (ii) the offender; and (iii) the protected legal interest. The use of subtly different legal definitions for the conduct at issue cannot disguise the equivalence between the underlying protected legal interests.
- d. Artificial territorial segmentations between regions covered by the same cross-border conduct, but sanctioned by the Commission for one region and by an NCA for another, should not be used to subvert the fundamental protection of *ne bis in idem*.

3. THE ECN AND THE COMMISSION AT ITS HEAD MUST ACT TO ENSURE ROBUST AND COHERENT APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE

- (14) Historically, cooperation and coordination between the Commission and the NCAs has worked well to attain the ‘one case to one authority’ objective of Reg 1/2003. There are a number of instances where NCAs either unilaterally withdrew their investigations or the Commission reallocated cases to avoid parallel investigations into the same conduct and to preserve legal certainty (e.g., in 2011, the Commission commenced an investigation into Amazon’s e-book distribution arrangements, and the UK’s NCA ceased its own investigation into the same conduct).
- (15) It is only more recently that effective cooperation within the ECN has started to be undermined. The problem is particularly prevalent in the tech sector, which is currently a primary focus of competition enforcement at both EU and national level.²¹ This has

²¹ This is illustrated both:

- a) by recent statements made by the Commission and NCAs – for example, Commissioner Vestager recently said, in relation to the launch of the EU-US launch Joint Technology Policy Dialogue that the EU-US collaboration will focus in particular on “*the fast evolving technology sector*”, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6671; in the United Kingdom, Andrea Coscelli, chief executive officer of the Consumer Markets Authority, noted that, going forward, “*it will be really important to have th[e] horizon scanning and constantly thinking about big tech*”, available at: <https://www.bloomberg.com/news/articles/2021-11-26/brexit-britain-s-antitrust-cop-counts-on-global-help-taming-tech>; in Germany, Andreas Mundt, President of the Bundeskartellamt, confirmed that “*Since January 2021 we have a new instrument [Section 19a of the German Competition Act] to monitor large digital companies. In less than a year, we have now taken the first official decision based on this provision and determined that Google is of paramount significance across markets...At the same time, we are vigorously conducting other proceedings against Amazon, Apple and Meta, formerly Facebook*”, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html; and
- b) by the fact that, all the highest fines for abuse of dominance infringements imposed by the European Commission in recent years concerned companies active in the tech sector, including AT.40220

resulted in inconsistent and seemingly arbitrary application of the case allocation rules and a disregard of the *ne bis in idem* principle. Two recent examples include:

- a. the multitude of inconsistent decisions in relation to Booking.com's price parity clauses²², which resulted in NCAs themselves calling upon the Commission to use its powers to "*prevent conflicting decisions by Member States*";²³ and
 - b. the Commission's decision to investigate Amazon's conduct in relation to its "Buy Box", but to exclude Italy from the scope of its EEA-wide investigation on the basis that the Italian Competition Authority had already initiated an investigation into the same conduct.²⁴
- (16) Despite Commissioner Vestager's promise in the aftermath of the Booking.com saga that the Commission will "*intervene earlier to avoid divergent outcomes*",²⁵ there are currently over 20 ongoing investigations by the Commission and NCAs into the digital sector, many of which seem to be investigating very similar (if not the exact same) conduct, and which could therefore lead to inconsistent decisions.²⁶
- (17) The status quo in this regard is contrary to the letter and spirit of Reg 1/2003, which requires that "*each case should be handled by a single authority*"²⁷. It has also significantly weakened *ne bis in idem* protection in the enforcement of competition law in the EU and has further undermined legal certainty for companies under investigation.
- (18) To address these shortcomings, the ECN should take inspiration from other well-established enforcement cooperation bodies and institutional frameworks, such as the EU Merger Working Group (established by ECN members) and the EFTA Surveillance

Qualcomm (€997,439,000), AT.39740 *Google* (Shopping) (€2,424,495,000) and AT.40099 *Google* (Android) (€4,342,865,000).

²² In 2015, competition regulators in France, Italy, and Sweden adopted parallel decisions accepting Booking.com's commitments to remove a set of price-parity clauses (so-called "wide" price-parity clauses), but maintained so-called "narrow" price-parity clauses. Conversely, the German Federal Cartel Office (**FCO**) declined to settle the case on the same terms, prohibiting Booking.com from using narrow price-parity clauses, which led Booking.com to appeal the FCO's decision, arguing that narrow price-parity clauses were indispensable to maintaining the functionality of its platform. A number of competition authorities from other EU Member States (including Austria, Czech Republic, Greece and Ireland) also opened their separate investigations into Booking.com's price parity clauses. Recently, the German Supreme Court confirmed the prohibition of Booking.com's narrow MFN clauses, a conduct accepted by competition authorities in other EU jurisdictions.

