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**Doomed or Misunderstood? Unveiling Regulatory
Strategies within the Digital Markets Act for an Enhanced
Understanding of its Design and Objectives**

*A dissertation submitted by Naghira Franchesca Delgado Barreda to the Department
of Government, the London School of Economics and Political Science, in part
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ABSTRACT

The exponential growth of digital platforms, exacerbated by the economic dynamics of digital markets, has raised concerns among authorities about the consolidation of undertakings that are 'too big to engage with fairly, to be contested against, and to allow new market entrants'. With competition proving insufficient to address these issues, a consensus has emerged on the need for further action, and the debate has turned to regulation. One of the pioneers in this field is the European Union with the recent enactment of the Digital Markets Act that attempts to improve 'fairness' and 'contestability'. While this regulatory tool has been widely questioned by competition experts regarding its ability to fulfill its objectives, the efforts invested in comprehending the regulatory approach remain insufficient.

The dissertation presents a critical review and analysis of the regulatory strategies underlying the design of the DMA, and how such an understanding can inform new insights into its objectives and essential characteristics. The analysis confirms that the DMA occupies an intermediate position on the regulatory continuum, combining elements from command-and-control, self-regulation, and performance-based approaches. This analysis, contrasted with expert critiques, underscores how comments over its essential characteristics often overlook the underlying regulatory strategies. Rather than weaknesses, perceived shortcomings stem from a strategic design that engages regulatees in compliance mechanism design, facilitates collaboration with the regulator. Ultimately, this study evidence that the DMA's multifaceted strategy intends to address challenges specific to dynamic and heterogeneous digital markets. It promotes compliance through dialogue and iterative processes, recognizing companies' specialized knowledge. While skepticism revolves

around maintaining competition in inherently concentrated markets, the DMA aligns with a regulatory understanding that seeks a nuanced equilibrium through collaboration, oversight, and strategic compliance. As such, the DMA holds good chance in achieving its objectives, exemplifying a proactive approach to the complexities of digital market regulation.

TABLE OF CONTENTS

I. INTRODUCTION	5
II. THEORETICAL FRAMEWORK.....	8
WHAT IS REGULATION?	8
REGULATORY STRATEGIES	10
COMMAND-AND-CONTROL.....	10
SELF-REGULATION	12
PERFORMANCE-BASED REGULATION	15
III. THE DIGITAL MARKETS ACT.....	18
THE STATED OBJECTIVES.....	18
THE ESSENTIAL CHARACTERISTICS	20
REGULATOR	20
TARGET.....	20
COMMANDS	22
CONSEQUENCES	24
IV. ANALYSIS	28
AN INITIAL THEORETICAL APPROACH	28
REFINING THE DIAGNOSIS THROUGH EXPERT INSIGHT	31
REVERSAL OF THE BURDEN OF PROOF	32
DESIGN OF THE COMMANDS AND POSSIBLE CONSEQUENCES	33
RISKY LEEWAY	35
ENFORCEMENT CHALLENGE	36
INTERPRETING THE OBJECTIVES BY ANALYSING ITS COMMANDS.....	38
V. CONCLUSION	43
VI. BIBLIOGRAPHY.....	47

I. INTRODUCTION

With constantly evolving technologies, it is undeniable that innovation in the highly specialized products and services offered by digital platforms has driven significant growth for these providers. Furthermore, the economic dynamics of digital markets amplify this trend through indirect network effects and returns to scale (Crémer et al., 2019, p.15), resulting in substantial entry barriers. Additionally, large digital platforms benefit from an unparalleled advantage compared to business users and potential competitors due to the data-driven nature of these technologies. The convergence of these features has raised significant concerns among authorities. Unlike the financial sector, in digital markets, the issue isn't just about undertakings being 'too big to fail,' but rather 'too big to engage with fairly, to be contested against, and to allow new market entrants'. These concerns are reflected in the various cases that the competition authorities have been dealing with in recent years. However, while the cases were being presented, the limitations of the competition authorities to intervene in these matters with an ex-post control were noted. This is mainly due to the significant amount of time antitrust enforcement takes to reveal its effects, emphasising the need for the authorities to intervene earlier, and even when the effects do eventually surface, such intervention may still prove insufficient (Daems, 2022, p.106). This has led to a widely held consensus that further measures are required (Bania, 2020), placing the regulation of digital markets as a live topic in policy debates across the globe (Dunne, 2022, p.341). However, the power of these platforms (Lynskey, 2017), their information asymmetry with authorities (Finck, 2017), and their borderless operations across traditional jurisdictional boundaries make this a far from straightforward task.

One of the pioneers in this field is the European Union with the recent enactment of the Digital Markets Act (DMA) that attempts to improve 'fairness' and 'contestability'¹. Since its proposal in 2020, the DMA has captured the attention of competition experts - academics, practitioners, and even authorities - most of whom have c (Ibáñez, 2020; De Stree, 2022). One of the main debates has centered on the dichotomy of qualifying its nature as a competition law instrument or a regulation (Andriychuk, 2022b; Reyna, 2021). However, the fallacy of qualifying this instrument as competition law is easily refuted on the understanding that it imposes *ex-ante* conduct requirements, that undertakings designated as 'gatekeepers' will need to comply with. Having overcome the doubt regarding its nature, it remains to analyze the regulatory approach taken. Although certain authors have suggested that the presence of a 'list of do's and don'ts' renders it a form of command-and-control (Petit, 2021, p.533) or does not have a collaborative approach (Dunne, 2022, p.355), the efforts invested in comprehending the underlying regulatory strategy, or strategies, behind it remain insufficient. Thus, a pivotal question arises: Are the criticisms voiced by competition experts justified, or do they potentially stem from a misconception of the DMA's objectives and essential characteristics - a perspective that overlooks the regulatory strategies behind its design?

Faced with this gap, this dissertation aims to critically analyze the complex and innovative legislation to comprehend the regulatory strategy or strategies underpinning its design. Building upon this foundation, the objectives of the regulation

¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022.

will be examined, alongside expert critiques, albeit from a regulatory standpoint. Unraveling the employed regulatory strategies will shed light on the roles of the authorities, the level of engagement by the regulated entities, how the mandates are expected to be implemented, and an enhanced comprehension of the objectives, based on the anticipated outcomes derived from the instrument's design. Moreover, this study draws upon insights gleaned from the existing literature on command and control, self-regulation, and performance-based regulation. However, instead of emphasizing the significance of any single strategy, this research endeavors to explore how the DMA's regulatory essential characteristics can be explained by a combination of these strategies. To elucidate this aim, this dissertation will proceed as follows. The next section will set the theoretical framework for analysing how regulation should be understood and three regulatory strategies – two opposing approaches and an intermediary stance. Section III will undertake an examination of the DMA, scrutinizing both its objectives and its fundamental regulatory attributes. Drawing on this, Section IV contrasts the theory with the design features of the DMA and delves into the analysis with insights from expert commentaries. This analysis will facilitate the exploration of critiques directed at the objectives and provide a regulatory perspective for their interpretation. Finally, the last segment concludes with the main takeaways.

II. THEORETICAL FRAMEWORK

What is regulation?

