THE DIGITAL MARKETS ACT, EU COMPETITION ENFORCEMENT AND FUNDAMENTAL RIGHTS: SOME REFLECTION ON THE FUTURE OF *NE BIS IN* IDEM IN DIGITAL MARKETS

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This article discusses some of the implications of the entry in force of the Digital Markets Act for the future application of the EU Competition rules in digital markets and in particular for the continuing protection of the right against double jeopardy, enshrined in Article 50 of the EU Charter of Fundamental Rights. It questions whether the possibility that the DMA and Articles 101 and 102 TFEU might apply concurrently might be incompatible with this important safeguard. On that basis the article argues whether a different approach to it could provide a more balanced response to the need to reconcile the demands of effective competition enforcement with the observance of the DMA's obligation and the efficient functioning of the ex-ante framework that the new Regulation introduces.

I. INTRODUCTION

The Digital Markets Act ("DMA") marks a significant change in the way in which the EU tackles practices restrictive of competition in the digital services industry. Designed to apply to platform service providers, it sets out a system for the designation of some of them as 'gatekeepers' by virtue of their position on the market, their financial strength and the reach of their activities. Gatekeeper designation has considerable consequences for the concerned undertakings, since it subjects them to several pervasive behavioral obligations. Their observance is backed by powers of investigation and sanction, enjoyed by the EU Commission. The Commission also enjoys powers of general supervision of platform services markets, by means of market investigations and studies.

The DMA therefore establishes an ex ante regulatory system for the policing of competition on an important sector of the digital economy. Rather than applying ex post facto, it imposes specific obligations on those providers that are in a position of "control" over entry in and/or the functioning of these markets. However, a cursory look at the Act shows that the obligations it imposes are closely modelled to commitments and remedies that have been sanctioned by the Commission and the EU Courts as a response to anti-competitive behavior.

The purpose of this article is to interrogate how the DMA and the mainstream competition rules are going to interact and at the same time ensure the continued observance of fundamental rights, in particular the principle of ne bis in idem. The right not to be prosecuted and sanctioned twice for the same offence is enshrined in Article 50 of the EU Charter of Fundamental Rights ("EU CFR"). The article will consider the nature of the relation existing between the DMA and the EU competition rules and discuss in particular the nature of the legislative purpose of the DMA. On that basis, it will argue that it might be difficult to disentangle the internal market objectives that the DMA purportedly seeks to achieve from the attainment of competition policy goals, which seem also to be inherent to the framework of the new Regulation.

On that basis the article will discuss the question of whether the concurrent application of the DMA and the EU competition rules might be compatible with Article 50 EU CFR. It will review the state of play as regards ne bis in idem generally and in respect of parallel or subsequent competition and sector regulation investigations. It will be argued that, in light of the most recent decisions of the CJEU, a more flexible framework for the assessment of questions relating to the observance of this principle might be emerging. The paper will conclude that it might be possible to accommodate the concurrent application of the new Regulation and of the mainstream EU competition rules. For this purpose, however, it is going to be essential to ensure that investigations and sanctions imposed on the basis of the DMA find their primary legislative purpose in the improvement of the functioning of the Internal Market.

II. THE DIGITAL MARKETS ACT AS THE EX ANTE REGIME FOR "IMPORTANT" PLATFORMS

The Digital Markets Act is the point of arrival of extensive debate concerning how to respond to collusive or abusive practices occurring in digital markets and especially in the market for the provision of platform services. Speaking in 2020 Margrethe Vestager, the EU Commission Vice-President recognized that Articles 101 and 102 had proved to be flexible and resilient enough to withstand the challenges posed to competition in digital markets. However, she recognized that systemic factors had sometimes prevented the Commission from addressing the special features and dynamics of platform markets, such as the impact of positive feedback loops on entry or expansion of rivals, in a timely and effective manner.[2]

The length of the proceedings, the ex post nature of the assessment they required and the limits associated with a finding of dominance did not allow timely and effective intervention in some cases.[3] In addition, the Commission saw the proposals for reform of platform services' regulation as a window of opportunity for embedding in competition analysis a number of non-economic systemic policy objectives, such as the need to safeguard pluralism and democracy in the online sphere and the transition toward a "green" economy.[4] Adopting an *ex ante* approach allowed the Commission to shape a vision for platform services markets that would not only "serve" competition but would also achieve these broader societal goals.[5]

2 Margrethe Vestager, speech given at the College of Europe, Bruges, on 2 March 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

3 Signoret, "Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants," (2020) 16(2) Eur Comp J 221 at 232-234; see also pp. 238-240.

