DMA and competition law: CJEU case law sheds light on risks of concurrent sanctions

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The Digital Markets Act Regulation (DMA) is an upcoming piece of EU legislation to regulate behavior of so-called gatekeeper firms. These are typically large tech platforms that have been found or suspected in the past of abusing their strong position or resorting to practices that distorted competition and resulted in the denial of certain players to markets (think Google Shopping, Google Android, or the pending Apple App Store or Amazon Marketplace investigations).

The DMA seeks to provide a framework to regulate gatekeepers' behavior and prevent these failures before they become a reality. Such ex-ante regulation is unlike ordinary competition law, which normally allows only ex-post investigations and remedies.

A considerable amount of ink has been spilled discussing the possible interplay between the two. In fact, our Prague office managing partner, Petr Zákoucký, spoke about this very issue at a competition law conference at the Czech Office for the Protection of Competition in November 2021, causing a storm of differing views and arguments at the event.

Pertinent questions include these:

- Is the DMA a competition law instrument or something else?
- Are the interests sought / protected by the DMA any different from those of ordinary competition law?
- Should the DMA be enforced centrally or subject to a de-centralized application, as it is the case with competition law?

Practical implications

Many worry about overenforcement towards businesses that fall under the purview of both legal instruments. Others worry about the chilling effect on competition law enforcement by national authorities because of the exclusive jurisdiction of the European Commission under the DMA. In fact, discussions like these impacted the wording of the DMA right up to the culminating moments of the legislative process in April-May 2022.

At least recent Court of Justice of the EU (CJEU) case law may help shed some light on the following controversy: Can companies be subject to parallel / duplicative proceedings and fines if their conduct breaches both their DMA obligations and competition law rules?

If a company can get a hefty fine for the same offence under two different legal instruments (in both cases up to 10 percent of its yearly turnover), isn't it an example of double jeopardy (i.e. when a party is punished and subject to several procedures twice for the same action)? The legal principle of ne bis in idem (no double penalty for the same

offence) is generally recognized in European law. So how would this work under the final DMA text as it was agreed at the end of the day?

Traditionally in competition law, the CJEU and Commission have applied the ne bis in idem principle by checking whether the protected "legal interest," or objectives pursued in the various measures were the same or different. If the same, the principle would operate against imposition of a double penalty. Where the ultimate interest or goal of the legislative instruments differed, however, a double or additional penalty could apply.

This could cause problems under the DMA. Recital 10 of the final text clarifies that while competition laws (meaning Articles 101 and 102 of the Treaty on the Functioning of the European Union) seek to ensure protection of undistorted competition, the DMA's objective is to ensure that markets where gatekeepers are present are and remain contestable and fair. Recital 10 goes on to state explicitly that the aims of the DMA protect "different legal interests than those [of competition law] rules and should be without prejudice to their application."

Fortunately, the CJEU has departed from the traditional approach of testing the identity of protected "legal interest" in a recent Grand Chamber judgment in bpost (Case C-117/20 of March 22, 2022). It held instead that what matters for the application of ne bis in idem is whether the material facts of the case, meaning the factual circumstance and identity of the perpetrator, are identical. (The court upheld some limited exceptions in cases of duplicated proceedings under sectoral regulation and competition law, though).

Nordzucker was a judgment handed down on the same day (Case C-151/20 of March 22, 2022). It didn't address this issue of concurrent proceedings under sectoral regulation on the one hand, and competition law on the other hand. Instead, the CJEU was asked to decide whether two parallel cartel investigations in neighboring member states (Germany and Austria) could violate the ne bis in idem principle if both resulted in a separate fine. Applying the bpost method, the Court considered that if the German fining decision did not consider the object or effect of the anticompetitive conduct in Austria, the concurrent Austrian proceedings did not relate to the same facts and so the ne bis in idem principle would not be violated.

The two recent judgments thus provide a fairly clear and practical framework for application of the principle against double jeopardy in competition law cases and arguably also in the interplay with the DMA. Possibly under the direct influence of these judgments, the legislator added—at the last minute—Recital 73 to the DMA to steer the Commission away from duplicating proceedings: "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 national or EU rules".

But as with practically all aspects of the controversial DMA legislation, it remains to be seen how these play out in practice. We will watch closely.

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