This dissertation delves into comprehending the regulatory strategies embodied by the DMA. However, before engaging in this analysis, it is essential to gain an understanding of the notion of regulation and its core elements. On this matter, the literature presents varying perspectives, and a consensus remains elusive, leading to what has been described as ‘an agreement to disagree’ (Koop & Lodge, 2017, p 95). Ongoing debates persist regarding various elements surrounding the concept: intentionality, complexity, interdependencies, among others. Within the scope of the present research, two elements assume particular significance: the components of the intervention and the nature of the regulator. Hence, a further description of these elements will be provided before presenting a suitable definition.

There is a widely accepted consensus that regulation involves intervening in the behaviour or activities of the regulated individuals or entities (Koop & Lodge, 2017, p.97), whether these interventions are direct or indirect, three components can be distinguished. Firstly, the desired standard of behaviour is defined through standard-setting. Secondly, information-gathering tools are utilized to detect any potential deviations between the set standards and the actual behaviour of those being regulated. And finally, behaviour modification mechanisms to achieve the standards through rewards or sanctions (Hood et al., 1999, p.46). Although some authors propose that in the absence of one component, the control over the system vanishes

(Hood et al., 2001, p.23), this dissertation considers that regulation can be found in some or all these three functions. While it is common to associate regulation solely with the state's authority to impose mandates upon the private sector, it is important to recognize that this instrument is not exclusively derived from the government nor exclusively targeted at private activities. Regulation extends beyond such narrow confines, and this departs by understanding that actors have the capacity and in practice are self-regulating. Therefore, regulation comes as an intervention that seeks to 'act upon the action' (Rose, 1999, p.137). This approach recognises that knowledge, power, and control are distributed among social actors and the state, hence are not exclusive of the government. Moreover, the society interactions within actors are not linear 'state-individual' but complex and interdependent. Regulation, as outlined by Black (2001, p.106) is a process that unfolds among various social actors and within their interactions.

Considering these factors and acknowledging that Black's essentialist concept encompasses all three elements, the present study conceives regulation as 'the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes to produce a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification' (2002, p.20). This definition embraces both the capacities and limitations of the state, along with the interactions and interdependencies with social actors, thereby shifting the government's role towards that of an enabler.

Regulatory strategies

Regulation can take a variety of forms, resulting in a diverse range of regulatory strategies that will be chosen according to the desired objectives, the needs of the regulator, and the circumstances (Baldwin, 1997, p.76). Although several strategies are extensively covered in literature, command-and-control is arguably the most prominent and is often contrasted against self-regulation. However, the apparent polarity between strategies, which is often portrayed as opposing ends, can result in losing sight of the many strategies that exist somewhere in between (Buckley, 1994, p.4; Coglianese & Mendelson, 2010, p.147). In practice, many regulatory instruments combine elements of both strategies and therefore lie in between this 'regulatory continuum' (Sinclair, 1997). Since this dissertation aims to identify the regulatory strategies employed in the design of the DMA, it begins by gaining a thorough comprehension of command-and-control, self-regulation, and a middle ground, performance-based regulation.

Command-and-control

Based on deterrence (Job et al., 2007, p.87), command-and-control aims to exert influence by imposing standards backed up with sanctions (Baldwin, 1997, p.68). This implies that the supervisory capacity of the regulator and the severity of sanctions are sufficient to create the necessary incentives to avoid transgressions (Sinclair, 1997, p.534). It must therefore be designed with plenty of information and a strong understanding of the regulated market so that it not only sets out obligations clearly and in detail but also covers any non-compliance, creative compliance, or other breaches that may arise (Bardach & Kagan, 1982; Coglianese & Mendelson, 2010). In terms of obligations, these can be either positive mandates, prohibitions, or entry

requirements into a sector (Baldwin et al., 2011a, p.106). However, are characterized by taking a one-size-fits-all approach (Bardach & Kagan, 1982) and are therefore applicable to homogeneous markets (Black, 2002). Moreover, by telling the regulatee exactly what they must do or achieve, these highly restrictive rules take discretion away from regulated targets (Black, 2001), thus, this strategy is praised for providing high degrees of legal certainty.

Nonetheless, the practical feasibility of implementing this regulatory strategy is challenging to attain. Thus, an optimistic perspective on the effectiveness of command-and-control is rarely shared by scholars and practitioners, and on the contrary, it has been subject to considerable criticism in recent decades (Baldwin, 1997, p.67; Bardach & Kagan, 1982, Chapter 11; Black, 2011, p.34). Due to the complexity of setting appropriate standards, this strategy has been doomed to failure. The challenge arises either from information asymmetry between the regulator and the regulatee, impeding not only the adequacy of mandates but also the delimitation of the underlying problem. Alternatively, it emerges due to the diversity among the entities subject to regulation, rendering it impractical to impose a uniform measure upon all of them (Baldwin et al., 2011a; Coglianese & Mendelson, 2010). Moreover, command-and-control may turn unresponsive to dynamic markets and technologies, that change quickly over time (Sinclair, 1997, p.542). On the other hand, achieving the desired level of deterrence places high demands on the capacity of regulators (Coglianese & Mendelson, 2010, p.163). Although, enforcement difficulties are not unique to this regulatory approach, by its nature command-and-control have strong budgetary and capacity implications for proper monitoring and sanctioning (Baldwin et al., 2011a, p.107), elements that can hardly be maintained over time (Job et al., 2007,

p.88) leading to an imminent implementation failure (Black, 2002, p.106). Lastly, even when standards are properly set and deterrence mechanisms are generated, unintended consequences can be triggered (Baldwin et al., 2011a). These consequences could include the propensity for regulatory capture (Baldwin et al., 2011a, p.107), stifling innovation, and inadvertently 'destroying virtue in the business community' (Braithwaite, 1993, p.85). It is precisely this myriad of concerns that has led academics to analyze alternative regulatory strategies.

Self-regulation

At the opposite end of Sinclair's continuum (1997) lies self-regulation. Unlike command-and-control, it lacks a consensus definition (Gunningham & Rees, 1997). Self-regulation is employed to describe a range of methods involving or excluding governmental intervention (Coglianese & Mendelson, 2010). Nevertheless, some distinguishing features can be identified when considering pure self-regulation. It heavily relies on the voluntarism of the regulatees (Sinclair, 1997) to exercise self-control by setting, monitoring, and ensuring compliance with objectives or means (Baldwin et al., 2011b). The regulatee, which may be a single entity or an association of individuals, simultaneously assumes the role of the regulator. The unity of the regulatee and regulator role denotes a considerable degree of discretion, enabling those responsible for causing the problem to willingly modify their conduct to address the problem (Coglianese & Mendelson, 2010, p.164). While this approach emphasizes the lack of government intervention, scholars suggest that it often involves an implicit threat of imminent government intervention (Baldwin et al., 2011b; Coglianese & Mendelson, 2010). Under the discretion that characterises self-regulation, different

standards can be designed, however, these tend to be more concerned with means than with the narrow delineation of outcomes (Freeman, 2000).

