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Applying *ne bis in idem* in the aftermath of *bpost* and *Nordzucker*: the case of EU competition policy in digital markets

Abstract: In *bpost* and *Nordzucker* the Grand Chamber of the European Court of Justice has finally arrived at a unified test for *ne bis in idem*, applicable to all areas of EU law. It rejected the antitrust-specific threefold condition of *idem* (same offender, same facts, and same protected legal interest) developed in *Aalborg Portland* and *Toshiba*, and focused solely on material acts, in line with *Van Esbroek* and *Menci.* The judgements are extremely timely given the increasing risks of overlapping decisions as a result of recent legislative initiatives undertaken at EU and national level targeting large online platforms. The paper maintains that, although *bpost* and *Nordzucker* are welcomed, some relevant issues remain unaddressed and may undermine the sound implementation of the *ne bis in idem* principle in the digital economy.

Keywords: ne bis in idem, Digital Markets Act, competition law, platforms, enforcement

JEL Codes: K21, K42, L40

1. Introduction

The principle of *ne bis in idem* or double jeopardy is enshrined in Article 54 of the Schengen Convention (CISA), Article 50 of the Charter of Fundamental Rights of the European Union (CFREU), and Article 4 of Protocol No. 7 of the European Convention on Human Rights (ECHR), and occupies a prominent position in the European Constitution, since it has the same legal value as the Treaties and constitutes a general principle of the Union's law.[1] According to this principle, in the case of multi-offensive conduct, the legal system finds it undesirable to punish the perpetrator twice or to prosecute it in multiple parallel cases once the first investigation has been concluded with a conviction or an acquittal decision.

The prohibition applies when four conditions are jointly met: (i) the identity of the person prosecuted, tried or punished (unity of the offender condition); (ii) the identity of the conduct involved (*idem* condition); (iii) the existence of two sets of proceedings which may both result in the imposition of a punitive penalty (*bis* condition); and (iv) the fact that the first decision is final (final decision or *res judicata* condition).

Over time, the *idem* condition has undergone changing interpretations before the European Court on Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), especially in the field of competition law. Those differences have recently

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[1] Art. 6(1 and 3) TEU. For the definition of *ne bis in idem* as a general principle of EU law see, e.g., CJEU, 15 October 2002, Case C-238/99P, *Limburgse Vinyl Maatschappij and Others v. Commission*, EU:C:2002:582, para 59, and Bas van Bockel, "The 'European' Ne Bis in Idem Principle. Substance, Sources, and Scope", in Bas Van Bockel (ed.), *Ne Bis in Idem in EU Law* (Cambridge University Press, 2016), 15.

been levelled by the judgements of the Grand Chamber in *bpost*[2] and *Norzucker*[3]. In this context, the adoption of the Digital Markets Act (DMA)[4] and of national competition laws addressing the specific role of large digital platforms[5] stimulates a discussion on the impact that the twin judgments are likely to have on the enforcement of these new rules. Indeed, in the near future a number of sanctioning proceedings may affect the same digital platform with respect to the same facts. Namely, investigations may be jointly launched to assess the violation of: (i) obligations imposed on gatekeepers under Articles 5, 6, and 7 DMA; (ii) European competition law (Articles 101 and 102 TFEU) and corresponding national provisions; (iii) platform-specific national competition rules. As a result, a remarkable risk of fragmented and uncoordinated enforcement is emerging.

Against this background, the paper pursues a twofold aim. It supports the introduction of a unified test for the *ne bis in idem* principle, shaped on a materialistic notion of *idem*. At the same time, the paper maintains that, in the absence of further clarifying interventions by the Court, some unaddressed issues may undermine the sound implementation of such principle in digital markets.

The paper is structured as follows. Section 2 describes the relevance of the *ne bis in idem* principle in punitive administrative proceedings. Section 3 retraces the interpretations which the *idem* condition has undergone over time before the European Courts. Section 4 illustrates the findings of the CJEU's Grand Chamber in *bpost* and *Nordzucker*. Section 5 investigates how the principles ruled in the twin judgements may affect regulatory and antitrust enforcement in digital markets. Section 6 concludes.

2. The scope of the *ne bis in idem* principle

Despite the different territorial scope of the Convention and the Charter, the substantive levels of protection guaranteed by the ECtHR and the CJEU have approximated over time.[6] The influence of the Strasbourg case law on the jurisprudence of the CJEU is consistent with Article 52(3) CFREU, which stipulates that the meaning and scope of the

[2] CJEU, Grand Chamber, 22 March 2022, Case C-117/20, *bpost SA v. Autorité belge de la concurrence,* EU:C:2022:202.

[3] CJEU, Grand Chamber, 22 March 2022, Case C-151/20, *Bundeswettbewerbsbehörde v. Nordzucker AG and others,* EU:C:2022:203. For a comment on the twin judgements, see Bernadette Zelger, "The Principle of *ne bis in idem* in EU competition law: The beginning of a new era after the ECJ's decisions in *bpost* and *Nordzucker*?", (2022) 60 CML Rev. 1-24, and Pieter van Cleynenbreugel, "*BPost* and *Nordzucker*: Searching for the Essence of *Ne Bis in Idem* in European Union Law", (2022) 18 EuConst 357–374.

[4] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

[5] See the 10th amendment to the German Competition Act (GWB) which entrusts the competition authority (Bundeskartellamt) with the power of declaring that a firm is of "paramount significance for competition across markets", thus prohibiting it from certain specified practices presumed to be unlawful. See also the recent Italian Annual Competition Law (5 August 2022, No. 118) introducing a rebuttable presumption of economic dependence when dealing with digital platforms that play a "key role" in reaching end-users and/or suppliers (Article 33).

[6] On the transnational scope of Article 50 CFREU, see Martin Wasmeier and Nadine Thwaites "The development of *ne bis in idem* into a transnational fundamental right in EU law: comments on recent developments", (2006) 31 EL Rev. 565-578; John A. Vervaele, "Ne bis in idem: Towards transnational constitutional principle in the EU", (2013) 9 Utrecht Law Review 211-229. Conversely, Article 4, Protocol 7 ECHR applies only to duplications taking place in the same Signatory State.

rights protected by the Charter shall be the same as the correspondent rights protected by the Convention.

The main contribution of the Strasbourg Court is in the delimitation of the field of application of the general principle. Starting from *Engel*, the ECtHR adopted an autonomous concept of criminal charge and penalty.[7] It considered the formal criterion of the legal classification of the offence as the first (not conclusive) stage of a wider analysis, which shall be complemented by the additional criteria of the very nature of the offence and/or the nature and degree of severity of the penalty that the perpetrator is liable to incur, including the level of reputational stigma attached to the charge.[8] Antitrust administrative fines, for instance, satisfy the *Engel* test.[9] This functional approach is mirrored by the notion of criminal proceedings relevant under Article 4 of Protocol No. 7. Therefore, for the purposes of the conventional *ne bis in idem* principle, a final administrative decision satisfying the *Engel* criteria bars the initiation or continuation of a second trial (or administrative punitive proceeding) against the same person for the same fact.[10]

In principle, the CJEU has never questioned the relevance of the right to *ne bis in idem vis à vis* punitive administrative procedures. In the antitrust field the Court invoked the principle a long time before the ratification of CISA, CFREU, and even Protocol No. 7 ECHR.[11] Nonetheless, the degree of protection guaranteed to individuals facing punitive administrative proceedings has proven to be lower before the Luxembourg Court. This trend can be partially explained by the reluctance to fully embrace the *Engel* standard. It is worthy of note that such test has been explicitly adopted by the CJEU only in the 2012 *Bonda* decision.[12] The CJEU's approach to competition law fines represents a valuable example in this respect. Indeed, overriding its early case law[13], the Court quickly attached,

[7] ECtHR, 8 June 1976, Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, *Engel and Others v. the Netherlands.*

[8] Ibid., paras 80-82. Since the two substance-based *Engel* criteria are alternative, there is nothing in the Convention to suggest that the criminal nature of an offence necessarily requires a certain degree of seriousness (ECtHR, 10 February 2009, Appl. No. 14939/03, *Sergey Zolotukhin v Russia*, para 55).