4 EU Commission, "Strategy: priorities for 2019-2024—A Europe fit for the digital age," available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en.

5 See, *inter alia*, Cini & Czulno, "Digital single market and the EU competition regime: an explanation of policy change," (2022) 44(1) Journal of European Integration 41 at 42, 45.

With a view to tackling these concerns, the new Regulation enshrines substantive and procedural rules applicable to large online platforms that enjoy position of market power in relation to the entry in and the expansion of other competitors on specific digital market segments and/or consumer and supplier segments.[6] At its core is the designation of specific undertakings as "gatekeepers," either following a notification from individual platform services' providers or as a result of a market investigation. This designation has important consequences for the undertakings concerned who as a result are subject to an array of pervasive obligations as to future behavior on the market. Some are clearly defined and are enshrined in Article 5 of the DMA whereas other can be "further specified" by the EU Commission, in accordance with Article 6. Thus, according to Article 5, gatekeepers will no longer be allowed to impose price parity obligations on customers or tie the provision of certain services to others'. Article 6 expands the range of gatekeepers' duties by allowing the Commission to tailor the latter in a number of important areas, such as data portability and interoperability standards. The Commission enjoys exclusive powers of investigation and can punish undertakings that fail to comply with their obligations.[7]

It is clear from the above that the new Regulation brings about substantive change in the way in which rivalry and openness are maintained in platform markets. It is special, in that it only applies to a restricted number of undertakings. It is applicable ex ante and confers to the Commission an exclusive power of enforcement of its obligations, to the benefit of uniformity and legal certainty. It also centralizes enforcement powers on the Commission to the exclusion of the national competition authorities and sector regulators. It is however clear that its "feet" are firmly grounded in the EU competition law acquis. Articles 5 and 6 reproduce almost verbatim commitments and remedies that had been imposed by the EU Commission (and approved by the EU Courts) on undertakings that had infringed the EU competition rules.

This therefore raises important questions of consistency, coordination between institutional frameworks and, despite the DMA's best intentions, legal certainty. It is added that the circumstance that these obligations are imposed without the need for an individual decision or the obligation to meet exacting standards of proof gives the new Regulation a rather significant "edge" over "old-style" mainstream competition enforcement.[8] Is this the start of the end for the application of Articles 101 and 102 TFEU in important areas of the digital economy? How are the general EU competition rules and the DMA destined to interact in practice? Can the concurrent application of these two sets of rules remain consistent with the protection of fundamental rights? These questions will now be examined in turn.

III. THE EU COMMISSION AND THE NCA AND PLATFORM SERVICES MARKETS — ASYMMETRIC COORDINATION?

The previous section sketched the DMA and highlighted how its relationship with the general competition rules might actually prove critical to its effective application. This section will explore the nature of the interplay between the new Regulation and the enforcement of Articles 101 and 102 TFEU. According to Recital 10 of the Preamble, the DMA will not prejudice the applicability of EU or national competition laws to practices falling within its remit or prevent or limit the application of domestic sector regulation pursuing objectives other than preserving open and fair markets.[9] Furthermore, Article 1(6) of the Regulation expressly provides for the parallel application of the new Regulation and the mainstream competition rules as well as of sector specific regulation, whenever the latter is relevant.

The DMA also provides a mechanism designed to minimize the risk for inconsistent outcomes, which could in turn prejudice the effectiveness of the new Regulation's own framework. Article 40(5) establishes a high-level Group of Digital regulators, whose purpose is to act as a forum for the discussion of "matters of mutual cooperation and coordination between the Commission and the Member States in their enforcement actions."[10] The Group can also make recommendations to the EU Commission as regards new market investigations.[11] In addition, Article 38 introduces an obligation for all NCAs to inform the Commission of any investigations concerning identified gatekeepers[12] and to notify it of any

6 See Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereinafter referred to as DMA), 15 December 2020 (and successive amendments), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN , Preamble, Recitals 32-34.