Acknowledging that regulation does not only emerge from the state, allows to address problems when the government lacks the resources or information needed to craft rules. This may arise due to the complexity of the regulatory challenge or the dynamic and heterogeneous nature of the industry. Although its effectiveness requires knowledge and capacity similar to command-and-control, insofar as it is conducted by the regulatees, it reflects higher levels of expertise and technical knowledge of their operations (Baldwin et al., 2011b). Furthermore, it is less burdensome to obtain the information, formulate the standards, implement and monitor them (Sinclair, 1997). By obtaining tailor-made standards, self-regulation foresees high levels of compliance (Black, 2001; Gunningham & Rees, 1997). Furthermore, it is lauded for promoting greater innovation due to its flexible nature (Sinclair, 1997). Nevertheless, its adaptability is also a subject of critique, particularly the lack of transparency and accountability mechanisms. Instead of regulating voluntarily, individuals will respond to their interests. This could lead to regulation in name only, lack of continuity, or potentially even 'highly manipulative regulation' (Baldwin et al., 2011b, p.157). At the same time, this regulatory strategy is not exempt from conflicts in its design and implementation, or even from concerns about its legitimacy, especially when it is implemented through associations that bring together individuals. While generally optimistic, this approach also draws substantial criticism and may ultimately become as contentious as command-and-control (Baldwin et al., 2011b).

Conversely, it's essential to acknowledge that self-regulation takes on a distinct complexion when it intersects with governmental entities giving rise to other regulatory strategies. When self-regulation involves the participation of interest groups and some degree of direct oversight or ratification by the government, the regulatory strategy will be co-regulation (Ayres & Braithwaite, 1992, Chapter 4). Where some of the regulatory functions are delegated to the regulated firms, the government retains the rest and oversees the delegated function, then enforced self-regulation is involved (Baldwin et al., 2011b; Braithwaite, 1981). Meta-regulation applies when the regulatory authority explicitly encourages or prompts the regulated entities to formulate their regulations, wherein commands will typically be characterized as general means. In this context, the regulator assumes the role of overseeing the control system rather than directly implementing regulations (Coglianese & Mendelson, 2010). Consistent with many explored regulatory concepts, these strategies often lack universally agreed definitions and similarities between them. However, examining the concept of pure self-regulation and the diverse range of regulatory strategies that arise from it reveals that the appeal of this regulatory strategy is rooted in the recognition that self-regulation is a necessary element of any social framework. Ultimately, all forms of regulation encourage self-regulation to some extent, making it an inherent part of regulation (Black, 2001; Coglianese & Mendelson, 2010), whether this involves contributing to the design of rules or monitoring a company's compliance with them. In this context, it is generally recognised that regulatory tools do not typically adopt an absolute approach in practice. Instead, practical challenges can be best addressed through a combination of regulatory strategies that are appropriate to specific circumstances and needs (Baldwin et al., 2011b; Coglianese & Lazer, 2003; Coglianese & Mendelson, 2010).

Such instruments can be situated in the middle of the continuum between pure self-regulation and strict command-and-control.

Performance-based regulation

While some authors refer to performance-based regulation as a command-and-control modality (Gunningham & Sinclair, 2017; Keohane et al., 1998), others contrast it with the prescriptive pure command-and-control (Bluff, 2017) or highlight how it stimulates the self-regulatory capacities of the regulatees (Coglianese & Lazer, 2003). Irrespective of the divergent viewpoints, the foundation of this strategy lies in its ability to blend elements from both ends of the spectrum (Van der Heijden, 2017), which has triggered great theoretical enthusiasm in academia and governments (Coglianese & Nash, 2017; Gunningham & Holley, 2016; OECD, 2021). By definition performance-based regulation is outcome-focused, specifying the ends that must be met and leaving to the regulatees discretion the pathway (Coglianese & Lazer, 2003; Gunningham & Sinclair, 2017; May, 2003). The central feature of this theoretical proposal is the flexibility and autonomy offered to regulated entities to plan and determine the means to achieve desired outcomes. This is particularly appealing for regulatory frameworks in dynamic and uncertain technological sectors (OECD, 2021). Particularly commended for promoting innovation in the regulated entity, as it stimulates the search for the most economical methods to attain the prescribed results while minimising compliance costs (Coglianese & Nash, 2017; Gunningham, 1996). Given these attributes, a performance-oriented approach is appealing for generalising its impacts on a supranational scale (OECD, 2021).

A critical and frequently undervalued aspect of performance-based regulation is that the results should not only be suitably designed and measurable (Baldwin et al., 2011a) but also proficiently and accurately monitored by the regulator (Coglianese & Lazer, 2003). The way the regulator decides to assess performance can be diverse, however, must be previously tested and subject to ongoing review and modification, which can place significant demands on the regulator's resources (Coglianese & Nash, 2017; May, 2003). The academy underscores the evaluation of two specific components when determining the feasibility of this regulatory strategy (Coglianese & Lazer, 2003). The initial aspect hinges on the recognition that the regulator, often the state, functions with limited resources. Hence, it becomes crucial that the costs related to outcome measurement remain low and sustainable over time. The second component directs its attention towards the regulatees and their level of uniformity, emphasizing the applicability of this approach on a market basis. This adaptability proves valuable in effectively addressing heterogeneous targets using technology that evolves. A careful assessment of these aspects makes it possible to address one of the most serious difficulties for its proper functioning, although not the sole challenge, as the regulator's adept monitoring and timely imposition of consequences in cases of non-compliance also hold significance. Furthermore, aligning the results with the overarching aim of the regulatory tool is also essential (Coglianese, 2016).

However, this promising strategy is not a panacea (OECD, 2021, p.22), as the freedom it proposes also creates vulnerabilities. Flexibility in reaching outcomes should not be misunderstood as flexibility of the outcomes themselves. However, by allowing this wide leeway, performance-based regulation can inadvertently create ambiguity in their interpretation (Van der Heijden, 2017). The innovation it promotes can also lead to

'teaching-to-the-test' (Coglianese & Nash, 2017), 'creative compliance' (Black et al., 2007), or 'gaming the system' (Bevan & Hood, 2006), so that even if the regulatees are complying with the letter of the regulation they might miss the real purpose. On the contrary, this regulatory strategy is also criticised for not promoting the continuous improvement of the regulatees beyond the established standards (Gunningham & Holley, 2016). In addition to the advantages of combining elements of self-regulation, such as flexibility in achieving objectives, and command-and-control, such as setting desired outcomes, this strategy is highly challenging for the regulator, on whose performance its effective functioning depends.

Overall, there is no singular regulatory strategy that can serve as a universal solution; each strategy possesses its own merits and drawbacks. Their suitability for implementation largely hinges on the specific regulatory goals they aim to accomplish and the context in which they are employed. Having gained an understanding of the regulatory strategies, their characteristics, and shortcomings, this study proceeds to introduce the regulatory instrument under examination. Beyond simply synthesising what is contained in the final text of the DMA, this analysis will involve examining the tools employed in formulating it, including expert reports (Cabral et al., 2021; Crémer et al., 2019), the Impact Assessment (2020), the Explanatory Memorandum (2020), the initial proposal and subsequent amendments.

III. THE DIGITAL MARKETS ACT

The stated objectives

From its very denomination, the DMA emphasizes its aim to promote fair and contestable markets within the digital sector, based on the understanding that large online platforms function mainly as intermediaries between businesses and end-users in most transactions within the digital economy, as noted in the Impact Assessment (2020). The position held by these platforms is strongly rooted and has a vocation of permanence, creating a conglomerate system concerning their core platform services (CPS). Aligned with a business rationale, platforms will capitalize on their advantages (Crémer et al., 2019), increasing the entry barriers for these markets. Moreover, the interconnection between contestability and fairness (Recital 34) gives rise to a self-perpetuating cycle, where unfair practices curtail the ability of undertakings to challenge gatekeepers, while the limited contestability of CPS provision allows gatekeepers to engage in such practices.