[9] ECtHR, 23 October 2018, Appl. No. 47072/15, *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*; 27 September 2011, Appl. No. 43509/08, *Menarini Diagnostics S.R.L. v. Italy*; 3 December 2002, Appl. No. 53892/00, *Lilly v. France*.

[10] For instance, with respect to punitive administrative proceedings conducted by the Italian Financial Authority, see ECtHR, 4 March 2014, Appl. Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens and Others v. Italy,* paras 219, 221, and 224.

[11] CJEU, 14 December 1972, Case C-7/72, *Boehringer v. Commission*, EU:C:1972:125.

[12] CJEU, 5 June 2012, Case C-489/10, *Lukasz Marcin Bonda,* EU:C:2012:319, para 37, which by the way left to the referring court the determination on the facts. For a comment, see Arianna Andreangeli, "*Ne bis in idem* and administrative sanctions: *Bonda*", (2013) 50 CML Rev. 1827-1841.

[13] At the very beginning, the Court stated that "the Commission (…) cannot (…) be classed as a tribunal within the meaning of Article 6 [ECHR]" (CJEU, 29 October 1980, Joined Cases 209-215/78 and 218/78, *Heintz van Landewyck SARL and Others v Commission*, EU:C:1980:248, para 81).

at least implicitly, a criminal status to antitrust procedures.[14] However, traces of the formalistic approach can still be retrieved in secondary legislation.[15]

The European reluctance to fully recognise the criminal-head guarantees in competition law matters is, to a remarkable extent, linked to the fear of undermining the effectiveness of antitrust rules.[16] This policy-driven concern finds a theoretical justification in the idea that, albeit falling within the scope of Article 6 ECHR, competition law penalties would not belong to the 'hard-core of criminal law', according to the *Jussilia* case law.[17] As a consequence, in this field the criminal-head guarantees would not necessarily apply with their full stringency.[18]

3. Different shades of *idem* before the European Courts

The CJEU's interpretation of the *ne bis in idem* principle has been deeply affected by such cultural background. In particular, for a long time the main misalignment with the elaboration of the ECtHR has resided in the interpretation of the *idem* condition.

3.1 The ECtHR's case law on the *idem* condition

In *Sergey Zolotukhin v. Russia* the Grand Chamber of the Strasbourg Court ruled that Article 4 of Protocol No. 7 prohibits the prosecution or trial of a second offence if it arises from "identical facts or facts which are substantially the same."[19] In so doing, the Grand Chamber cleared the ambiguities stemming from *Franz Fischer v. Austria*, where the Court found that two offences sharing "the same essential elements" fall under the scope of Article 4.[20] Notably, it explicitly adopted the material notion followed in *Gradinger v. Austria*, solely based on the conduct (*idem factum*),[21] and discarded the formalistic criterion embraced in *Oliveira v. Switzerland*, where the Court ruled that Article 4 shall not apply when a single act constitutes two separate offences (*idem crimen*).[22]

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[14] See CJEU, 17 December 1998, Case C-185/95 P, *Baustahlgewebe v. Commission*, EU:C:1998:608, paras 20-21, recognising the right to legal process within a reasonable period; 8 July 1999, Case C-199/92 P, *Hüls v. Commission*, EU:C:1999:358, para 150, and 8 July 1999, Case C-235/92 P, *Montecatini v. Commission*, EU:C:1999:362, para 176, both holding that the principle of the presumption of innocence shall apply to procedures relating to infringements of the competition rules.

[15] See Article 23(5) of the 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, [2003] OJ L 1/1 (Modernisation Regulation), stipulating that "decisions taken [by competition authorities] shall not be of a criminal law nature."

[16] See CJEU, 8 September 2003, Case C-338/00 P, *Volkswagen v. Commission*, EU:C:2003:473, paras 96-97, and, more extensively, the Opinion delivered by the AG Colomer on the same case (17 October 2002, EU:C:2002:591, para 66). *Contra*, see Gianni Lo Schiavo "The principle of *ne bis in idem* and the application of criminal sanctions: of scope and restrictions", (2018) 14 EuConst 644-663, noting that policy objectives should not legitimate a departure from the uniform application of fundamental rights enshrined by the Charter.

[17] ECtHR, 23 November 2006, Appl. No. 73053/01, *Jussila v. Finland*, para 43.

[18] See Wouter P.J. Wils, "EU antitrust enforcement powers and procedural rights and guarantees: The interplay between EU law, national law, the Charter of fundamental rights of the EU and the European Convention on human rights", (2011) 34 World Comp. 189-213.

[19] Application No. 14939/03, *supra* note 8, paras 78–84.

[20] ECtHR, 29 May 2001, Appl. No. 37950/97, *Franz Fischer v. Austria*, para 25.

[21] ECtHR, 28 September 1995, Appl. No. 15963/90, *Gradinger v. Austria*, para 55.

[22] ECtHR, 30 July 1998, Appl. No. 25711/94, *Oliveira v. Switzerland*, para 26.

From *Zolotukhin* onwards, the ECtHR did not shift from the materialistic notion of *idem*. However, it introduced additional elements providing enforcers with greater flexibility. In particular, while confirming its case law on the *idem* condition, in *A and B v. Norway* the Grand Chamber widened the notion of *bis*.[23] It ruled that two sets of proceedings combined in an integrated manner and forming a coherent whole do not constitute a *bis* under Article 4. To this end, "not only (…) the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also (…) the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected."[24]

The Court laid down the criteria for identifying, in practice, "a sufficiently close connection in substance."[25] First, the proceedings shall pursue complementary purposes, thus addressing *in concreto* different aspects of the social misconduct involved. Second, the duality of proceedings concerned shall be a foreseeable consequence, both in law and in practice, of the same conduct. Third, the relevant sets of proceedings shall be conducted in such a manner as to minimise any duplication in the collection as well as the assessment of the evidence. Fourth, the sanction imposed in the proceedings which become final first shall be taken into account in those which become final last, so as to prevent an outcome where the individual concerned is made to bear an excessive burden. Moreover, the Grand Chamber clarified that when the connection in substance is present, the requirement of a connection in time must be jointly satisfied.[26]

In his dissenting opinion, Judge Pinto de Albuquerque pointed out that, despite the explanatory effort made by the Court, *A and B* marks a relevant paradigm shift compared to *Grande Stevens v. Italy*, where the Second Chamber ruled that the combination of a criminal and administrative charge against the same offender and for the same course of conduct shall always be prohibited under Protocol No. 7, regardless of the level of connection, in substance and time, achieved by enforcers.[27]

3.2 The CJEU's case law on the *idem* condition

The case law of the CJEU has long been erratic.[28] Such swinging approach can to a large extent be explained by the tendency to vest policy-driven concerns with the theory of minor offences.

