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Alexandre de Streel
Richard Feasey
Jan Krämer
Giorgio Monti

ARCHITECTURE OF THE DIGITAL MARKETS ACT

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info@cerre.eu
www.cerre.eu

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About the authors

Alexandre de Streel is Academic Co-Director at CERRE and a professor of European law at the University of Namur and the Research Centre for Information, Law and Society (CRIDS/NADI). He is a Hauser Global Fellow at New York University (NYU) Law School and visiting professor at the European University Institute, SciencesPo Paris and Barcelona Graduate School of Economics, and also assessor at the Belgian Competition Authority. His main areas of research are regulation and competition policy in the digital economy as well as the legal issues raised by the developments of artificial intelligence. Recently, he advised the European Commission and the European Parliament on the regulation of online platforms. Previously, Alexandre worked for the Belgian Deputy Prime Minister, the Belgian Permanent Representation to the European Union and the European Commission (DG CNECT). He holds a Ph.D. in Law from the European University Institute and a Master's Degree in Economics from the University of Louvain.

Richard Feasey is a CERRE Senior Adviser, an Inquiry Chair at the UK's Competition and Markets Authority and Member of the National Infrastructure Commission for Wales. He lectures at University College and Kings College London and the Judge Business School. He has previously been an adviser to the UK Payments Systems Regulator, the House of Lords EU Sub-Committee and to various international legal and economic advisory firms. He was Director of Public Policy for Vodafone plc between 2001 and 2013.

Jan Krämer is an Academic Co-Director at CERRE and a Professor at the University of Passau, Germany, where he holds the chair of Internet & Telecommunications Business. Previously, he headed a research group on telecommunications markets at the Karlsruhe Institute of Technology (KIT), where he also obtained a diploma degree in Business and Economics Engineering with a focus on computer science, telematics and operations research, and a Ph.D. in Economics, both with distinction. He is editor and author of several interdisciplinary books on the regulation of telecommunications markets and has published numerous articles in the premier scholarly journals in Information Systems, Economics, Management and Marketing research on issues such as net neutrality, data and platform economy, and the design of electronic markets. Professor Krämer has served as academic consultant for leading firms in the telecommunications and Internet industry, as well as for governmental institutions, such as the German Federal Ministry for Economic Affairs and the European Commission. His current research focuses on the role of data for competition and innovation in online markets and the regulation of online platforms.

Giorgio Monti is Professor of Competition Law at Tilburg Law School. He began his career in the UK (Leicester 1993-2001 and London School of Economics (2001-2010) before taking up the Chair in competition law at the European University Institute in Florence, Italy (2010-2019). While at the EUI he helped establish the Florence Competition Program which carries out research and training for judges and executives. He also served as Head of the Law Department at the EUI. His principal field of research is competition law, a subject he enjoys tackling from an economic and a policy perspective. Together with Damian Chalmers and Gareth Davies he is a co-author of European Union Law: Text and Materials (4th ed, Cambridge University Press, 2019), one of the major texts on the subject. He is one of the editors of the Common Market Law Review.

1 The architecture of the Digital Markets Act

This paper addresses the 'architecture' of the Digital Markets Act.

In this paper, we first outline the key elements of the 'architecture' of the Act, with a specific focus on how obligations can be introduced and further specified by the Commission, and the implications which this may have for how they are enforced. These are the aspects of the proposals where we think there is most room for improvement, although we also make brief comments on the process for the designation of gatekeepers in this paper.

In some cases, there remain differences in view amongst the CERRE academic team. We indicate where that is the case.

2 The Commission's proposal

The Act proposes that gatekeepers will be designated and so be subject to regulation (concerning particular core platform services) if they satisfy the criteria of Article 3(1). This is presumed if they meet or exceed the quantitative thresholds in Article 3(2). The gatekeeper must notify the Commission that it meets the quantitative thresholds within 3 months and the Commission must then designate within a further 60 days.

The gatekeeper is also allowed to advance 'sufficiently substantiated' arguments as to why, despite meeting the quantitative thresholds, it does not meet the criteria of Article 3(1), and thus should not be regulated (either at all or concerning a particular core platform service). The Commission must then investigate the arguments, taking into account the elements listed in Article 3(6). The Commission is required to make its decision on the merits of these arguments within 5 months (Article 15(3)).