As articulated in the preamble of the DMA, these features hinder the effective functioning of the digital markets - making the market prone to failure. Given the clear unequal bargaining power, concerns arose about the fairness of business relations between service providers and business users or end users. This aim, term by some academics as 'distributional fairness' (De Streel, 2023), seeks to ensure a balance between the rights and obligations of business users when gatekeepers gain disproportionate advantages (Recital 33). Not only to achieve fair economic outcomes in the digital economy but ultimately to safeguard competitors' and third parties' access to the CPS (Lamadrid de Pablo, 2022). The scope of fairness encompasses the

position of gatekeepers and their market power, rather than the necessary materialization of abuse, a broader perspective than the anti-competitive object or effect (Ibáñez, 2020). It seeks to mitigate the adverse structural consequences of unfair practices ex-ante (Explanatory Memorandum, 2020, p.4). Competition authorities have highlighted the appropriateness of regulation as a tool to achieve the objective of fairness (Fernández, 2021). Furthermore, the short deadlines to apply the mandates and the regulator's power to modify the obligations according to market evolution over time should contribute to this goal.

Unlike the expected competition of progressive and fast-changing technological markets, digital markets feature network effects, extreme returns to scale, and benefits from data (Crémer et al., 2019) which undermine the contestability of these markets. Therefore, with high entry barriers, existing market competitors and potential new entrants won't have the capacity and eventually lose the motivation, to penetrate these markets and challenge the dominance of existing players, regardless of their efficiency or innovation. The DMA emphasizes ensuring that markets with dominant players are and remain open to new entrants, which, in turn, encourages greater efficiency and innovation(Recital 11). The primary difficulty resides in the observation that the absence of contestability is attributable not only to the behaviour of gatekeepers but also to their corporate design and underlying market structural problems. To achieve this goal, regulation must create opportunities for entry or prevent exclusion by reducing structural barriers. Although promising and undoubtedly well-intentioned, the stated objectives of the DMA are certainly challenging.

The essential characteristics

Coglianesse (2009, as cited in Coglianesse & Mendelson, 2010) asserts that irrespective of the strategy used, every regulatory instrument will share four essential characteristics: regulator, target, commands, and consequences. The analysis of these characteristics unveils key insights for discerning the regulatory strategies applied in practical scenarios. Accordingly, through this section, the DMA will be presented following the same structure.

Regulator

The DMA is a supranational harmonization regulation aiming to ensure contestable and fair digital markets across the European Union (Article 1). Therefore, the European Commission is designated as the only regulator of the DMA, which will be implemented and enforced by the Directorate General for Competition and the Directorate Communications Networks, Content and Technology -DG Connect- (European Commission, 2023). Notwithstanding this, the DMA (Articles 37, 38 & 39) also emphasizes the need for close cooperation with the national authorities - especially in the field of competition- of member states.

Target

The applicability of the DMA is limited by focusing on gatekeepers, whereby a two-step strategy is followed to determine the undertakings falling under this new legal category. Thus, the regulation first identifies CPS in its Article 2. Among the 10 services listed, perhaps the most familiar are web browsers, search engines, social networking platforms, and intermediation services. Moreover, this list is not entirely closed, the DMA leaves open the possibility of adding further services through a

market investigation. The second step is to identify the characteristics of those platforms that, due to their size and position, will be subject to regulation since the mere provision of these services does not threaten the contestability and fairness of digital markets. To fall within the scope of the regulation, the provider of CPS must cumulatively meet three criteria: 'i) significant impact on the market, ii) the status of the service as an important gateway for business providers to reach end users, and iii) the entrenchment and durability of its position over time' (Article 3.1). While these criteria are broadly phrased, the DMA associates each with thresholds of capitalization, the number of users, and the period over which the provider will enjoy the position. The responsibility for assessing whether an entity falls within the scope of the DMA rests with the CPS providers. Those that meet the criteria must notify the regulator, together with the information supporting the assessment. Based on the information submitted, the Commission will designate the gatekeepers and specify the CPS which shall be subject to regulation. It should be noted that the DMA (Article 4) not only enables the regulator to reevaluate, modify, or revoke the designation, but also mandate to periodically review.

Furthermore, the DMA incorporates up to three exceptions that serve to either rebut designation, special designations, or designate entities that have not submitted notifications. Article 3.5 grants entities that meet established criteria the chance to challenge the presumption with 'sufficiently substantiated arguments' encompassing circumstantial factors hindering the fulfilment of the three criteria. Therefore, within the same designation period, the Commission may either reject de facto the request and designate the gatekeeper or, if the arguments manifestly 'call into question the presumption', open a market investigation to elucidate the designation. On the other

hand, if the core service provider fails to meet any of the criteria, the regulator still has the power to classify it as a gatekeeper under Articles 3.8 & 17 following a market investigation. This investigation could determine that while the supplier currently lacks a firmly established and lasting position, there is a potential for it to acquire this status in the foreseeable future. Consequently, the authority will impose only some of the regulatory obligations on it. Finally, in instances where an entity neglects to submit a notification, the Commission maintains the right to confer gatekeeper status upon the entity. To facilitate this determination, the Commission will seek information from the entity, although non-compliance with the request does not impede the designation process, as the regulator can draw upon information at its disposal.

Commands

As explored within the theoretical framework, regulation seeks to alter the behavior of the regulates and, to this end, display a function, among others, of standard-setting. This role entails articulating ‘the desired state of the world’ (Koop & Lodge, 2017, p.99), which is intricately connected to the commands that the regulator will instruct the targets to perform or refrain from. In the case of the DMA, these commands have been specified in Articles 5 & 6 as directly applicable obligations². These obligations have been crafted considering practices: ‘(i) particularly unfair or harmful, (ii) which can be clearly and unambiguously identified to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience’ (Explanatory Memorandum, 2020, p.6). As explicitly stated, these

² Although Article 7 also detail obligations, since its scope of applicability is limited to interoperability of communications services, therefore it does not apply across all gatekeepers, the analysis of this research will focus on Articles 5 and 6.

commands are built based on the experience gained in past and ongoing competition law cases and sector inquiries (Connect et al., 2020, pp.53-61; ECN, 2021, p.5). A crucial aspect of the analysis of regulatory strategy is to distinguish the nature of the commands, not only distinguishing between mandates or prohibitions but either they are means or ends, and the degree of detail that is delimited (Sinclair, 1997). Given that the DMA comprises 21 commands, it is impractical within the scope of this research to present the exhaustive list, however, a sample is below.