3.2.1 *Ne bis in idem* in general criminal law and in dual track punitive systems

[23] ECtHR, Grand Chamber, 15 November 2016, Appl. Nos. 24130/11 and 29758/11, *A and B v. Norway*, confirmed, among many, 18 May 2017, Appl. No. 22007/11, *Johannesson and Others v. Iceland*, para 49; 6 June 2019, Appl. No. 47342/14, *Nodet v. France*, para 51; Grand Chamber, 8 July 2019, Appl. No. 54012/10, *Mihalache v. Romania*, para 83; 21 July 2020, Appl. No. 34503/10, *Velkov v. Bulgaria*, paras 70-72; 8 October 2020, Appl. No. 67334/13, *Bajčić v. Croatia*, para 39.
[24] Applications Nos. 24130/11 and 29758/11, *supra* note 23, para 130.
[25] Ibid., para 132.
[26] Ibid., para 134.
[27] Ibid., paras 56 and 80.
[28] Michiel Luchtman, "The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order", (2018) 55 CML Rev. 1717-1750.

Ruling on cases involving criminal law in the strict sense[29], covered by Article 54 CISA, the CJEU developed a materialistic notion of *idem*. Namely, it found that "the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together."[30]

Despite CISA refers to "same acts", while the Charter reads "same offence", the Court applied the materialistic test beyond the scope of the Schengen *acquis*. Indeed, further elaborating upon *Fransonn*[31], in *Menci*,[32] *Garlsson Real Estate*,[33] and *Di Puma - Zecca*[34] the Grand Chamber stated that Article 50 CFREU applies to cases of criminal/administrative overlap, insofar as there is "identity of the material facts."[35] However, somehow pushed by the wind of change blowing from Strasbourg, it also introduced elements of flexibility close to those elaborated by the ECtHR in *A and B*, albeit rooted in a different conceptual framework.[36] Indeed, whereas, pursuant to Article 15(2) ECHR, the Convention does not allow derogations from the *ne bis in idem* principle, according to Article 52(1) CFREU the guarantee enshrined by Article 50 of the Charter may be subject to limitations where they are envisaged by law, they respect the essence of those rights, and they comply with the principle of proportionality (so-called general limitation clause).[37]

Relying on the general limitation clause, the CJEU ruled that the duplication of criminal and administrative proceedings for the same conduct (so-called dual-track punitive system) may satisfy the criteria laid down under Article 52(1) CFREU, insofar as three conditions are jointly met.[38] First, the legislation shall pursue an objective of general interest that justifies such a duplication of proceedings and penalties, being necessary for

[29] In his opinion delivered in the Case C-129/14 PPU, *Zoran Spasic*, EU:C:2014:739, para 39, fn 30, the Advocate General (AG) Jääskinen defined as "general criminal law" any punitive criminal law, which reflects a serious social or moral condemnation of the act at issue and which is classified as such by the applicable law.

[30] CJEU, 9 March 2006, Case C-436/04, *Van Esbroek*, EU:C:2006:165, para 36; 28 September 2006, Case C-150/05, *van Straaten*, EU:C:2006:614, para 48; 18 July 2007, C-367/05, *Kraaijenbrink*, EU:C:2007:444, para 26; 18 July 2007, C-288/05, *Kretzinger*, EU:C:2007:441, paras 29-34. See Robin Lööf, "54 CISA and the Principles of *ne bis in idem*", (2007) Eur. J. Crime Crim. Law Crim. Justice 309-334, considering the CJEU's interpretation of the *idem* condition a model of consistency compared to the early ECtHR's case law, which unambiguously came to a materialistic test only in the 2009 *Sergey Zolotukhin* decision.

[31] See CJEU, Grand Chamber, 28 February 2013, Case C-617/10, *Aklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, para 34, noting that "Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with [EU law], a combination of [administrative/disciplinary] and criminal penalties."

[32] CJEU, Grand Chamber, 20 March 2018, Case C-524/15, *Menci,* EU:C:2018:197.

[33] CJEU, Grand Chamber, 20 March 2018, Case C-537/16, *Garlsson Real Estate and Others,* EU:C:2018:193.

[34] CJEU, Grand Chamber, 20 March 2018, Joined cases C-596/16 and C-597/16, *Di Puma v. Consob* and *Consob v. Zecca,* EU:C:2018:192.

[35] Case C-524/15, *supra* note 32, para 35, and Case C-537/16, *supra* note 33, paras 37-38.

[36] See Paulo Pinto de Albuquerque and Hyun-Soo Lim, "The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit", (2018) 6 EHRLR 567-577, considering the partial alignment between the CJEU and the ECtHR as an example of negative cross-fertilisation between courts.

[37] Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", (2012) 8 EuConst 375-403, 388.

[38] Case C-524/15, *supra* note 32, paras 41-64; Case C-537/16, *supra* note 33, paras 42-62; Joined cases C-596/16 and C-597/16, *supra* note 34, paras 38-40.

those proceedings and penalties to pursue additional objectives. Second, the law shall contain rules ensuring coordination, limiting the additional disadvantage to only what is strictly necessary. Third, the law shall provide for rules ensuring that the severity of all penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. Therefore, while the ECtHR concluded that closely linked and coordinated prosecutions in substance and time do not constitute *bis* at all, the CJEU stated that, although in principle such scenarios constitute a *bis*, the rule allows for exceptions, provided that the threefold test of the general limitation clause is satisfied.[39]

3.2.2 *Ne bis in idem* in competition law

The CJEU developed a completely different interpretation of the *idem* condition limited to competition law, where an enduring conservative approach has long prevailed.[40]

In *Boehringer* the Court found that two parallel prosecutions against the same undertakings for the same set of agreements (one by virtue of European competition law and the other according to national law) had not infringed the double jeopardy principle.[41] However, the Court also introduced the accounting principle, noting that "in fixing the amount of a fine the Commission must take account of penalties which have already been borne by the same undertaking for the same action."[42] The same line of reasoning was followed in *Walt Wilhelm*.[43] This early understanding of the *ne bis in idem* in competition law matters was consolidated in the *Aalborg Portland* judgement, where the CJEU explicitly stated that in competition law issues the *idem* condition is subject to the threefold test of the same offender, the same facts, and the same protected legal interest.[44]

Against this background, the modification of several surrounding factors should have supported a swift change of paradigm in the decisions following *Aalborg Portland*. Aside from the establishment of the European Competition Network (ECN),[45] the main

[39] See Max Vetzo, "The Past, Present and Future of the Ne Bis in Idem Dialogue Between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci, Garlsson* and *Di Puma*", (2018) 11 REALaw 55-84, describing the CJEU approach as an example of "Charter-centrism."

[40] For a general overview, see Wouter Devroe, "How General Should General Principles Be? Ne Bis In Idem in EU Competition Law", in Ulf Bernitz, Xavier Groussot, and Felix Schulyok (eds.), *General Principles of EU Law and European Private Law* (Aphen aan de Rijn, Kluwer, 2013), 401-442; Renato Nazzini, "Parallel Proceedings in EU Competition Law: Ne Bis in Idem as a Limiting Principle", in Van Bockel (ed.), *Ne Bis in Idem in EU Law, supra* note 1, 131-166.

[41] Case C-7/72, *supra* note 11.

[42] Ibid., paras 3-4.

[43] CJEU, 13 February 1992, Case C-14/68, *Walt Wilhelm and Others v. Bundeskartellamt,* EU:C:1969:4, para 11.

[44] CJEU, 7 January 2004, 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. European Commission*, EU:C:2004:6, para 338.