The Commission can also designate a gatekeeper that does not meet the quantitative thresholds in Article 3(2) after having undertaken a market investigation under Article 15. It is expected, but not obliged, to conclude this investigation within 12 months (and to notify its provisional findings to the firm in question within 6 months). In undertaking the investigation, the Commission must take into account the same elements in Article 3(6).

The Commission can change its decision to designate a gatekeeper concerning any core platform service at any time if circumstances require. It must also review each designation every 2 years (Article 4).

Gatekeepers designated under Article 3 must then comply with obligations which are specified in two Articles, Articles 5 and 6. The two sets of obligations are distinguished on the basis that those in Article 5 are expected to be 'self-executing'. This means that all designated platforms must comply with the obligations in Article 5 within 6 months of their being designated, after which the Commission may take appropriate enforcement action. Enforcement action may include interim measures (Article 22), the acceptance of commitments to bring the gatekeeper platform into compliance (Article 23), and/or the issuing of a non-compliance decision and directions on the actions required to comply (Article 25), the issuing of a fine (Article 26) or, ultimately, the imposition of structural remedies following a market investigation (Article 16).

Article 7(1) requires that the measures taken by the gatekeeper to ensure compliance must be 'effective in achieving the objective of the relevant obligation'. Some guidance as to the objectives of each obligation appears in recitals 36-57 but the gatekeeper is expected to decide for themselves what measures are needed to ensure it complies with Article 5.

The obligations in Article 6 are described as being 'susceptible of being further specified' by the Commission. This can happen in one of two ways:

- The Commission may itself consider that the measures a gatekeeper proposes to take or has already taken are not compliant with the obligation in question[1] and can adopt a decision in which the Commission specifies the measures which the gatekeeper must take. The Commission must issue its 'specification decision' within 6 months of initiating proceedings but must communicate its provisional views to the gatekeeper within 3 months. Any measures proposed by the Commission must ensure effective compliance but must also be 'proportionate in the specific circumstances'[2].

- Alternatively, the gatekeeper may request that the Commission initiate a proceeding to determine whether a measure or measures which the gatekeeper proposes to take, or has taken, are effective and so compliant with the obligation in question. We assume the Commission would also be subject to the same 6-month deadline (with 3 months for provisional findings) as applies when proceedings are initiated by the Commission. The gatekeeper may provide the Commission with a submission that explains why the measures it proposes to adopt, or has already adopted, are compliant. The Commission is not obliged to act upon the request of the gatekeeper.

Under the Commission's proposals, compliance with both Article 5 and Article 6 can be achieved through the acceptance by the Commission of commitments offered by the gatekeeper during an enforcement proceeding (with those commitments being offered under Article 23)[3]. If the Commission accepts commitments it may declare there are no further grounds for action. The issue then becomes one of compliance with the commitments.

Although Article 23 is not entirely clear, it would appear the Commission need not accept the commitments offered. This would be the case if the Commission considered the commitments to be ineffective in terms of compliance with the obligation. But we think it might also occur in circumstances where the commitments would ensure compliance but the Commission nonetheless wished to proceed with enforcement action. This might occur, for example, if the Commission felt that the measures required to comply with obligations were so self-evident that the gatekeeper ought to have implemented them from the outset, rather than proposing them as commitments. That might be more likely to be the case in respect of Article 5 obligations, which the Commission regards as 'self-executing', than Article 6 obligations (although this is a presumption on our part that is not made explicit in the text). It might also arise if the measures the gatekeeper had taken fell so far short of being effective that the Commission considered that no serious attempt at compliance had been made[4].

Under the current proposals, both the gatekeeper and the Commission will face several different scenarios or what we might think as 'paths to compliance'. These are illustrated in the Annex to this paper[5]. Some scenarios appear less likely (as indicated by the dotted lines) than others but are not entirely excluded and remain at the discretion of the Commission. These are:

1. In cases of non-compliance with an Article 5 obligation (which is regarded as not requiring further specification) or an Article 6 obligation for which a specification decision has already been provided the Commission may be less likely to accept commitments and more likely to impose fines, even if the commitments offered would be an effective measure.