Articles	Command	Nature	Arguably based on
5.2.b	Not combine personal data across the gatekeeper's services regardless of whether they are obtained from the CPS or third parties.	Prohibition demanding a general outcome	Facebook on data processing (Bundeskartellamt, Decision B6–22/16)
5.3	Not prevent users from offering products or services, directly or through another intermediary, at different prices, or on different terms and conditions.	Prohibition demanding a general outcome	Amazon E-Books Most-Favorite-Clauses (European Commission, Case AT.40153)
5.8	Not require users to subscribe or register with any additional CPS as a prerequisite for utilizing, accessing, or registering with any other CPS from the same gatekeeper.	Prohibition demanding a general outcome	Google Android (European Commission, Case AT.40099)
6.3	Allow end users to un-install any software on the operating system of the gatekeeper	Mandate demanding a general outcome	Apple Pay (European Commission, Case AT.40452)
6.5	Not treat more favorably, in ranking and related indexing and crawling, services and products offered by itself than similar ones of a third party, while ensuring transparent, fair, and non-discriminatory conditions to such ranking.	Prohibition demanding a general outcome	Google Search Shopping (European Commission, Case AT.39740)
6.12	Apply fair, reasonable, and non-discriminatory conditions of access for business users to	Mandate demanding a general outcome	Apple – App Store

	gatekeeper's software application stores, online search engines, and online social networking services.		(European Commission, AT.40716)
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Since gatekeepers' compliance is expected to be ingrained in their technological design (Recital 65), the DMA seeks to ensure that obligations are adequately delimited. By decree the gatekeepers must follow these commands within six months of their designation, the only difference being that the provisions of Article 6 can be further specified through 'regulatory dialogue'. Therefore, whether at their request or that of the gatekeeper, the Commission may initiate a dialogue process with the regulatee, including third-party comments. This collaborative approach may result in the Commission adopting an implementing act to delineate specific measures that gatekeepers should adopt to ensure effective compliance. However, the request for specification, or the process itself, does not undermine the effectiveness of the regulatory mandates.

Consequences

Following the analogy with the functions of regulation, this section presents how the DMA has foreseen to align the behavior of gatekeepers to the commands, the behavior-modification function. Additionally, as the accomplishment of desired outcomes hinges upon the accurate understanding of compliance status and the potential deviations in behavior, this section will also delve into the information-gathering function. Given the extensive scope of the regulation and the inherent information asymmetry between regulators and digital market undertakings, the regulator needs to hold robust investigative and enforcement powers, enabling it to

investigate, enforce, and monitor (Recital 80). Therefore, the DMA incorporates a range of provisions to this end.

The DMA provides the regulator with extensive powers to demand information, including data, algorithms, testing, and explanations, from digital economy entities such as gatekeepers, potential gatekeepers, or associations (Article 21). Upholding the integrity of this information, the Commission also has the power to require these entities to keep records related to the execution and observance of the orders (Article 26). Moreover, the DMA confers authority on the regulator to obtain information through interviews with individuals and legal entities as well as by carrying out inspections on undertakings or associations of undertakings (Articles 22 and 23). The information sources are not restricted to the undertakings, on the contrary, the DMA involves third parties, who may be business users, end users, competitors, or stakeholders, thus enabling their participation not only to report on gatekeeper behavior that may fall within the scope of the Regulation, such as non-compliance or unfair practices (Article 27), but also to provide input before the introduction of remedies or sanctions for gatekeeper non-compliance (Articles 18 and 29). The DMA ensures compliance with these provisions by imposing fines (Article 30), thus relying on the deterrent effect of penalties. Alternatively, through the imposition of periodic obligations, the Commission secures an additional way for gathering information, primarily through the submission of compliance reports. Moreover, during the same period that a designated gatekeeper must comply with the obligations, it must also submit a report detailing how compliance has been achieved and an independently audited description of the consumer profiling techniques it uses in its core services, both of which must be updated annually (Articles 8.2 and 15). Furthermore, in cases

where the Commission identifies non-compliance or systemic non-compliance, it also requests the submission of a description of the planned measures to comply (Articles 18 and 29).

The DMA opts for negative consequences in the event of non-compliance. The magnitude of these sanctions is significant, as they encompass both monetary penalties, fines (Article 30), and periodic penalty payments (Article 31) relative to the worldwide turnover; and far-reaching behavioral or structural remedies (Article 18). Neglecting to provide notification when the thresholds are met could result in the imposition of a fine amounting to 1% of the annual worldwide turnover. The delay in compliance with the obligations may be sanctioned with up to 5% of the average daily worldwide turnover. Non-compliance with the commands may lead to fines of up to 10% of the annual worldwide turnover., which could escalate to as much as 20% in the event of a recurrence. Although the potential for implementing behavioral and structural remedies stands as the most severe form of sanction, this course of action will only apply when the commission, following a market investigation, determines systematic non-compliance. This would be the case when a gatekeeper is found to have breached one or more obligations, despite the issuance of three or more non-compliance decisions within 8 years. Moreover, the provision of representative actions (Article 42) when collective consumer interests are harmed adds another layer of deterrence. This redress mechanism can have extensive pecuniary implications for the undertaking, which also generates incentives to steer the gatekeeper's behavior toward compliance. Finally, it is important to highlight that the DMA mandates the implementation of an internal compliance system in each gatekeeper (Article 28),



specifying the minimum organizational set-up expected and the powers to be conferred on the compliance officers.

IV. ANALYSIS

An initial theoretical approach

This section aims to compare the theoretically explored strategies with the essential features of the DMA to determine whether the DMA is consistent with these strategies in its design. Particularly by evidencing inclinations on Sinclair's continuum between strict command and control and pure self-regulation, as well as the middle ground proposed by this research, performance-based regulation. As a first approach, when analysing the regulatory framework, it is noteworthy that the binding nature of the DMA differs from pure self-regulation. In contrast to pure self-regulatory approach, the implementation of regulatory mandates does not depend on the willingness of those to be regulated, but rather on the mandates imposed by the governing authorities. This distinction is emphasised by the regulator itself, the Commission, a supranational body.

Regarding the procedure for the definition of its target, the first step of the DMA is the establishment of a list of services that can be qualified as CPS and therefore will be subject to the regulation. This is a closed list, which cannot be reduced or extended by the companies, and only the Commission can add additional services based on a market study. The unavoidable one-size-fits-all approach of the DMA has characteristics that tend towards strict command and control and thus a high degree of legal certainty. Conversely, the second step in determining the target of the regulation indicates greater flexibility by establishing broad criteria for qualifying these providers as gatekeepers. While the wording could be counterbalanced by the fact that thresholds have been set for their effective application, flexibility remains in that

the Commission can designate a gatekeeper even if the thresholds are not met and the undertakings can rebut the designation under broad arguments. This reduces the high degree of legal certainty expected from a command-and-control approach.

Furthermore, the undertakings -gatekeepers or potential gatekeepers- bear a responsibility that extends beyond mere compliance with the commands, as seen in the command-and-control strategy. Instead, they assume the onus of ascertaining whether they are subject to the DMA and substantiating this assertion to the regulatory authority ~~within two months' frameworks~~. Although the designation can be challenged, the onus of proof to provide 'sufficiently substantiated arguments', once again, rests upon the respective undertaking to be assessed within the same time framework. The delegation of these assessments to the undertakings could be interpreted as an implicit recognition of the limitations of the authority in the dynamic and heterogeneous digital markets, recognizing that the providers of these services have greater access to information to make this assessment. Notwithstanding this, the DMA stresses that the Commission retains the authority to designate gatekeepers who fail to notify the regulator within the deadline based on the information at its disposal. Even though these characteristics cannot be identified as pure self-regulation, it does reflect elements of enforced self-regulation.

Focusing on the commands, it should be noted that they follow a performance-based approach as they define a general outcome without providing either the granular detail characteristic of technology-oriented standards or the means to achieve the objective of management-based standards. In this sense, undertakings are free to determine which are the best tools or measures to fulfil the obligations in the most cost-effective

way for them. Although the DMA allows for the possibility of regulatory dialogue with regulated parties and stakeholders to further specify obligations, this does not detract from the self-regulatory orientation. This approach is consistent with the theory of performance-based regulation, which emphasizes that this strategy helps to deal with heterogeneous, technological, and dynamic targets. This is particularly relevant given that the DMA aims to ensure that gatekeeper compliance arises organically from its design. The design of the DMA allows for extensive input from the regulated party into the implementation of the regulation.