[45] The Modernisation Regulation (*supra* note 15) has somehow fuelled the idea that antitrust enforcement had become supple enough to avoid multiple prosecutions (see, e.g., Gabriele Accardo and Frédéric Louis, "Ne Bis in Idem, Part Bis", (2011) 34 World Comp. 97-112). However, from a procedural standpoint, the ECN framework mainly relies upon best practices, while the procedural safeguards therein outlined are just recommended, rather than being imposed: see Giacomo Di Federico, "EU Competition Law and the Principle of 'Ne Bis in Idem'", (2011) 17 EPL 241-260; and Nazzini, *supra* note 40, 137-139. Notably, the main task of the ECN is to ensure "an efficient division of work", rather than safeguarding fundamental rights: see Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43, para 5.

innovations were represented by the materialistic *idem* test meanwhile developed by the Court on Article 54 CISA and the entry into force of the Treaty of Lisbon, which attached legally binding effect to the CFREU, thereby definitively fixing the right to *ne bis in idem* into the European primary law.[46] This led several scholars and the AG Kokott to call for a departure from the threefold identity test, in favour of the twofold one, considering the legal qualification of the offence immaterial.[47]

In the renewed setting, the issue of *ne bis in idem* in competition law cases was brought before the CJEU in *Toshiba*.[48] The Grand Chamber had two options, namely to follow a strict interpretation of the secondary legislation in force, whose literal wording allowed for a confirmation of *Aalborg Portland*, or to rule out the threefold test therein developed on the basis of highest-ranked principles. The Court opted for the formalistic solution, stating that, due to the confirmation of the double barrier system by the Modernisation Regulation[49], European and national rules would continue to safeguard undistorted competition "from different angles."[50] In short, in *Toshiba* the public interest for efficient enforcement, as modelled in secondary legislation, trumped the fundamental right to *ne bis in idem*.

Even in the aftermath of *Menci* the EU confirmed such antitrust specialism. Indeed, although the general limitation clause could be used as a yardstick to reconcile the need to protect the fundamental right with the effectiveness of antitrust enforcement, the EU appeared reluctant to change. The ECN+ Directive represented a further and timely opportunity to design a *Menci*-compliant mechanism, but it did not do so.[51] In the absence of such a legislative solution, it was up to the CJEU to clarify that *Menci* principles apply,

[46] For an early application of the right to *ne bis in idem* grounded on constitutional traditions common to the Member States, see Case C-7/72, *supra* note 11, and Case C-14/68, *supra* note 43. Notably, the ante-Lisbon version of Art. 6(2) TEU, like the current Article 6(3), also included within EU primary law "fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Consistently with this background, the Charter's preamble illustrates that the catalogue "reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […] and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights." In between the enactment of the Charter and the entry into force of the Lisbon Treaty, the CJEU established the relevance of the CFREU as a direct source of inspiration and interpretation for the general principles of Union law. For instance, in *Viking* (CJEU, Grand Chamber, 11 December 2007, Case C-438/05, EU:C:2007:772, paras 43-44) the Court acknowledged the existence of a fundamental right to strike, explicitly recalling Article 28 CFREU, together with the European Social Charter (Council of Europe, 18 October 1961, ETS No. 35).

[47] See, e.g., Nazzini, *supra* note 40, 142-143; Vervaele, *supra* note 6, 221-222 and 228; Wouter P.J. Wils, "The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis", (2003) 26 World Comp. 131-148, 143-144. See also AG Kokott's Opinion, 8 September 2011, Case C-17/10, *Toshiba Corporation and Others*, EU:C:2011:552, paras 116-118.

[48] CJEU, Grand Chamber, 14 February 2012, Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72.

[49] By this expression it is commonly described the power of national competition authorities (NCAs) to apply, under Article 3(1) Modernisation Regulation, national law together with Articles 101 and 102 TFEU, provided that national laws do not hamper the *effet utile* of European law.

[50] Case C-17/10, *supra* note 48, paras 81-83 and 97.

[51] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

mutatis mutandis, in the antitrust field.[52] After all, in the Opinion delivered in *Menci*, the AG Campos Sánchez-Bordona called for a unification of the case law.[53]

To this end, an important opportunity was provided by the *Slovak Telekom* judgement.[54] However, once again the CJEU reaffirmed that the application of the *idem* condition is subject to the threefold sub-condition that the facts, the offender, and the protected legal interest must be the same.[55]

Interestingly, while enunciating the threefold test, all of the aforementioned landmark decisions (*Aalborg Portland*, *Toshiba*, and *Slovak*) found that the second sub-condition (i.e. the fact must be the same) was not met in the specific case.[56] Therefore, the message was clear: the Court would have rejected the *bis in idem* defence even by adopting the *van Esbroek* twofold test.

4. The rise of a pan-European *ne bis in idem* principle: *bpost* and *Nordzucker*

The question of the legal standard to be applied to *ne bis in idem* defences in competition cases has once again been brought before the CJEU's Grand Chamber in *bpost*[57] and *Nordzucker*.[58] The former questioned whether, in case of overlapping charges under sector-specific regulation and competition rules, the *Toshiba* or *Menci* test should apply. The latter concerned the interpretation of the third sub-condition elaborated in *Toshiba* (i.e. same legal interest protected) whereby two national competition authorities (NCAs) apply, against the same offender and for the same set of facts, Article 101 TFEU in combination with the corresponding provisions of national law.

Facing the *Toshiba* or *Menci* dilemma and rejecting the view that the area of competition law is any different from the others, the AG Bobek called for a long-awaited unification.[59] However, in his view such unification should be based on the application of the *Toshiba* test to all fields of European law.[60] This conclusion would ensue from the wording of Article 50 CFREU, which, departing from Article 54 CISA, refers to "same offence"

[52] See Luchtman, *supra* note 28, 1746-1749; and Marc Veenbrink, "Bringing Back Unity: Modernizing the Application of the *Non Bis in Idem* Principle", (2019) 42 World Comp. 67-86, welcoming legislative *Menci*-like solutions in the competition area. Conversely, Pierpaolo Rossi and Valentina Sansonetti, "Untangling the inextricable: The notion of "same offence" in EU competition law", (2020) 3 Concurrences 59-68, argue that the *Menci* doctrine has been elaborated for situations where European law is not fully harmonized, with the result that national law can prosecute a same conduct under both administrative and criminal law. This would not be the case of competition law.

[53] AG Sánchez-Bordona's Opinion, 12 September 2017, Case C-524/15, EU:C:2017:667, para 103.

[54] CJEU, 25 February 2021, Case C-857/19, *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky,* EU:C:2021:139. For a case comment, see Peter Whelan, "Applying *Ne Bis in Idem* to Commission Proceedings Implicating Article 11(6) of Regulation 1/2003: Case C-857/19 *Slovak Telekom*", (2021) 12 JECLAP 746-749.

[55] Case C-857/19, *supra* note 54, para 43.

[56] Joined Cases C-204/00 P et al.*, supra* note 44, paras 338 and 340; Case C-17/10, *supra* note 48, paras 98-99; Case C-857/19, *supra* note 54, para 45.

[57] Case C-117/20, *supra* note 2.

[58] Case C-151/20, *supra* note 3.

[59] AG Bobek's Opinion, 2 September 2021, Case C-117/20, EU:C:2021:680, paras 6, 37, and 92.