²³ Remarks made by Andreas Mundt at Third E.CA Competition Law and Economics Expert Forum, Brussels, May 8, 2015.

²⁴ See the Commission press release here: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

²⁵ Concurrences, Paris, June 15, 2015.

²⁶ See the following ongoing investigations by: (a) the European Commission: Amazon Marketplace – Case AT.40462, Amazon Buy Box – Case AT.40703, Apple App Store Practices (music streaming) – Case AT.40437, Apple App Store Practices (e-books/audiobooks) – Case AT.40652, Apple App Store Practices – Case AT.40716, Facebook Data-gathering practices – Case AT.40628, Facebook Marketplace – Case AT.40684, Google Ad Manager (Privacy Sandbox) (not yet reported), Google 4 Jobs (not yet reported), Google Local and Travel Search (not yet reported); Visa - use of digital wallets (not yet reported); and (b) national authorities: (i) in Italy, Amazon – A.528, Amazon Sale of Apple products – I842, Google EnelX Italia App – A.529, and Google Online Advertising (not yet reported), (ii) in Germany, Amazon "Brand gating" practices, Google News Showcase results preferences, Google Data Processing practices (iii) in France, Google Online searches concerning payment for content re-use and Apple data protection and advertising policy in iOS 14. (iii) in Spain, S0013/21 - Apple & Amazon Brand gating practices.

²⁷ See Reg 1/2003, recital 18.

Authority. The example of largely coherent co-ordination in those two fora²⁸ is to a large extent due to the robust application of a “one case to one authority” rule, embodied in the so-called “one-stop-shop” principle under the EU Merger Regulation. As explained in the Commission Notice on Case Referral in respect of concentrations, the key objective of the “one-stop-shop” principle is to “*increase administrative efficiency*”, avoid “*duplication and fragmentation of enforcement effort as well as potentially incoherent treatment [...] by multiple authorities*”, reduce “*the costs and burdens arising from multiple filing obligations*” and eliminate “*the risk of conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes*”.²⁹

- (19) These same objectives hold true in the context of EU antitrust enforcement. In fact, it is difficult to see why the Commission and Member States should enforce strict case allocation rules in the context of merger control, and in the context of antitrust enforcement under the EEA Agreement, but neglect this fundamental protection with respect to antitrust proceedings within the EU.

Key takeaway:

The ECN should facilitate stricter and more consistent application of the *ne bis in idem* principle in EU antitrust proceedings in order to bring the implementation of the case allocation rules in line with the original objective of Reg 1/2003 – *i.e.*, one case to one authority.

4. THE DMA CREATES ADDITIONAL LAYERS OF OVERLAP THAT COULD FURTHER UNDERMINE EFFECTIVE *NE BIS IN IDEM* PROTECTION

- (20) One of the main objectives of the DMA is to “*prevent fragmentation*”, and “*ensure the proper functioning*”, of the Single Market.³⁰ Indeed, in its impact assessment report³¹, the Commission emphasised the importance of ensuring a coherent EU regulatory framework for all market participants. The Commission has warned that “*different national legislations within the EU may lead to increased regulatory fragmentation and increased compliance costs*” not only for global digital platforms, but also for “*smaller platforms and startups*” and “*business users*”. The Commission has further observed that a patchwork of (potentially conflicting) regulatory and legal regimes risks creating

²⁸ There are numerous examples of effective cooperation in the merger control context, including: M.1383 Exxon/Mobil, where the Commission, despite a request from the United Kingdom Competition and Markets Authority (CMA) to have part of a concentration relating to the market for motor fuel retailing in the North-west of Scotland referred to it, pursued the investigation as the case required a single and coherent remedy package designed to address all the problematic issues in the sector concerned. In addition, in M.2706 P&O Princess/Carnival, despite the fact that the CMA was assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral, as the Commission had identified preliminary competition concerns in other national markets affected by the merger and so wished to avoid a fragmentation of the case. In relation to EFTA Surveillance Authority, there appears to have been no case in which the EFTA Surveillance Authority and Commission took measures with respect to the same conduct by the same offender.

²⁹ Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), paragraph 11.

³⁰ Joint paper of the heads of the NCAs of the EU on ‘How national competition agencies can strengthen the DMA?’.

³¹ See the Commission executive summary of the impact assessment report on the proposed DMA.

“legal uncertainty [...], an appreciable distortion of competition in the internal market and undermine fundamental freedoms protected by the Treaty”.