7 See e.g. Monti, "The Digital Markets Act: institutional design and suggestions for improvement," (2021), TILEC Discussion Paper no 2021-04, available at: https://ssrn.com/abstract=3797730, pp.4-5.

8 See inter alia, Fernandez, "A new kid on the block: how will competition law get along with the DMA?," (2021) 12(4) JECLAP 271.

9 *Id.* Preamble, Recitals 9-10.

10 Amended DMA, Preamble, Recital 93.

11 *Id.* Article 40(5).

12 Amended DMA, Preamble, Recital 91; see also Article 1(7); Article 38(3).

decision it intends to adopt imposing obligations on them before the former is adopted. The Commission can object to the proposed decision on the ground that it "runs counter" the DMA and if this objection is made, the NCA will be prevented from adopting it.[13]

It is clear that the DMA provides a specialized framework for the regulation of platform services markets while at the same time recognizing the continuing applicability of the general EU and domestic competition rules.[14] It is suggested that this new structure responds to the need to preserve competition in markets that are perceived as critical not only for the attainment of economic goals, but also for the preservation of broader values, such as enhancing fairness, open democracy and contributing to the green transition.[15] It can be argued therefore that imposing generally applicable obligations, backed by sanctions in case of non-compliance and a designation mechanism, destined to enhance legal certainty, ensures that goals that are not as market-related as those pursued by the general competition rules can be achieved.[16]

The forgoing indicates that the DMA introduces a different approach to protecting competition in platform services markets. It is "special " in nature, as opposed to the general Articles 101 and 102 TFEU, both objectively and subjectively. It is applicable *ex ante*, namely before any prima facie restrictive practice occurs and imposes sanctions for non-compliance, regardless of whether conduct has an adverse impact on competition. Unlike with Articles 101 and 102 TFEU, it sets as its goals objectives that are non-economic in nature. Finally, differently from the general EU competition rules, whose application has been decentralized (albeit with the narrow exception contemplated by Article 11 (6) of Council Regulation No 1/2003), the DMA can only be applied by the Commission, albeit with a general commitment to preserving cooperation and coordination and thereby a role for the national competition agencies.[17]

It is however also clear that the extent to which this structure will deliver on its stated objectives, there is a potential risk that it would result in the gradual marginalization of Articles 101 and 102 TFEU when it comes to detecting and sanctioning restrictive practices affecting digital markets. It is acknowledged that the Regulation provides a framework where discussion can take place between the Commission and its national counterpart agencies. However, it is argued that the approach that the Commission will take to exercising its power to take over cases concerning gatekeepers from NCAs is going to be critical to defining the extent to which the "auxiliary" relationship envisaged in the DMA's Preamble will actually be achieved.[18] It could be suggested, not without merit, that the expansion of the DMA in these markets is a desirable outcome, since the new Regulation aims to provide a tailored response to restrictive conduct in fast-moving industries, whose competition dynamics are relatively sui generis compared with "bricks and mortar" markets. Nonetheless, it is argued that whether this outcome "fits" with the idea of a complementary relationship between the DMA and the general EU competition rules is highly uncertain.[19]

In light of the forgoing it can be concluded that the DMA is going to change significantly how we address restrictive practices in digital markets. Nonetheless, to the extent that it is likely to overlap with their application, the new Regulation might actually challenge the continuing enforcement of the Treaty competition rules and the role acquired by the NCAs under the Modernisation Regulation.

IV. THE DMA, EU COMPETITION ENFORCEMENT AND FUNDAMENTAL RIGHTS — IS THE "AUXILIARY" RELATIONSHIP CONSISTENT WITH THE PRINCIPLE OF *NE BIS IN IDEM*?

So far we discussed the issues arising from the structure of the DMA and its perspective relationship with the general competition rules. It was noted how the future interplay with the general competition rules might actually prove far more difficult to navigate than originally thought. The purpose of this section is to a highlight another source of potential uncertainty arising from this relationship, namely the extent to which the concurrent application of the new Regulation and of Articles 101 and 102 TFEU might be incompatible with the principle of ne bis in idem.

13 Amended DMA, Article 1(7); see also

14 Margrethe Vestager, speech given at the College of Europe, Bruges, on 2 March 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

15 EU Commission, "Strategy: priorities for 2019-2024—A Europe fit for the digital age," available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en.

16 *Id.* See also Cini et al., cit. (fn. 4), p. 46-47.