[60] Ibid., paras 100-117 and 132-133.

instead of "same acts."[61] It would follow that all European law areas shall be subject to an *idem crimen* test, rather than to an *idem factum* one.[62]

Against this background, it has been argued that, although the AG's proposal has the merit of advocating for a unified test, in essence it suggests a downgrading of the general *ne bis in idem* test, rather than an upgrading of the competition-specific one.[63]

The Grand Chamber confirmed this interpretation. While the CJEU acknowledged that "the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another"[64], it came to the opposite conclusion that the substantive test should be that of the *idem factum*. Therefore, relevance shall be attached solely to the criterion of the "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."[65] The *idem factum* criterion must be applied in cases where competition law comes into play, either alone[66] or in combination with other disciplines.[67] Consistent with the *Menci* jurisprudence, the Court also recalled that, according to Article 52(1) CFREU, limitations on the exercise of the rights and freedoms recognised by the Charter can be tolerated, insofar as they are provided for by law, respect the essential content of those rights and freedoms, are necessary, and genuinely meet "objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others", and respect the principle of proportionality.[68]

In this context, the Grand Chamber provided the referring courts with elements of interpretation of EU law in the context of the assessment of that scope. In *bpost* it noted that the possible duplication of proceedings and penalties was provided for by law.[69] In addition, the CJEU noted that the essence of the right guaranteed by Article 50 was apparently not called into question as such. Indeed, the Belgian postal regulator and competition authority did not proceed "on the basis of the same offence or in pursuit of the same objective, but (…) under different legislation."[70] According to the Grand Chamber, a general interest objective exists when "the two sets of legislation at issue (…) pursue distinct legitimate objectives."[71] In the case in question, the first punitive

[61] Ibid., paras 123-125.
[62] Ibid., para 133.
[63] Marco Cappai and Giuseppe Colangelo, "A Unified Test for the European *Ne Bis in Idem* Principle: The Case Study of Digital Markets Regulation", (2021) <https://ssrn.com/abstract=3951088> (last visited 10 Sep. 2022).
[64] Case C-117/20, *supra* note 2, para 34; Case C-151/20, *supra* note 3, para 39.
[65] Case C-117/20, *supra* note 2, para 33; Case C-151/20, *supra* note 3, para 38. See Zelger, *supra* note 3, 17, welcoming the elaboration of a unified test.
[66] Case C-151/20, *supra* note 3, para 40.
[67] Case C-117/20, *supra* note 2, para 35.
[68] Ibid., para 41; Case C-151/20, *supra* note 3, para 50.
[69] Case C-117/20, *supra* note 2, para 42. In Case C-151/20, *supra* note 3, para 58, this concept remained implicit, as the Court observed that, under Article 101 TFEU (and corresponding national law), two NCAs can legitimately prosecute/punish the same conduct, provided that none of the decisions are based on a finding of an extraterritorial anticompetitive object or effect.
[70] Case C-117/20, *supra* note 2, para 43.
[71] Ibid., para 44. According to van Cleynenbreugel, *supra* note 3, 470, expressions such as "same offence" or "in pursuit of the same objective" appear, at first sight, "puzzling" as they refer to "the notion of objective (of general interest), which returns in the proportionality assessment." The Author finds that "is all the more

intervention was intended to drive the process of liberalisation of the postal sector, while the second was conducted to protect competitive dynamics, so that the requirement seems to be satisfied.[72] Arriving at the proportionality test, in a similar vein the CJEU noted that the duplication of proceedings or punishments is proportionate insofar as the overlapping interventions pursue "distinct objectives of general interest", thus acting in a complementary manner.[73] Finally, with respect to the requirement of the necessity for the procedural/punitive overlap, the CJEU referred to the criterion of "close substantial and temporal connection" developed by the Strasbourg Court in *A & B v. Norway*.[74] In this context, it clarified that the mere "existence of a provision of national [or European] law providing for cooperation and the exchange of information between the authorities concerned, would constitute an appropriate framework for ensuring the coordination." However, whether such coordination did in fact take place must be ascertained on a retrospective and case-by-case basis.[75]

Conversely, in *Nordzucker* the Court noted that, due to the substantive constraint exerted on national competition law by Article 3(2) of the Modernisation Regulation, in a case where two NCAs apply Article 101 TFEU in combination with corresponding national provisions, the legal interest protected would indisputably be the same.[76] Therefore, insofar as the facts are the same, no derogation from the ban on double jeopardy could "in all events be justified under Article 52(1) of the Charter."[77] Indeed, such a derogation would run counter to the essence of the fundamental right. Hence, the question here becomes whether NCAs had truly assessed the same fact.[78] To this end, one has to consider "the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect."[79]

5. The DMA/antitrust intersection in the light of *bpost* and *Nordzucker*: resolved questions and open issues

In September 2022, the DMA has been officially signed into law. Such regulatory intervention is based on the assumption that competition law alone is unfit to effectively address challenges and systemic problems posed by online platforms designated as gatekeepers. Notably, the aim of the DMA is to protect a different legal interest from those of antitrust rules. The Regulation pursues an objective that is different from that of protecting undistorted competition in any given market, namely by ensuring that markets where gatekeepers are present are, and remain, contestable and fair, independently from

remarkable since the Court's test no longer depends on the classification of certain behaviour as an offence protecting the same legal interest (*idem crimen*) in its identification of bis in idem situations."

[72] Ibid., para 47.

[73] Case C-117/20, *supra* note 2, para 49.

[74] Applications Nos. 24130/11 and 29758/11, *supra* note 23.

[75] Case C-117/20, *supra* note 2, para 55.

[76] Case C-151/20, *supra* note 3, para 56.

[77] Ibid., para. 57. Pursuant to Article 3(2) of the Modernisation Regulation, the application of national competition law may not lead to the prohibition of agreements which may affect trade between Member States if they do not restrict competition within the meaning of Article 101(1) TFEU.

[78] Case C-151/20, *supra* note 3, para 44. Namely, it is for the referring court to ascertain whether the latter decision found that the cartel existed, and penalised it, on the basis also of the cartel's anticompetitive object or effect considered in the former decision adopted by the other NCA (ibid., paras 45-48).

[79] Ibid., para 41.

the actual, likely or presumed effects of the conduct of a given gatekeeper.[80] Accordingly, the relevant legal basis is represented by Article 114 TFEU, rather than Article 103 TFEU, which is intended for the implementation of antitrust provisions pursuant to Articles 101 and 102 TFEU. Furthermore, from the institutional design viewpoint, the DMA opts for the centralisation of its implementation and enforcement at EU level against the traditional decentralised or parallel antitrust enforcement at both national and European level.

In light of the purported complementarity, antitrust rules remain applicable, but their application should not affect the obligations imposed on gatekeepers under the DMA and their uniform and effective application.[81]

Against this backdrop, the DMA/antitrust intersection may represent a *liaison dangereuse*.[82] Indeed, to a great extent, the list of obligations proscribed on gatekeepers under the DMA seems a synopsis of past and ongoing antitrust cases. Moreover, some Member States have recently updated their antitrust provisions, empowering their NCAs with new tools to tackle abusive practices which are similar to the DMA (i.e. Germany) or to impose over large digital players the burden of proof to dismiss a presumption of economic dependence in their business relationship (i.e. Italy).[83] Hence, as a result of the parallel application of the DMA and (EU and national) antitrust rules, the issue of *ne bis in idem* may soon emerge.

Unsurprisingly, in the aftermath of *bpost* and *Nordzucker,* the final version of the DMA has been amended to explicitly cope with the *ne bis in idem* principle. In particular, Recital 86 states that "the Commission and the relevant national authorities should coordinate their enforcement efforts in order to ensure that [the *ne bis in idem* principle is] 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." Further, the final version also brings back the traditional mechanism of cooperation between the Commission and NCAs (i.e. the ECN).[84]

These additions seem compliant with the findings of the CJEU in *bpost* and *Nordzucker*.[85] In this context, it is submitted that while the benefits ensuing from the elaboration of a unified test to *ne bis in idem* are undisputed, several questions remain unanswered.

5.1 Are national laws targeting market power of digital platforms implementing EU law for the purposes of Article 51 CFREU?