It should be borne in mind that following a performance-based strategy the highest burden will be on the regulator, which will need to ensure a high capacity to measure and monitor compliance. In this respect, throughout the legislation the Commission is invested with robust investigative and enforcement powers, only to require information from undertakings, associations, and third parties but also to produce information such as testing and explanations. The latter is one of the elements that academics highlight as important for an adequate performance-based approach. The materialization of monitoring will be resource-intensive for the authority, especially considering that it encompasses digital markets, which has been foreseen by the authorities. In addition, the DMA requires gatekeepers to develop a compliance function. Although initially this function could be considered as self-regulatory as it will be executed by the regulatee, due to the high degree of specificity given by the DMA for its implementation and the little flexibility granted to the gatekeepers in this regard, evidence an instance that leans more towards command and control.

Finally, concerning the consequences, the regulation establishes significant sanctions to ensure compliance by deterrence, which are not only pecuniary in terms of the global profits of these companies, but also structural remedies. These sanctions not only reinforce compliance with regulatory mandates but also those mandates that seek to contribute to the monitoring activities, such as failure to provide information or delay in the implementation of the internal compliance system. As the theory points out, it is not enough that sanctions are negative but that they are effectively enforced, which cannot be measured yet, as the DMA is still in the process of implementation. However, imposing periodic reporting obligations not only provides the regulator with more information but also compels the regulatee to greater compliance. This deterrent effect is reinforced by the DMA's emphasis on the active participation of third parties, competitors, and users, which also indirectly encourages compliance through their ability to report to the Commission. The possibility for Member States to bring representative actions also acts as a deterrent.

Refining the diagnosis through expert insight

In sum, from the comparison of the theory with the essential characteristics of the DMA, the regulatory strategy followed contains a mixture of command and control and self-regulation elements, showing a particular inclination on the continuum towards performance-based regulation. To further explore this determination, we will draw on the comments of experts. Embarking upon the realm of digital market regulation is a highly challenging but sensitive task, evoking a profound discourse among scholars, stakeholders, and competition practitioners. This debate revolves around the interpretation of the DMA, any possible limitations, and, more importantly, the potential to effectively achieve its stated objectives. Analysing how this new regulatory

framework has been understood will allow us to reinforce the assessment of regulatory strategies, culminating in a more comprehensive understanding of the DMA's objectives from a regulatory viewpoint.

Reversal of the burden of proof

If we consider the design of the DMA, one of its most prominent aspects is the regulatees' participation in its effective implementation. Bostoen (2023) finds a motivation for undertakings to develop arguments that would allow restoring the burden of proof to the Commission in the broad prerogative to challenge the designation. Meanwhile, Lamadrid (2020) emphasizes that it remains unclear how this will take place in practice, as there are no parameters. Ibañez (2020) concurs with this view, highlighting that the commission's freedom regarding dominance is not constrained by case law as with antitrust proceedings. Most comments express concern about the wide-ranging provision, particularly as it departs from familiar competition rules. However, from an enforced self-regulation perspective and considering the complexity of digital markets, not setting constrained parameters aims precisely to give breadth to gatekeepers' arguments. This is not necessarily to encourage novel defensive measures, but rather to recognise the dynamic and diverse nature of regulated services, which expand through the entire digital economy rather than a single industry or market. Conversely, an excess of detail could become outdated over time and exclude assumptions resulting from a lack of understanding of the operation of the regulatees specific activities.

Design of the commands and possible consequences

Unquestionably, the 'Do's & Don'ts' lists of the DMA have emerged as the central focus of scholarly examination. While some experts characterize them as complete (Komninos, 2021) and well-defined obligations (Reyna, 2021), others label them as abstract rules (Dunne, 2022) and sweeping and ill-defined prohibitions (Lamb, 2021). In contrast to ex-post intervention, ex-ante regulation is expected to offer heightened legal certainty (Decker, 2015, p.48), thereby enabling it to function as a self-executing mechanism (Akman, 2021). In the absence of detail on how these generally applicable obligations should be implemented (Dunne, 2022), it has been argued that the commands are too broad. The flexibility provided by a standard should not be mistaken for ambiguity in the desired outcome, as this affects legal certainty. The performance-based approach does not seek to diminish legal certainty but instead centres on assessing that the outcomes are met. The DMA defines the expected behaviors, and its drafting provides flexibility to customize the subjective scope based on market conditions. Moreover, this viewpoint acts as a counter-argument to criticisms that argue that the directives overlook the business model (Lamb, 2021), or impose obligations that will not be equally effective across all services (Akman, 2021). Through regulatory lenses, these concerns dissipate. From a different perspective, Andriychuk (2022a, 2022b) advocated for the DMA's 'all-inclusive & opaque' design, purposely introduced for the Commission to strategically pinpoint instances of non-compliance and ensure specific adherence, consequently, the regulation doesn't aim to enforce all commands uniformly. While we acknowledge the deliberate broadness of the command phrasing, there is no backing within the regulation, its drafting

documents, or the theoretical framework to assert that it intends to grant the regulator selective discretion.

Concerning mandate implementation, gatekeepers are expected to be fully and effectively compliant (Article 13.3). While this expectation is legitimate in any regulatory regime, academics have identified that gatekeepers face an excessive burden in having to determine how to meet obligations (Ibáñez, 2020, p.571) and update regularly on actions taken to achieve this end (Bostoen, 2023). Moreover, they emphasise possible negative outcomes, such as the risk of excessive regulation as antitrust case law has shown that when undertakings are required to formulate remedies, they often go beyond the requirements to avoid potential legal action (Dunne, 2022; Ibáñez, 2021a). Although these remarks were intended to provide a critique of the regulatory approach, from a performance-based perspective they accurately describe the strategy. Specifying only the desired outcome and giving it the regulatee flexibility to develop the means of achieving it. The requirements to detail compliance not only aim to facilitate monitoring but also to give the Commission an understanding of how they are being implemented. The regulator's willingness to understand the gatekeeper's compliance is a sign of openness, that can be seen way before the reports, for example with the regulatory dialogue. Therefore, despite criticism, it is unlikely that over-regulation will occur according to the underlying theoretical foundation. Instead, the Commission should be attentive to 'creative compliance'.

Risky Leeway

A cross-sectional overview of the DMA illustrates that it has succeeded in strengthening the faculties of the regulator. Thus, beyond reviewing compliance with the thresholds for the designation of the gatekeepers, given that the criteria are quite loose (Fernández, 2021) and descriptive (Ibáñez, 2020), the commission holds extensive interpretative powers. Likewise, concerning the commands of the regulation these not only allow authorities participation in implementation through regulatory dialogue, but the broad approach taken in formulating the DMA's obligations inherently bestows significant authority on their interpretation. The extensive leeway granted to the regulator has triggered concerns among possible gatekeepers (Lamb, 2021; Meunier et al., 2021) and experts (Daems, 2022; Petit, 2021), particularly on how the Commission will execute its discretion. This leeway has a direct impact on their interactions with regulatees, who have clear incentives to influence the regulator's decisions. This may include avoiding classification as gatekeepers, reducing the range of essential platform services specified in their designation, or limiting the extent of obligations imposed. Simultaneously, third parties, who are invited to participate in certain instances of the DMA share comparable incentives to impact regulatory authorities towards stricter measures. As shown during the legislative process for enacting the DMA (Geradin, 2022), it is expected that the Commission will encounter considerable lobbying from stakeholders on its execution (Lamadrid de Pablo, 2020). However, the legislature considered the risk of regulatory capture, as stated in the DMA's Legislative Financial Statement (2020), which noted that the current regime is less susceptible to capture than alternative regulatory strategies.