17 See *inter alia* Komninos, "The Digital Markets Act: how does it compare with competition law?," available at: https://ssrn.com/abstract=4136146, pp. 3-5.

18 Akman, "Regulating competition in digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act," (2022) 47(1) ELRev 84, p. 102-103.

19 *Id.* p. 100.

As is well known, the parallel application of EU and national competition law has occurred from time to time and, according to the case law of the CJEU, is not necessarily incompatible with Union law. According to the much debated Wat Wilhelm decision, while Article 101 (then 85 EEC) is concerned with "obstacles which may result from trade between member states," domestic competition law looks at the impact that a prima facie unlawful arrangement can have on markets that are internal to its jurisdiction.[20] The only limitation to this principle is that of imposing on the authority proceeding after a sanction has already been imposed an "accounting obligation": "a general requirement of natural justice (…) demands that any previous punitive action must be taken into account in determining any sanction that is to be imposed."[21]

It can be suggested, in light of the above, that on the basis of the Walt Wilhelm judgment, it would be possible to apply the DMA concurrently with the general competition rules, only subject to the onus of adjusting any sanction in light of earlier penalties that might have been imposed on the same platform.[22] This approach, however, might be open to question if it is contrasted with more recent jurisprudential developments. IN particular, the case law of the Court of Justice shows that the *ne bis in idem* principle has been applied in a more expansive way, one which does away with the requirement of "identity of legal interest protected," in other areas of Union law. This more protective standard can be found in cases concerning the application of this principle when invoking the Convention for the Implementation of the Schengen Agreement, where *ne bis in idem* is enshrined. The Court of Justice held that the principle in question prevents every person from being tried in a criminal court in respect of an offence for which they had already been acquitted or convicted in different member state of the EU.[23] The notion of "same acts" was read as a set of concrete circumstances which are inextricably linked together, irrespective of their legal classification given to them or of the legal interest protected."[24]

The approach above and especially its mode of appraisal of the "idem factum" condition has since prevailed in cases concerning the concurrent investigation and sanction of the "same facts" in accordance with, respectively, stricto sensu criminal and non-criminal regulatory rules, such as financial regulation. In *Garlsson*, the Court of Justice expressly addressed the question of the impact of Article 50 of the EU CFR, which expressly protects the right against double jeopardy, on sanctions applied concurrently, albeit under different legal frameworks, by member states' authorities.[25]

The judgment found that the parallel investigation and sanction of the same behavior under, respectively, criminal and administrative laws should be regarded as an interference with the right enshrined in Article 50 of the EU Charter. As such, therefore, it should be scrutinized in light of the framework for assessment provided in Article 52(1) EU CFR. According to this provision, "any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms." Limitations can be imposed "only if they are necessary and genuinely meet objectives of general interests recognized by the Union or the need to protect the rights and freedoms of others" and in accordance with the principle of proportionality. The Court of Justice observed that the concurrent imposition of criminal and regulatory sanctions on the applicant had been prescribed by law and was appropriate to pursue the legitimate aim of protecting and maintaining financial stability.[26]

However, the Court took the view that in the case at hand the imposition of an administrative penalty on top of a criminal sanction did not conform to the requirement of proportionality, enshrined in Article 52(1) EU CFR. [27] The Court took the view that the regulatory sanction had duplicated the penalty that the criminal courts had already imposed on the applicant. [28] In light of the forgoing analysis, it appears difficult to reconcile the approach to *ne bis in idem* adopted by Walt Wilhelm with the one emerging from cases such as Garlsson, where the concurrent investigation and sanction of what appears to be "same facts" were assessed in light of the EU CFR.

The Court of Justice relied on a generally applicable test, as provided in the Charter, as opposed to a set of conditions that would only be applicable to one particular policy field. In addition, the Court framed the assessment of concurrent regulatory and criminal sections as a

20 Case 14/68, *Walt Wilhelm v Bundeskartellamt*, ECLI: EU: C: 1969: 4, para. 10.

21 *Id.* para. 11.

22 See e.g. Colangelo & Cappai, "A unified test for a European Ne Bis in Idem principle: the case study of digital markets regulation" 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088, p. 14-15. Also, Andreangeli, "The Digital Markets Act and the enforcement of EU competition law: some implications for the application of Articles 101 and 102 TFEU in digital markets", (2022) 43(11) ECLR 496, p. 500.