[80] DMA, *supra* note 4, Recitals 8 and 11.
[81] Ibid., Recital 10 and Article 1(6).
[82] Giuseppe Colangelo, "The European Digital Markets Act and antitrust enforcement: A *liaison dangereuse*", (2022) 47 Eur. Law Rev. 597-621.
[83] *Supra* note 5.
[84] DMA, *supra* note 4, Article 38.
[85] Assimakis P. Komninos, "The Digital Markets Act: How Does it Compare with Competition Law?", (2022) <https://ssrn.com/abstract=4136146> (last visited 15 Sep. 2022).

A preliminary issue left open by *bpost* and *Nordzucker* is whether national competition laws targeting market power of large digital platforms can be considered to be implementing EU law for the purposes of Article 51 CFREU.

Pursuant to the test elaborated in *Siragusa*, one of the criteria to determine whether national rules are implementing EU law, when they are not themselves giving effect to a piece of EU law, but happen to be in a field occupied by EU legislation, is the nature of the rule and whether it pursues objectives other than those covered by EU law, including the case where it is capable of indirectly affecting EU law.[86] The result of the application of the *Siragusa* test to the overlap between the DMA and national laws targeting market power of digital platforms is controversial. Indeed, the purpose of the DMA is to ensure for all businesses "contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users."[87] The obligations therein imposed are *per se rules* and, unlike Article 102 TFEU, cannot be escaped by means of an efficiency defence. Accordingly, the Regulation is grounded on the shared competence on the internal market (i.e. Article 114 TFEU) instead of relying on the EU exclusive competence to establish the competition rules necessary for the functioning of the internal market, which would have allowed activation of Article 103(2)(c) TFEU.[88]

In turn, national DMA-like provisions, such as the German Section 19a GWB, occupy areas left uncovered by the Modernisation Regulation. Notably, the new German provision appears to be in between sector-based regulation and European competition law. Indeed, similarly to the DMA, it designs a two-part process based on the former designation of the undertaking and the subsequent application of a list of *ex ante* rules.[89] However, similar to antitrust law, it also allows efficiency defences.

In this respect, it can be noted that the CJEU seems willing to follow a substantive-based approach to identify the objectives pursued by different pieces of legislation, investigating, beyond legal qualifications, the very nature of the public interest at hand. For instance, in *Nordzucker* it considered that, if Article 101 TFEU and corresponding national law pursue the same objectives, then the same should apply among national provisions enacted by different Member States *vis à vis* cartels capable of distorting competition in the internal market.[90] The Opinions of the AG Colomer in *Aalborg Portland*[91] and Bobek in *bpost*[92] adopted the same perspective. Therefore, considering national DMA-like provisions as implementing EU law for the purposes of Article 51 CFREU may be reasonable. However, there would still remain room for uncertainty, since in practice the answer to that question can only be provided following a case-by-case assessment.

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[86] CJEU, 6 March 2014, Case C-206/13, *Siragusa*, EU:C:2014:126, para 25.
[87] DMA, *supra* note 4, Recital 7 and Article 1(1).
[88] For a critical reading, see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, "Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It", (2021) 12 JECLAP 576-589.
[89] *Supra* note 5.
[90] Case C-151/20, *supra* note 3, para 56.
[91] See AG Colomer's Opinion, 11 February 2003, 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, EU:C:2003:83, paras 173 and 176, finding that "the unity of the legal right to be protected [wa]s beyond doubt", due to the substantive overlap of Article 101 TFEU with the corresponding national provision.
[92] AG Bobek's Opinion, *supra* note 59, paras 136 and 139.

In this scenario, the choice made by the European legislator to declare that the DMA pursues complementary objectives to antitrust rules may lead to consequences relevant to *ne bis in idem*.

Indeed, if the Court were to consider that national laws tackling digital gatekeepers fall outside the scope of Article 51 CFREU, the *ne bis in idem* principle enshrined under Article 50 CFREU would not apply at all. Consequently, enforcers would not be obliged to satisfy the general limitation clause under Article 52(1) CFREU, and the provisions of the DMA introducing information exchange mechanisms between the Commission and NCAs would merely be an attempt to promote best administrative practices. As a result, in the case of parallel criminal proceedings under the DMA and national laws targeting online platforms, competent authorities would neither be obliged to coordinate enforcement to mitigate the additional burden suffered by defendant nor to impose an overall proportionate fine. Accordingly, the standard of protection ensured by the ECHR, although constituting a general principle of EU law under Article 6(3) TEU, may not cover such a situation. Indeed, the scope of application of the Charter and of general principles of EU law appears to be, in the CJEU's case law, nearly the same.[93] Therefore, once excluded that national DMA-like provisions implement EU law for the purposes of Article 51 CFREU, the general principle consisting in the right to *ne bis in idem*, as interpreted by the Strasbourg Court, may not apply as well. As for the direct application of Article 4 of Protocol No. 7 ECHR as a legal source, it shall be recalled that, due to the territorial scope of the Convention, it would remain limited to scenarios where the overlapping punitive intervention takes place in the same Signatory State.

Conversely, if the CJEU were to consider that, at a substantive level, a national law pursues the same objectives as the DMA (thus qualifying that piece of legislation as implementing EU law), the parallel investigations would be covered by Article 50 CFREU. At the same time, however, the general limitation clause may not apply to a case such as that. Indeed, in *Nordzucker* the CJEU considered that when the proceedings do not prosecute complementary aspects of the offence but protect the same legal asset, no softening of the ban on *bis in idem* can be tolerated. Thus, it might be argued that the intervention by an NCA under national law bars the enforcement of the DMA with no room for exceptions, irrespective of the level of coordination achieved by enforcers and overall proportionality of the fines eventually imposed. *Mutatis mutandis*, the same conclusion may be reached under the ECHR. Since the Convention is a living instrument, the Strasbourg Court may in particular question that national provisions of this kind truly pursue complementary aims to the DMA, addressing *in concreto* different aspects of the social misconduct involved. As a consequence, a national proceeding targeting a given behaviour by a given digital gatekeeper may prevent the European Commission from enforcing the DMA with respect to the same conduct by the same player.

From this perspective, it seems that a reform based on competition law (Article 103 TFEU, eventually in combination with the flexibility clause under Article 352 TFEU) may have reduced such a risk. For instance, the exclusive competence to establish the

[93] See the Explanations on Article 51(1) CFREU, [2007] OJ C 303/32, and CJEU, 9 March 2017, Case C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, EU:C:2017:198, paras 50 and 54, arguing that since "the national legislation applicable to the main proceedings fall[ed] within the implementation of EU law, [for the purposes of Article 51 CFREU,] in the [referred] case, the general principles of EU law, including the principle of equal treatment, and of the Charter [we]re applicable."

rules on competition could be used to derogate, limited to digital gatekeepers and directly within the text of the DMA, the power of Member States to adopt, beyond Article 102 TFEU, stricter rules on unilateral conduct, under the last sentence of Article 3(2) of the Modernisation Regulation. Against this background, by relying on a shared competence, Article 114 TFEU strives to realize such a full harmonisation of the legal framework.

Both the described outcomes can be problematic. The former may undermine the fundamental right to *ne bis in idem*, since it may make it possible to prosecute the same conduct twice in the name of a diversity of offences which is actually nuanced. The latter, which appears to be more realistic because of the Court's broad understanding of Article 51 CFREU, may be at odds with the ultimate objective of the DMA, that is reducing fragmentation of the internal market and approximating diverging national laws.[94] Indeed, in that scenario a final national decision may end up preventing further punitive actions under the DMA. Ultimately, the choice by the European legislator to base the DMA on Article 114 TFEU may reveal itself to be a double-edged sword leading to unintended consequences.

