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Long abstract

Hybridism and experimentation: shaping digital markets through an integrated regulatory system.

The recent Digital Markets Act's enactment represented an epochal change in the regulatory landscape of the digital economy. As DG Comp recently claimed in its report «Protecting Competition in a Changing World», the Digital Markets Act can be considered as one of the most significant institutional factors, among many others, to have completely influenced EU competition policy over the last twenty-five years. Setting aside the failed *laissez-faire* regulatory approach and well aware of the structural limits of European antitrust enforcement, the EU Commission has prepared in order to regulate digital markets, a legal instrument that is characterised by two features: hybridism and experimentation. The new regulatory framework can combine together aspects of antitrust law and sector-specific economic regulation as well as overcome the opposition between enforcement's centralisation and decentralisation in an integrated regulatory system.

Having gone ahead of the idea that fairness and contestability - the objectives that the DMA intends to pursue - are completely different from the safeguarding of the competitive process, many scholars recognised that these objectives release the efficient functioning of the market from distortions of competition as EU competition policy is determined to achieve. For this reason, the complementary nature of the DMA and the EU antitrust rules becomes crucial. For instance, although *ex-ante* obligations are inspired by the anti-competitive behaviour of gatekeepers hitherto condemned *ex-post*, they are designed to function *ex-ante* so as to produce prescriptive rather than proscriptive effects. Furthermore, if the DMA had been only a traditional instrument of economic regulation, it would have had to address its obligations to a specific sector of the digital market. On the contrary, the DMA moves away from traditional regulation based on *ex-ante* general principles to embrace a rather practical idea of asymmetric *ex-ante* regulation because prescriptive obligations can only be applied to specific economic actors, i.e. gatekeepers. If the boundaries between antitrust and sector-specific regulation are disappearing in the Regulation (EU) No. 2022/1925, this may be mainly

attributed to its hybrid legal nature which allows it to embrace both fields of action by realising a dynamic complementary between them.

The dialectical relationship between antitrust law and sector-specific economic regulation of markets became concrete due to the adoption of responsive regulation as a regulatory model which helps to design an innovative and experimental cooperative governance for the digital industries. The new regulatory paradigm reacts to market failures and inefficiencies by implementing an idea of participatory regulation based on a trilateral approach. In this process, many actors are involved. The Commission, as policymaker, has the task of establishing the rules to address in a predetermined manner the corporate governance structure with *ex-ante* obligations. The gatekeepers have the task of incorporating the legal contents into the architectural choices of their business models. Last but not least, stakeholders are engaged in the consultation phase, in order to submit their comments on the proposed measures. In front of a reticular digital economic power, EU institutions have chosen to shape fair and contestable digital markets through a model based on a collaborative and participatory approach. This approach is founded on a public-private partnership aims to involve regulated firms, stakeholders and regulators in the design of the entire enforcement cycle in its two essential elements, namely a compliance and a deterrence-based approach.

With regard to DMA regulatory function, it covers not only the regulatory compliance but also deterrence measures and punitive style. The DMA compliance emerges in two ways. The first is contained in Article 8(2) of Regulation (EU) No. 2022/1925, whereby the Commission is empowered to specify the measures to be implemented by the gatekeeper in order to effectively comply with the obligations under Articles 6 and 7. The second, on the other hand, in paragraph 3 of Article 8, provides for the possibility of the Commission and the gatekeepers to engage in a regulatory dialogue. The dialectical process has not yet been fully implemented because, after specifying compliance measures, gatekeepers have no possibility of contradiction. However, the Commission mitigates this lack of effective regulatory dialogue by more strongly emphasising a cooperative regulatory approach in the later paragraphs of the same provision as well as in the subsequent rules. In fact, after a dialogue with the gatekeeper and having allowed third parties to submit comments (Article 8(5)), DMA provided for mutual information sharing through the gatekeepers' submission of reports on compliance (Article 11(2)), on the consumer profiling (Article 15(3)), and finally compliance workshops among all stakeholders, particularly regulators, regulated digital firms and other third parties interested. In this way, the DMA's corporate compliance regulation demonstrates that it has been inspired by the 2021 Guidelines for Better Regulation. According to them, the Commission should ensure broad participation throughout the

policy cycle, which means considering a wide range of views from all interested parties who have had the opportunity to express their views as confirmed by the 2023 Better Regulation Toolbox.

With regard to the DMA deterrent approach, the enforcement has been declined on more or less institutional levels, according to a relationship that is no longer horizontal as in the case of the compliance function, but vertical. The dialectical relationship aimed at implementation, enforcement and supervision of the compliance with the obligations involves all the actors engaged in the regulatory architecture envisaged for digital markets at Chapter IV and V of the DMA. Although Recital 91 of DMA states that in the exercise of its investigative powers the Commission is the sole enforcer of the regulation, thus proving that EU legislator has opted for a centralised enforcement model similar to the Regulation (EEC) No. 17/1962, things are much more complex than they appear at first glance. In fact, from DMA deterrent approach emerges various decentralised initiatives that facilitate the involvement of other actors in the regulatory decision-making process, such as gatekeepers, private or public stakeholders, Member States and national authorities, of which there is evidence in Articles 17 and 38(2) and (7) of the DMA. There is reason to believe that rejection of the decentralised model proposed by Regulation (EU) No. 1/2003 belongs to the initial stages of the DMA proposal. In fact, at the time of the actual implementation of the legislation, the situation looks very different because there are several elements of decentralisation in the new regulatory framework, able to coexist with the central role of the Commission.

This paper intends to prove that the EU legislator has introduced into the EU legal framework an integrated regulatory system specifically aimed at digital markets and based on two crucial features: hybridism and experimentation. Contrary to the prevailing doctrinal orientation, according to which the Commission has a central role in its enforcement tasks, there is reason to believe that the design of the DMA enforcement model is much more complex than it appears. It based on cooperation between different public and private actors, whether it relies on a persuasive approach typical of the compliance function or on a deterrent approach.

Therefore, this essay will attempt to show firstly that hybridism between antitrust rules and sector-specific regulation can be seen in the goals that DMA intends to pursue. Secondly, by analysing the different standard rules in the enforcement phase and using - as a leading case - the non-compliance investigation about the Meta's "pay or consent" advertising model, the essay will explain how experimentation emerges in the enforcement model, especially in the deterrence model. This latter approach embraces some of the collaborative potential that the compliance phase does not yet fully possess, as seen in relation to the regulatory dialogue, although as it has been said and will be demonstrated in this essay collaborative traits are emerging in other paragraphs of the same rule as well as in the subsequent ones. In addition, the experimental approach can also be identified in the

attempt to combine centralised and decentralised regulatory elements in order to achieve in the implementation of the DMA the overcoming of the dichotomy between centralisation and decentralisation to harmonise them together and not to forget the legacy of Regulation (EEC) No. 17/1962 and Regulation (EU) No. 1/2003. While the centralised approach is evident in the enforcement role played by the Commission, the decentralised approach can be traced, for example, in having delegated the reporting and monitoring of compliance directly to gatekeepers and third parties or in the coordinating relationship between the Commission and national competition authorities. It could be said that at the enforcement stage, the regulatory system is no longer highly centralised because it is able to make centralisation coexist with elements of decentralisation.

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