23 Case C-638/16, X, ECLI: EU: 2017: 173, para. 51.

24 *Id.* para. 71; see also, *inter alia*, C-261/09, Mantello, ECLI: EU: C: 2010: 683, para. 39-40.

25 Case C-537/16, Garlsson Real Estate SA, ECLI: EU: C: 2018: 13, para. 1-3.

26 *Id.* para. 54-55.

27 *Id.* para. 55-57.

28 *Id.* para. 59-61.

limitation of the right not to be prosecuted or sanctioned twice for the same offence, as such protected by the EU Charter, and accordingly, it subjected it to the scrutiny provided in one of the horizontal clauses of the Charter itself, namely Article 52(1). In this context, the Court regarded the different interest protected by each of the legal provisions allegedly violated not as a self-standing requirement for the applicability of *ne bis in idem*, but as one of the elements that should have been assessed to ensure that concurrent proceedings were truly "necessary" in accordance with Article 52(1).[29]

It should be noted that in a recent decision the CJEU seems to have moved a step closer to extending the "Charter-based " assessment of concurrent investigation and sanction of "same facts" to the parallel application of competition law and domestic sector regulation.[30] The Court observed that the principle of n bis in idem was applicable to the circumstances of the case on the ground that both proceedings, despite being non-judicial, retained a "criminal essence," in view of the severity of the sanctions they envisaged and of their general scope of application. It was also confirmed that the concept of "same facts" that should be applied to the question referred to the Court should be the one enshrined in the Garlsson preliminary ruling, namely "a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. (…)" On this basis the CJEU considered whether, in accordance with its more recent decisions, the concurrent proceedings at issue in bpost were compatible with Article 50 EU CFR, on the ground of being "prescribed by law," having a "legitimate aim" and being "necessary in a democratic society," as prescribed by Article 52(1) EU CFR.[31] The Court emphasized that the "duplication of proceedings and penalties" preserved the "essence" of the right against double jeopardy only if "the national legislation (…) provides only for the possibility of a duplication of proceedings and penalties under different legislation."[32]

On this basis, The Court of observed that each of the proceedings in issue in *bpost* pursued different aims, namely the preservation of genuine competition and the liberalization of the postal services within the EU internal market.[33] It added that member states could provide for the duplication of sanctions for the same conduct, so long as these concurrent proceedings did not compromise the essence of the right against double jeopardy and in particular did not impose a disproportionate burden on the accused.[34] For this purpose, the national court should consider factors such as the existence of rules ensuring coordination between the competent agencies, a "sufficiently proximate timeframe" for the adoption of the final decision and a requirement to take into account, when imposing a sanction, any other penalties already inflicted for the same conduct.[35] In particular, ascertaining whether each set of proceedings pursued different legitimate policy objectives constituted another important element of the test of "necessity in a democratic society" of the interference with the accused's rights under Article 50 EU CFR.[36] This condition would be fulfilled if the proceedings in question constituted "distinct legal responses to the same conduct."[37]

In light of the forgoing analysis, it is argued that bpost represents a significant step toward ensuring a broadly consistent yet at the same time flexible approach to the principle of *ne bis in idem* in cases where competition enforcement takes place in parallel with the application of other regulatory framework. It is submitted that the holistic approach developed by the encompasses a varied set of factors ranging from the nature of and connection between the facts at issue to the nature of the legitimate aim pursued by each of the proceedings to the procedural rules assisting each of them, thereby focusing on the necessity and the proportionality of concurrent sanctions. In this context, the identity or otherwise of the "interest protected" by the applicable rules, while being relevant, is appropriately balanced against other considerations that relate to the nature of the facts at issue, the quality of the rules governing the imposition and timing of any penalties.[38]

Against this background, it is legitimate to query whether the rules of the DMA can be applied in parallel with and as a complement to the mainstream EU competition rules without infringing the principle of *ne bis in idem*. It was observed earlier that while the new Regulation

29 See *inter alia, mutatis mutandis,* 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," (2018) 11(2) Review of European Administrative Law 55, pp. 68-9; see also p. 77. Also, see Andreangeli, cit. (fn. 22), p. 502.

30 Case C-117/20, *bpost,* judgment of 22 March 2022, ECLI: EU: 2022: 202, see para. 2-3.

31 *Id.* para. 40-41.