5.2 How should the *idem factum* be delimited?

A second issue almost untouched by *bpost* and *Nordzucker* is represented by the criterion to identify the same fact.

Albeit the question of the *idem crimen* has attracted most of the attention, the proper definition of the concept of *idem factum* is crucial. As has been shown, elaborating the threefold identity test in *Aalborg Portland*, *Toshiba*, and *Slovak*, the CJEU adopted a formalistic approach and always found that the second sub-condition (i.e. the fact must be the same) was not met. This prevented the application of Article 50 CFREU. Therefore, since the double jeopardy defence did not even pass the two-fold identity approach developed in *van Esbroek*, the enunciation of the threefold identity test in the cases mentioned has proven to be of little import.

Apparently, in *bpost* the Court reiterated the same idea, stating that "the *non bis in idem* principle is not intended to be applied where the facts in question are not identical but merely similar."[95] However, the concrete application of such criterion is disputed. Indeed, the distinction between differing aims of an infringement and differing facts is quite blurred, and "this is a specificity of competition."[96] Moreover, antitrust enforcement relies on catch-all concepts elaborated to make investigations swifter and more effective. Those concepts interfere with the constitutive elements of the ban on double jeopardy. Notably, the identity of the offender condition shall be reconciled with the single economic entity theory (SEE). According to this theory, the fact that a subsidiary is a separate legal entity does not obstruct the possibility of attributing its conduct to the parent company. Furthermore, in competition law the *idem* condition shall be reconciled with the broad notion of single and continuous infringement (SCI). This concept allows

[94] DMA, *supra* note 4, Recitals 6 and 8.
[95] Case C-151/20, *supra* note 2, para 36. Further, the Grand Chamber noted that the "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" (para 37).
[96] Rossi and Sansonetti, *supra* note 52.

enforcers to assess a series of (even heterogeneous) actions by different undertakings allegedly forming part of an overall plan to distort competition.[97]

It is far from clear whether two investigations concerning facts which might be regarded as part of an SCI by an SEE, and enacted, at least in part, in the same territory and timeframe, shall be considered as constituting the same fact by the same offender. In such circumstances competition authorities may well decide to prosecute different undertakings belonging to the same group, identify different relevant markets, prosecute only the effects produced in the territory of a single State[98], consider a different duration of the objected infringements, or focus on different aspects of the overall conduct. For instance, in the (Italian and European) *Amazon buy box* case the facts under investigation were indisputably the same.[99] However, the European Commission identified a different (European Economic Area-wide) geographic market, excluding Italy.

The *Amazon buy box* case demonstrates that sticking with an over-formalistic notion of same fact might nullify the benefits of the unified test elaborated in *bpost* and *Nordzucker*. Indeed, enforcers could be in a position to circumvent Article 50 CFREU by simply gerrymandering the market definition, the duration, the piece of conduct assessed, or the territory where the conduct produces effects.

Proposals have been put forward to avoid such outcomes. Namely, it has been noted that the freedom of movement foundation of *ne bis in idem* suggests that fragmentation of the same offence should not allowed.[100] The test for the establishment of a single continuous infringement requires that the facts are closely connected, therefore inextricably linked for the purposes of the *ne bis in idem* principle. In a similar vein, it has been argued that in antitrust matters it is often impossible to separate the national and EU-wide aspects of the infringement, due to the existence of an economic link between the two kinds of

[97] Although originally conceptualised in the context of cartel enforcement, over time the notion has extended to abusive conduct: see CJEU, 25 March 2021, Case C-152/19 P, *Deutsche Telekom AG v. European Commission*, EU:C:2021:238, as illustrative of the potential combined effect of SEE and SCI on *ne bis in idem* claims raised in the context of abuses of dominant position.

[98] See van Cleynenbreugel, *supra* note 3, 365-366, noting that *Nordzucker* "could be understood as a clear invitation for member states to limit the territorial effects of their enforcement activities as a way to avoid *ne bis in idem* claims being made against them." In turn, Zelger, *supra* note 3, 17-21, argues in favour of the "effects approach" put forward by the AG Kakott in *Toshiba* (*supra* note 47, paras 128 et seq., followed by the Court in its decision in Case C-107/10, *supra* note 48, paras 98-99). Further, she notes that the effects approach would be "perfectly suitable to solve potential problems" coming from the overlap between the DMA and national provisions targeting digital platforms. In a way, this finding is perfectly consistent with the view expressed in the present paper: any improvement, in terms of enhanced individual protection, deriving from the rejection of the *idem crimen* test may be reduced (or even nullified) by a broad understanding of the *idem factum* criterion.

[99] See European Commission, 10 November 2020, C(2020) 7692 final; and Italian Competition Authority, 10 April 2019, Case No. A528. The General Court 14 October 2021, Case T-19/21, *Amazon.com and Others v European Commission*, EU:T:2021:730, rejected the Amazon's appeal, ruling that the plea was inadmissible, as the opening decision constitutes a preparatory act which does not produce legal effects within the meaning of Article 263 TFEU. On November 30, 2021 the Italian Competition Authority adopted a final decision finding that Amazon has abused its dominant position, imposing behavioural remedies and issuing a € 1,128 billion fine (<https://en.agcm.it/en/media/press-releases/2021/12/A528> last visited 15 Sep. 2022).

[100] Nazzini, *supra* note 40, 146-147.

conduct, so that a formalistic approach may run counter to the *esprit* of Article 50 CFREU.[101]

5.3 Much ado about nothing? Taking the general limitation clause seriously

The judgements in *bpost* and *Norzucker* have finally elaborated a unified test for the European *ne bis in idem* principle, shaped on the *van Esbroek* two-fold identity test. Aligning to the *Menci* case law, the Grand Chamber also clarified that, under the general limitation clause, the guarantee enshrined by Article 50 CFREU may be subject to limitations where they are envisaged by law, they respect the essence of the rights, and they comply with the proportionality principle.

Intuitively, if the criteria for qualifying for the exception are too broad, then the exception becomes the rule, and the prohibition is *de facto* downgraded to a mere petition of principle. Hence, there is the need to define the actual content of the conditions that make it possible to derogate from the *bis in idem* prohibition. This step is particularly relevant to the antitrust-regulation intersection because of the described minor offence mindset, according to which the criminal-head guarantees may apply weakly to punitive administrative law not belonging to the hard core of criminal law. However, it seems that a clear rulebook on the application of the general limitation clause to the *ne bis in idem* principle is yet to come with respect to administrative punitive proceedings.

The most controversial aspects are to be found in the proportionality test.

As in *Menci* and echoing the Strasbourg Court's decision in *A & B*, in *bpost* the CJEU ruled that the necessity bar of the three-pronged proportionality test (i.e. the measure shall be suitable, necessary to achieve the objective, and the least restrictive means available to achieve that objective) requires the existence of a sufficiently close connection in substance and time between the two sets of proceedings involved.[102] The Court further clarified that the existence of a provision of national or European law providing for cooperation and the exchange of information between the authorities concerned represents "an appropriate framework" for achieving the first part of the test (i.e. the close connection in substance).[103]

In abstract, the DMA seems to fulfil this requirement.[104] Pursuant to Articles 38-40, the Commission and Member States shall work in close cooperation and coordinate their enforcement actions to ensure coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers. In this context, the Commission shall be promptly informed if an NCA intends to launch an investigation or impose obligations on gatekeepers based on national competition laws. Notably, both the Commission and NCAs shall have the power to provide one another with any matter of fact or of law, including confidential information. Coordination mechanisms are also established between the Commission and national courts. In addition, to ensure a consistent implementation of the DMA with other sectoral regulations applicable to gatekeepers, the Commission shall be assisted by a high-level group composed of the relevant European

[101] Giorgio Monti "Managing decentralized antitrust enforcement: Toshiba", (2014) 51 CML Rev. 261-279, 272.
[102] Case C-117/20, *supra* note 2, para 53.
[103] Ibid., para 55.
[104] DMA, *supra* note 4, Articles 38-40.

bodies and networks, whose role is limited to providing the Commission with advice and expertise in the areas falling within the competences of its members.