As the performance-based approach theory points out, the effectiveness of this strategy hinges on the regulator's performance. If this premise is added to the complexity and extension of the digital economy, it becomes evident that the regulator requires extensive leeway for interpreting and adapting to diverse industries and services. In this context, the comments regarding the broad discretion from a regulatory perspective resemble more of a characterization of the strategy itself. When considering regulatory capture, the risk is present in many, if not all, regulatory strategies. Although being close to the regulatees can indeed increase this risk, the DMA has implemented measures to reduce it. The incorporation of diverse reporting mechanisms allows the Commission to ensure transparency in its implementation, not only towards the regulatees but also internally. Furthermore, the introduction of an Implementing Regulation (2023) and the potential issuance of guidelines provide opportunities to check and balance the Commission's discretion through implementation.

Enforcement challenge

While ex-ante binding rules and robust investigative powers might suggest that regulators are solely responsible for enforcement (Dunne, 2021), implementing effective regulation is easier said than done (Bania, 2020). Beyond the implementation of self-executing measures, which have been metaphorically described as the 'holy grail' (De Streel, 2023), there is an acknowledged 'daunting task' (Lamadrid, 2020) in enforcing the DMA, as highlighted by experts (Bostoen, 2023; Reyna, 2021), who have underscored critical aspects. These include the imperative for swift action, ideally ahead of market tipping points (Bostoen, 2023); the difficulties brought by asymmetrical information and technical intricacies heightened by the dynamic nature

of digital markets (Chirico, 2023; De Streel, 2023), and the requirement for significant resources to competently monitor the major players in the digital economy (Witt, 2023). All these approaches hold validity and will continue to be developed throughout the DMA implementation. Nevertheless, the regulatory regime's distinct feature lies in its approach.

The Commission is not looking for wrongdoings to trigger sanctions, but rather to continuum dialogue with the regulatees for them to achieve compliance (Portuese, 2022). In this regard, Chirico (2023) – Head of Unit of Digital Markets on DG Connect - emphasizes that compliance discussions do not necessarily refer to the optional regulatory dialogue, but rather a constant follow-up that won't normally require a decision. In practice until the first deadline for designation, contact between the Commission and undertakings has been carried out as well as informal pre-compliance discussions, the latter will continue for 6 months after designation. Moreover, by its design, the DMA promotes gatekeepers to develop internal tools to meet the commands, mainly the compliance function and the periodic reports they must present to the Commission. The DMA design does not seek investigations or the introduction of remedies but rather encourages collaboration with the Commission and discourages delays and non-compliance with fines and ultimately remedies (Ibáñez, 2020). Moreover, academics highlight that the language used avoids confrontational terms; for instance, referring to the proceedings as 'non-compliance' instead of 'infringement' (Andriychuk, 2022b). Beyond wording, stakeholder involvement, in decision-making concerning the designation and fulfilment of obligations changes the nature of the Commission enforcement action (Alexiadis, 2023).

In contrast to Dunne's assertion that the DMA lacks collaborative qualities(2022, p.14), this research holds a differing viewpoint. Insights from experts highlight a proposal that strongly encourages dialogue and acknowledges undertakings' potential for self-regulation. This approach delegates some regulatory functions to the undertakings, in a better technical position than the authority, enabling them to align their systems and structures with regulatory requirements. Meanwhile, the regulator exhibits a receptive attitude towards understanding how these targets are reached and monitoring gatekeepers' actions. This research interprets the approach as a balanced middle ground between command-and-control and self-regulation, recognizing its potential without neglecting the obstacles to its application. Given the substantial information asymmetry and resource disparity between authorities and digital markets undertakings, significant resources will be necessary for the authority to establish effective mechanisms and recruit qualified personnel for compliance evaluation. Despite the monumental task at hand, this paper emphasizes that a collaborative approach such as the display in the DMA, such as performance-based strategy and enforce self-regulation, can foster improved understanding and progress.

Interpreting the objectives by analysing its commands

It is often suggested that the significance of concepts lies more in their operational impact than their mere definitions (Rose, 1999, as cited by Black, 2002, p.4). Extrapolating this idea to the current analysis is complex, given that the DMA is still in its initial implementation stage, with concrete outcomes yet to fully materialize. Nonetheless, it's evident that the regulatory aims of fairness and contestability, as outlined by the DMA, are manifested not solely in its legislative text, but in the behavioural and structural modifications it seeks to introduce. In this context, Ibáñez

(2021a, 2021b) identifies three practical goals pursued by the DMA through its mandates. The first centres on preventing or mitigating the leveraging of market power from CPS into adjacent activities, illustrated by the prohibition of self-preferencing practices. A common objective for rules that seek to promote competition, as in the case of European telecommunications regulation (Alexiadis, 2023). The second goal is to reallocate rents across the digital ecosystem, leading the DMA to impose obligations that limit certain monetisation strategies of gatekeepers or address free-riding issues. For instance, the prohibition of most-favoured-nation clauses aims to lower barriers to entry from the demand side. The third goal seeks to introduce and preserve competition in the sectors where the gatekeepers wield considerable -if not dominant- market power, illustrated by the duty to allow the uninstallation of software, stifling a structural entry barrier. This is exemplified by the absence of a termination point, unlike other regimes such as European telecommunications regulation, which diminish as competition increases.

As noted above, fairness and contestability are interdependent and inextricably linked. Therefore, any obligations regarding one objective will advance the other as well. However, some obligations may favour one objective over the other. In this regard, the aims of mitigating the leverage of market power and reallocating rents are more closely linked to a broader understanding of the concept of fairness, as they seek to rebalance the conditions to achieve a level playing field (Fernández, 2021). Although some scholars argue that these goals are feasible (Andriychuk, 2021; Bauer, 2022), others remain sceptical about their potential achievement, associating it with high levels of uncertainty (Akman, 2021). However, for the third objective, there appears to be a consensus in perceiving it as a Sisyphean task (Streel, 2022) with no possibility of

attainment (Andriychuk, 2021). This assertion doesn't relate to the gatekeeper's fulfilment of the obligation, but rather to the overarching objective that the commands seek to achieve, which is inextricably linked to market contestability. The argument suggests that competition law, regulatory interventions, or any other mechanism cannot change the inherent tendency of markets that naturally exhibit extreme returns to scale (Ibáñez, 2020), even more so in markets that are not fully understood (Crémer et al., 2019). Therefore, if the DMA aims to foster and maintain strong competition in these markets, it remains unattainable. While regulation can mitigate gatekeepers' practices that accelerate the market's natural tendency towards concentration, it cannot promise to alter their natural tendency. Moreover, the act of attempting suggests a significant transformation in structure, exploring the fundamental design of gatekeepers' services and reshaping their business models and commercial strategies (Lamb, 2021). Some mandates may be so wide-ranging as to be equivalent to the entire regulatory framework of a utility (Ibáñez, 2021c).