- (21) As such, the primary goal of the DMA – in fact, its very legal basis under Article 114 TFEU regarding the harmonisation of laws – is to ensure that concerns as to inconsistency and fragmentation of the internal market do not materialise. However, the current draft(s)³² of the DMA do not provide for a clear case allocation mechanism, and this risks undermining the DMA’s purpose.
- (22) *First*, Articles 1(5)³³ and 1(6)³⁴ of the draft DMA proposed by the Commission (and largely endorsed by the Council³⁵ and Parliament) enable Member States to enact new rules overlapping (and potentially also conflicting) with those in the DMA, provided that these rules “*pursue other legitimate public interests*” (e.g., if they are enacted as part of the Member State’s national competition rules) and their scope is not narrowly limited to “gatekeepers” (as defined in the DMA). In consequence, Member States would be able to enact – and NCAs can apply – their own parallel tech-focused regimes that allegedly protect “*other legitimate public interests*” but in essence pursue very similar objectives to those of the DMA.
- (23) As such, companies are at risk of being deprived of appropriate *ne bis in idem* protection simply because of the labels assigned to certain rules, while all other factual parameters are the same or similar. Using AG Bobek’s criminal law analogy, this is akin to charging an individual for the exact same crime under a number of different legal acts and in multiple jurisdictions. Such an outcome cannot be the intention of EU policymakers.
- (24) *Second*, it remains unclear how the Commission would be able to ensure that NCAs do not take conflicting enforcement actions (as provided for in Article 1(7)³⁶ of the original draft DMA proposed by the Commission). Recognising this shortcoming, the Parliament and the Council suggested additional rules regulating cooperation between the Commission and Member States.³⁷ Some proposed amendments – in particular the Council’s suggestion to ensure that the cooperation takes place under the auspices of the ECN – indicate a step in the right direction. However, on their own, they are unlikely

³² As originally proposed by the Commission, and respectively amended by the European Council (**Council**) (Council’s proposal is available [here](#)) and European Parliament (**Parliament**) (Parliament’s proposal is available [here](#)).

³³ Article 1(5) states that the harmonization obligation “*is without prejudice to rules pursuing other legitimate public interests*” and that Member States are not precluded from imposing “*obligations [that] are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition*”.

³⁴ Article 1(6) allows for EU and national competition rules prohibiting restrictive agreements, abuses of dominant positions, and other forms of unilateral conduct “*insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers*”.

³⁵ The draft DMA proposed by the Council explicitly prohibits Member States from adopting the rules which fall within the exact scope of the DMA. However, the Council’s proposal still allows Member States to impose additional obligations as long as they apply beyond the scope of the DMA.

³⁶ Article 1(7) prevents NCAs from taking “*decisions which would run counter to a decision adopted by the Commission under this Regulation*” and requires “*the Commission and Member States [to] work in close cooperation and coordination in their enforcement actions*”.

³⁷ See a new Article 32a in the draft submitted by the Council (available [here](#)) and a new Article 31d in the draft put forward by the European Parliament.

to ensure effective and consistent enforcement. Importantly, while both proposals³⁸ require Member States to “*inform*” the Commission about parallel national investigations, they do not provide for any case allocation mechanism that would allow the Commission to take any steps to prevent such parallel proceedings. Without a clear and certain case allocation mechanism, any attempts by the Commission to coordinate enforcement might be met with stiff resistance from NCAs and would likely have very little chance of success.

- (25) As a result, as illustrated in the chart below, the DMA risks adding to an ever-increasing patchwork of overlapping antitrust (or antitrust-related) rules that apply in the tech sector, thus exacerbating the very problem of a lack of harmonisation that the DMA sought to resolve. In particular, there is a risk that the DMA will overlap with:
- a. *parallel national tech-focused regimes* – a number of Member States have already started adopting their own parallel tech rules as part of their national competition laws with very similar objectives in mind. For example, Section 19a of the German Competition Act targets the same digital platforms as the DMA (but instead of defining them as “*gatekeepers*”, uses the concept of “*companies with paramount cross-market significance*”) and enables the NCA to prohibit types of conduct that are also prohibited under the DMA, such as self-preferencing, certain tying practices, impediments to interoperability and portability of data, etc. Similar amendments have already been implemented or proposed by other Member States, including Austria³⁹, Italy⁴⁰ and Greece⁴¹; and other Member States will likely follow their example. This would likely result in the existence of a patchwork of overlapping (and potentially conflicting) laws which could lead to overlapping investigations and contradictory decision-making in relation to the exact same conduct⁴²; and
 - b. *EU and national competition rules* – the DMA makes clear that, upon its implementation, competition law rules will continue to apply in parallel. In the Commission’s view, the DMA is merely “*complementary*” to the competition rules and “*aims at protecting a different legal interest from those rules*”.⁴³ However, in practice, there will be a significant degree of overlap. The Commission argues that the purpose of the DMA is to ensure that markets remain “*contestable and fair*”, whereas the purpose of competition law is to ensure “*undistorted competition*”.⁴⁴ However, these purported distinctions are not obvious, and there is a real possibility of illogical situations whereby the same undertaking – designated as a

³⁸ See a new Article 32a(8) proposed by the Council and a new Article 31d(2) proposed by the Parliament.