32 *Id.* para. 43.

33 *Bpost*, cit. (fn. 29), para. 47.

34 *Id.* para. 49; see also, inter alia, appl. 24130/11 and 29758/11, *A and B v. Norway*, judgment of 15 November 2016, available at: https://hudoc.echr.coe.int/eng?i=001-168972, especially para. 130-132.

35 *Id.* para. 48; see also para. 51.

36 *Id.* para. 55.

37 *Id.* para. 57.

38 See *inter alia* Colangelo and Cappai, cit. (fn. 21), p. 28-29.

provides for mechanisms designed to ensure coordination and minimize the risk of overlap of the two systems, concurrent DMA and competition investigations, the latter especially on the part of NCAs, cannot be excluded.[39] It is submitted that the test elaborated by the CJEU in bpost does not appear to prohibit completely the parallel application of the DMA and the mainstream EU competition rules.[40] It is suggested that the approach it entails allows for the analysis of all the features of individual cases, of the characteristics of each of the regulatory frameworks involved and the intensity of the disadvantage that the same applicant had suffered due to the duplication of proceedings relating to "identical facts."[41]

This reading, therefore, seems to center on the substantive question of whether the scope of the right not to be prosecuted or sanctioned twice for the same "offence" had been limited to what was strictly necessary to attain the public interest pursued by the relevant regulatory framework.[42] The fact that any such limitation must be "prescribed by law" provides an additional safeguard, since it ensures that any restriction placed on the right prescribed by Article 50 EU CFR is contingent upon a set of exhaustively defined condition and as a result, is foreseeable.[43]

In light of the forgoing analysis it is concluded that the interpretation of the right against double jeopardy adopted by the CJEU in its recent case law is likely allow for the concurrent application of the DMA and of the EU competition rules, subject to an assessment of the "necessity" of the parallel proceedings, as dictated in bpost. It is submitted that the approach elaborated by the CJEU in its recent judgment is going to maintain the effectiveness of the right against double jeopardy while at the same time ensuring that both the DMA and the competition rules can be applied effectively in the circumstances of each case, without placing a disproportionate burden on the investigated undertakings.

V. REGULATING COMPETITION IN DIGITAL MARKETS — WHAT IS THE FUTURE HOLDING FOR PLATFORM UNDERTAKINGS? SOME CONCLUSIONS

The DMA represents an extremely significant development in the way in which we regulate digital markets. To the extent that it provides a set of *ex ante* rules applicable only to large online platforms and reinforces their observance with a complex institutional and sanctioning framework, the new Regulation breaks new ground *vis-à-vis* the "traditional approach" to the maintenance of competition and openness of markets.[44]

This contribution aimed to illustrate the terms of the debate that surrounds the new Regulation and argued that due to its scope and to the nature of the obligations it imposes the DMA is very likely to apply in parallel with the mainstream competition rules, thereby raising important questions as to their future substantive and procedural interplay. It was shown how these issues are especially relevant if seen against the framework for the protection of fundamental rights, enshrined in the EU Charter. It was argued that the possibility of the DMA and the mainstream EU competition rules applying in parallel could usher questions concerning the continued observance of the right against double jeopardy, protected by Article 50 EU CFR. This contribution summarized the current debate surrounding the reach of this right, its requirements and its scope of application, generally and in the area of competition law specifically. It was submitted that, although it remains to be seen how the CJEU will approach these questions going forward, the approach to the principle of *ne bis in idem* that seems to emerge from the Court's recent practice is likely to reconcile the demands associated with the effective application of the DMA with the protection of this important safeguard.

It can therefore be concluded that while questions remain as to their future interplay, Article 50 EU CFR does not appear to pose an absolute barrier to the auxiliary relationship that the DMA envisages vis-à-vis the general EU competition rules.

39 See e.g. Komninos, cit. (fn. 16), p. 5.

40 See *id.* p. 15-16.

41 *Id.*

42 See e.g. Luchtman, The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order," (2018) 55 CMLRev 1717, pp. 1729-1733; especially pp. 1731-1732.

43 See mutatis mutandis, Colangelo and Cappai, cit. (fn. 21), p. 14.

44 Speech given by Margrethe Vestager, on 15 December 2020, IPR/20/2347.

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