As demonstrated within this research framework, between the continuum of the extremes of command-and-control and self-regulation, the DMA has chosen to combine elements of both regulatory strategies and steer it toward a middle ground. Particularly, regarding commands, the strategy seems to adopt the contours of performance-based regulation. A central feature of this strategy is that the intended outcomes of implementing the commands are harmonized with the overarching goals. In this respect, both the theoretical foundation and expert opinions converge and support the achievement of this prerogative. However, the challenge persists when it comes to turning this alignment into tangible outcomes of fairness and contestability. Analysed through the lenses of legal and economic competition experts, the prevalent

scepticism is understandable. After all, the intrinsic dynamics of markets can't vary by the will of the legislator. Nevertheless, viewed through a regulatory understanding that acknowledges the informational asymmetry between regulators and regulated entities, the inherent dynamism of markets, and the optimal positioning of the undertakings to achieve objectives, the overarching purpose appears to be steering towards a nuanced approach in implementation. This implies achieving objectives through an iterative process driven by dialogue, as opposed to relying solely on a punitive approach or rigid command-and-control mechanisms. It embodies a distinct methodology for realizing the stipulated goals.

This perspective recognises the breadth and complexity of the objectives, particularly in ensuring the ability to challenge gatekeepers and maintain the openness of digital markets to new entrants, thereby ensuring their contestability. The associated challenge lies in the effective monitoring and application of sanctions to measure gatekeeper compliance with behavioural changes and structural adjustments. However, this research can conclude from the DMA design and expert comments that the inherent collaborative approach of the regulatory strategy offers the best possible course of action given the unique characteristics and challenges of the market. Embracing a strict command-and-control approach would prove ineffective, as it fails to adapt to the dynamic nature of digital markets and would render obligations swiftly outdated. Conversely, placing exclusive reliance on the voluntary actions of undertakings to introduce mechanisms curbing their market dominance and fostering increased competition would be overly simplistic. Striking a middle ground, one that shifts the burden of proof onto undertakings for designation and charges them with formulating compliance mechanisms in line with the objectives emerges as a prudent

alternative. This approach, when coupled with a regulator who welcomes dialogue and wields substantial oversight authority, possesses the potential—according to the regulatory theory and design of the DMA—to fulfil the envisioned objectives. While the DMA's initial phase of implementation is underway, the concrete outcomes await observation. Yet, it's crucial to underscore that the regulator's role assumes paramount importance. The ability of the regulator to orchestrate this strategy will significantly shape the way forward and determine the likelihood of achieving objectives through a nuanced and well-calibrated approach.

V. CONCLUSION

The dissertation presents a critical review and analysis of the regulatory strategies underlying the design of the Digital Markets Act, and how such an understanding can inform new insights into its objectives and essential characteristics. This study begins by exploring the concept of regulation, which encompasses various functions such as standard-setting, information gathering, and enforcement. It acknowledges that regulation extends beyond the confines of the state, recognizing that actors are in practice self-regulating entities. As a result, the regulatory framework develops through interactions between these entities and third parties, leading to a shift in the state's role towards one of an enabler. Furthermore, regulation employs various strategies, often in combination. Sinclair (1997) argues that these strategies lie on a continuum between strict command-and-control and pure self-regulation. One of these intermediate strategies is performance-based regulation. Hypothesizing that the DMA follows one or a combination of these strategies, this research explores their theoretical analysis, identifying their characteristics and drawbacks. Subsequently, the study systematically presents the DMA in two sections. Firstly, to understand the overall goals of the study, the preambles and formation process of this regulation are explored. Secondly, using the analytical methodology developed by Coglianese (2009, as cited in Coglianese & Mendelson, 2010), the content of the DMA is scrutinized based on four key regulatory characteristics: the regulator, the target, commands, and consequences.

With clarity on the theoretical premises and the DMA characteristics, this research confronted those insights to explore the regulatory followed. Although the nature of the regulator - a supranational authority - the closed list of regulated activities - CPS - and the mandatory nature of the commands, as well as the strongly deterrent sanctioning approach to the consequences - pecuniary and structural -, could be considered elements tending towards command and control. On the other hand, the broad three-test criteria to determine the gatekeepers and the regulator's flexibility to appoint even without meeting the thresholds, deviates from the end of the continuum. This is particularly relevant when considering that the duty to evaluate the fulfilment of the criteria and to propose arguments to avoid regulatory regimes is the regulated entity, elements that indicate a tendency towards enforced self-regulation. However, the most prominent features are undoubtedly the commands and enforcement powers granted to the regulator, demonstrating a clear commitment by the DMA to performance-based regulation. The commands establish a general outcome without providing detailed specifics, entrusting the regulated entity with designing the best way to achieve compliance. Moreover, it allows for dialogue between the gatekeepers and the commission to further specify obligations. The DMA's design enables the regulated party to offer considerable input on the regulation's implementation. To ensure that the performance-based approach works properly, the DMA gives the regulator robust investigative and enforcement powers. Altogether, the analysis allowed us to demonstrate in a systematic way that the regulatory strategy followed by the DMA contains a mixture of command and control and self-regulation elements, showing a particular inclination on the continuum toward performance-based regulation.

Furthermore, this study confronted these initial findings with the main comments of competition experts. This comparison uncovered that many of the arguments raised as concerns are directly related to the definition of regulatory strategies, and therefore, far from being criticisms from a regulatory perspective, they contribute to the identification of the mentioned strategies. Moreover, they allow speculation as to the reasons why these strategies were chosen, the principal one being a recognition of the limitations of authorities in dynamic and heterogeneous digital technology markets, recognising that companies are in a better position to develop specialised mechanisms to comply with mandates that will demand not only behavioural but structural changes. Openness to dialogue, flexibility in implementation, and participation of the regulatees should not be mistaken for a weakness of the regulators. The DMA design approach is set to encourage collaboration with the Commission, marking its distance from an entirely sanctioning regime. Furthermore, this approach delegates some regulatory functions to the undertakings, enabling them to align their systems and structures with regulatory requirements, in a balanced middle ground between command-and-control and self-regulation. As performance-based regulation theory points out, the effectiveness of regulation will also depend on the performance of the regulator. From its design, the DMA confers broad mandates on the regulator, so that front is covered, however, actual achievement will only be seen in its implementation, which is still in progress.

Drawing upon the insights gained from the study of regulatory strategies of the DMA, regulatory theory, and expert opinions, this dissertation assesses the criticism levelled at the regulation and the feasibility of achieving its objectives of fairness and contestability. The approach complements the definitions presented by the DMA,

analysing the overarching objectives of the commands, to provide a complete picture of what the DMA seeks to achieve. This shows that scepticism is mainly focused on the possibility of fostering and maintaining strong competition in markets that naturally exhibit extreme returns to scale by the will of the legislator. Nevertheless, viewed through a regulatory understanding the overarching purpose appears to steer towards a nuanced approach, through an iterative process driven by dialogue, regulatees in charge of designing the best compliance mechanisms, and a regulator that wields substantial oversight authority. Overall, confronted with comments and criticism from competition experts, this study shows that many overlook the regulatory strategies behind the DMA design, leading to misconceptions about its objectives and essential features. Conversely, in interpreting the regulatory strategies positively, this research does not attempt to foresee that the regulation will be flawless in its application, but rather that most of the perceived shortcomings are intended by the regulatory design and, from this perspective, are rather virtues. In consequence, the DMA stands a good chance of achieving its regulatory objectives.

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