³⁹ See the Austrian Cartel and Competition Law Amendment Act 2021; available [here](#).

⁴⁰ See the approved draft Annual Law for Competition; the proposals suggested by the Italian Competition Authority are outlined [here](#).

⁴¹ See the new draft Greek Competition Bill; available [here](#).

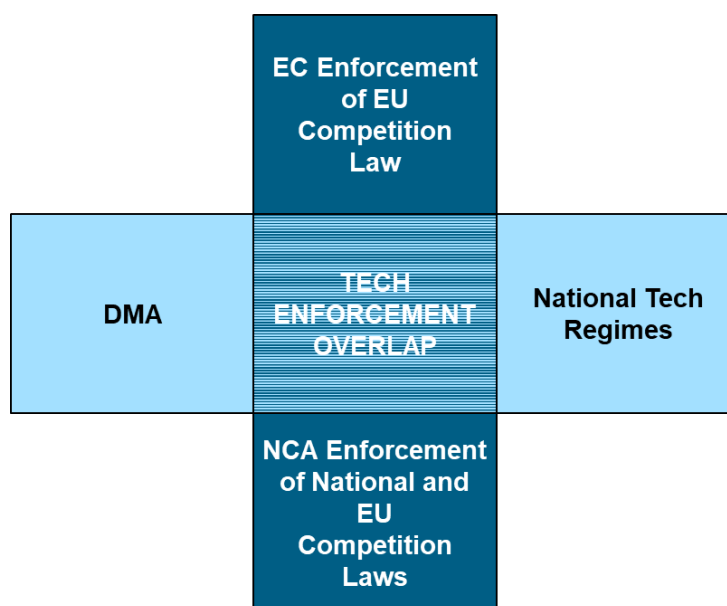
⁴² This could, in turn, undermine the duty of sincere cooperation, as laid down in Article 4(3) TEU.

⁴³ See the European Commission *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, December 15, 2020, recital 10. This rationale stems to a large degree from the Commission’s chosen legal basis. Indeed, to validly rely on Article 114 TFEU (which involves following the ordinary legislative procedure), the Commission had to argue that the main goal of the DMA is to harmonise national laws rather than create any new competition rules (which would require unanimity in the Council).

⁴⁴ *Ibid.*, Recital 10.

“gatekeeper” under the DMA and deemed “dominant” under Article 102 (or its national equivalents) – could be subject to two (or more) overlapping investigations with respect to exactly the same conduct. This is particularly true because the DMA codifies a number of practices that either have been subject to, or are being pursued in, ongoing competition law cases (e.g., abusive self-preferencing⁴⁵ and restricting the ability of app developers to inform users of alternative purchasing possibilities outside of apps⁴⁶). Moreover, they do so for precisely the same reasons.

Patchwork of overlapping antitrust rules that apply in the tech sector



- (26) In order to reduce the risk of an overlapping and fragmented regulatory environment, and in order to ensure that companies are not deprived of *ne bis in idem* protection simply because of the labels assigned to certain rules, the DMA should:
- a. provide for a clear case allocation mechanism at the early investigation stages – to ensure that only one authority deals with a given case, the relevant NCAs should be automatically relieved of their competence to investigate a case where the Commission initiates its own proceedings, as proposed by the Council (Article 32a(6)). What is more, as suggested by the Parliament and the Council,⁴⁷ NCAs and the Commission should be required to keep each other informed of their enforcement actions in the tech sector. This obligation should extend beyond competition law to include also relevant (e.g., DMA-like) national regulations; and
 - b. be supplemented by separate tailored guidance – the DMA should explicitly refer to separate guidance that would – similar to the ECN Cooperation Notice⁴⁸ – set out detailed rules on cooperation and case allocation mechanisms to be followed by the Commission and Member States. This approach would be in line with the

⁴⁵ See, e.g., Case AT.39740. Google Shopping.

⁴⁶ See, e.g., Case AT.40716, Apple App Store Practices.

⁴⁷ See Article 32a in the Council’s proposal and Article 31d proposed by the Parliament.

⁴⁸ See Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 2004.

Council's proposal for the Commission and Member State cooperation to take place under the auspices of the ECN.⁴⁹

Key takeaway:

Clear case allocation mechanisms to be followed by the Commission and Member States leaving no room for argument or obfuscating practices should be set out for the DMA. This will preserve legal certainty and ensure efficient and effective enforcement without risking breaches of the EU's double jeopardy rules.

⁴⁹ See Article 32a(3) proposed by the Council.