However, as noted by the CJEU, the mere existence of such a framework is not by itself sufficient, rather that, crucially, whether the coordination did in fact take place.[105] Thus, the Court should provide further guidance identifying the proper level of coordination. For instance, it might clarify that, where a prosecutor firstly carries on inspections and/or submits requests for information, and secondly exchanges the collected evidence with another enforcer, the latter shall be in a position of conducting further discovery activities on the same fact only by justifying in writing the reasons why such a duplication might be necessary to successfully conduct the investigation.

As to the second part of the test (i.e. the close connection in time), *bpost* stated that a period of around seventeen months between the two prosecutions could be considered appropriate, "given the complexity of competition investigations."[106] The reference to the complexity of the investigation allows inspiration to be drawn from the case law on the reasonable length of the administrative procedure of a criminal nature under Articles 6 ECHR and 47 CFREU. For instance, in the antitrust field the General Court found that the sending of a series of requests for information did not justify the elapsing of 65 months between the inspections and the notification of the statement of objections by the European Commission.[107] Therefore, a sufficiently close connection in time may exist if the enforcer initiates the proceeding in a reasonable timeframe from the moment it received (or shall have received) sufficient information to be able to assess whether the conduct at stake deserves a second line of investigation or not. Notably, in order to verify whether the initiation of the investigation is timely, attention could be paid to the pre-investigation activities actually performed from the moment the authority collected sufficiently circumstantial evidence and to the complexity of the matter.

Finally, Article 52(1) CFREU requires the duplication of penalties provided for by the law, taken as a whole, not to exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation. Namely, the severity of all of the penalties imposed shall correspond to the seriousness of the offence concerned. To this end, it seems that the Court has so far scrutinised the proportionality of the overall punitive treatment more strictly in case of national dual-track (administrative and criminal) punitive systems, where one of the two charges belongs to general criminal law (hard core of criminal law), compared to cases of duplication of administrative penalties of a criminal nature.

In particular, in *Menci* the CJEU ruled that "the national legislation at issue in the main proceedings provide[d] for the conditions appropriate for ensuring that the competent authorities limit the severity of all of the penalties imposed to what is strictly necessary in relation to the seriousness of the offence committed."[108] Further, the Court noted that the proportionality of the criteria laid down by the law is only the first stage of the test. The second stage is represented by the proportionality of the intervention, which shall be assessed in practice, having regard to the disadvantage resulting, in the case at hand and

[105] Case C-117/20, *supra* note 2, para 55.
[106] Ibid., para 56.
[107] GC, 16 June 2011, Case T-240/07, *Heineken Nederland BV and Others v European Commission*, EU:T:2011:284.
[108] Case C-524/15, *supra* note 32, para 56.

for the person concerned, from the duplication of penalties, which shall not be excessive in relation to the seriousness of the offence effectively committed.[109] Moreover, in *Garlsson* the CJEU stated that the bringing of an administrative proceeding of a criminal nature following a criminal conviction "goes beyond what is strictly necessary in order to achieve the objective [of general interest pursued by the law]."[110] In a similar vein, *Di Puma-Zecca* held that "the bringing of proceedings for an administrative fine of a criminal nature clearly exceeds what is necessary in order to achieve the objective [pursued by the law whenever] there exists a judgment of acquittal holding that there are no factors constituting an offence" under general criminal law.[111]

The accuracy of the case law on the proportionality of the overall punitive treatment seems to significantly decrease in cases concerning the duplication of administrative punitive proceedings of a criminal nature. For instance, in *bpost* the CJEU noted that "the fact that the fine imposed in the second set of proceedings is larger than that imposed in the first, by a final decision, does not in itself show that the duplication of proceedings and penalties was disproportionate with regard to the legal person concerned, given, in particular, that the two sets of proceedings may constitute complementary and connected, but nevertheless distinct, legal responses to the same conduct."[112] This assertion, however, is not grounded on objective normative parameters and is not subject to further explanation. In that regard, *bpost* resembles the early approach of natural justice elaborated in antitrust matters starting from *Walt Wilhelm*[113] and reiterated in *Toshiba*,[114] where the Court used to recall the need that the second punishment take into account the first one (accounting principle), without providing guidance on how to attain in practice said need for natural justice. Against this background, it is submitted that it is not sufficient for the prosecutor to merely declare it is taking account of a former penalty. Rather, ranges, thresholds, limits, and criteria governing the duplication of penalties shall be identified.[115]

6. Concluding remarks

bpost and *Nordzucker* have been much awaited. The CJEU has finally embraced a unified test to *ne bis in idem* putting an end to the competition law exceptionalism. The antitrust-specific threefold condition of *idem* developed in *Aalborg Portland* and *Toshiba* has been rejected to affirm that the twofold identity approach (same offender and same facts) established in *Van Esbroek* and *Menci* must be applied to all areas of EU law. As in *Menci*, the Grand Chamber acknowledged that exceptions might be tolerated under the general limitation clause.

The CJEU's rulings are particularly timely, as concerns about the lack of full recognition of double jeopardy in antitrust cases are being heightened by recent reforms of competition policy undertaken at EU and national level to tackle the emergence of large

[109] Ibid., para 58.
[110] Case C-537/16, *supra* note 33, para 61.
[111] Cases C-596/16 and C-597/16, *supra* note 34, para 44.
[112] Case C-117/20, *supra* note 2, para 57.
[113] Case C-14/68, *supra* note 43, para 11.
[114] Case C-17/10*, supra* note 48, para 101.
[115] See Pieter J.F. Huizing, "Proportionality of Fines in the Context of Global Cartel Enforcement", (2020) 43 World Comp. 61-86, addressing this topic in the antitrust field.

technology platforms. Indeed, given that the DMA will not displace competition rules but will be implemented alongside them, overlapping and conflicting decisions may emerge. Notably, the very same practices targeted by the DMA may be investigated by NCAs pursuant to (European and national) competition laws, national competition laws specific to digital markets, and national provisions on economic dependence.

Against this backdrop, *bpost* and *Nordzucker* strike the right balance between the need to guarantee the fundamental right enshrined in Article 50 CFREU and the parallel need to safeguard the effectiveness of the EU regulatory intervention. However, three areas remain uncovered and may jeopardise these goals.

It is indeed controversial whether national antitrust legislation targeting market power of large digital platforms is implementing EU law for the purposes of Article 51 CFREU. If the answer to such question were negative, firms may lose a fundamental protection in the name of a chameleonic use of the concept of legal interest protected. Vice versa, if the answer were positive, the centralised enforcement of the DMA might be undermined by the former intervention of a national authority. Moreover, the notion of *idem factum* remains over-formalistic in the competition area. The CJEU still requires perfect identity of the conducts in question which is almost impossible to verify. This may provide enforcers with an easy exit strategy preventing the application of Article 50 CFREU at all. Finally, the minor offence mindset shall not be misused. In the absence of such a paradigm shift, there is a significant risk that all cases of overlapping administrative enforcement will fall under the general limitation clause, thus transforming the exception to the *ne bis in idem* principle in the rule.