[1] This could be because they do not achieve the objectives, either because the gatekeeper and the Commission differ as to what the objective is, or because they agree on the objective but differ on whether the measures adopted will be effective in achieving it.
[2] There are additional requirements in Article 7(6) in relation to measures which relate to obligations under Article 6(1)(j) and (k) only.
[3] In this paper we use the term 'enforcement proceeding' to refer to procedures initiated under Articles 16 (market investigation into systematic non-compliance) and 25 (non-compliance)
[4] If these arrangements were to remain as currently proposed (i.e. without the presumptions which we propose) then we think it would be useful for the Commission to provide guidance as to when commitments might be accepted and when not
[5] We have ignored interim measures and measures following systematic non-compliance in order to simplify the presentation.

2. In cases of non-compliance with an Article 6 obligation for which a specification decision had not been provided by the Commission may be more likely to accept commitments (provided they are effective) and less likely to impose fines if an enforcement decision is made.

In addition to enforcing the existing obligations in Articles 5 and 6, the Act would allow the Commission to import new obligations, following a market investigation, which would then apply to all designated gatekeepers. Although not clear from the text, we assume that the gatekeepers would be a given a period, perhaps the same 6 months, in which to implement measures to comply with the new obligations. The removal or modification of existing obligations does not seem to be contemplated under Article 10. In the rest of this paper, we consider some aspects of the Commission's proposals which we think might be improved and discuss various proposals to achieve this.

3 The process of designating gatekeepers6 (Articles 3 and 4)

The proposals for designating gatekeepers, including reliance on quantitative thresholds that can be rebutted with 'sufficiently substantiated' evidence, seem well designed to allow the Commission to apply regulatory obligations on time and give incentives to the platforms to disclose relevant information whilst at the same time allowing a degree of flexibility and consideration to be given to the specific features of particular firms or services. There are two aspects which might nonetheless be improved.

The first relates to the application of the criteria in Article 3(1) and the elements of Article 3(6), both of which will involve applying economic concepts (including new concepts such as 'gatekeeper' and the various core platform services which are defined in Article 2[7]) in a new and untested legal framework. **We think the Commission should be required to produce guidelines – either from the outset or after having acquired the experience of applying the criteria over several years –to assist firms and courts in understanding how the designation process should be applied.** This would assist those firms (whether they meet the quantitative thresholds or not) that may wish to present arguments challenging the intention of the Commission to designate them under Articles 3(4) or 3(6).

Secondly, the requirement under Article 4 to review every designation every 2 years appears too burdensome. **A longer period should be adopted – we suggest every 5 years.** This would remain alongside the Commission's capacity to initiate a review at any time if it has reason to believe that the facts on which the previous decision was made appear incorrect or to have changed over time. As currently proposed, such a review may be requested by the gatekeeper or initiated by the Commission without a request. A question arises as to whether a decision by the Commission not to act upon a request from a gatekeeper to review its designation would be a decision that was capable of being appealed. If the Commission were required to review within 5 years in any event, it is not obvious that a right of appeal is required. We would want to avoid a situation in which the Commission is continually in receipt of requests from gatekeepers which may provide a basis for appeals if the Commission declines to act on them. We propose later that certain decisions by the Commission not to act upon requests from gatekeepers ought not to be capable of being appealed. The legal position concerning designation decisions may, however, require further consideration.

[6] This paper is concerned with architectural issues, rather than the substantive criteria of designation. CERRE has previously argued that an additional criterion for Article 3(1), so that only gatekeepers providing more than one core service (i.e. controlling an ecosystem) would be regulated, see CERRE, https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf, p.15

[7] Particularly the scope of 'online intermediation services', which would appear likely to encompass a very wide range of platform businesses.

4 The process of obtaining specification decisions on measures required to comply and the consequences of doing so (Articles 7 and 23)

The Commission draws a hard boundary between obligations in Article 5, which it considers to be generically applicable and sufficiently clear to mean that the measures required for each gatekeeper to comply with them ought to be self-evident, and obligations in Article 6 which it accepts may require a further specification (but for which it is not obliged to provide a specification decision in every case).

Our view is that this distinction is too sharp. We agree that there should be a presumption against an Article 5 obligation requiring a specification decision before a gatekeeper can be expected to comply and we also agree that there ought to be a presumption that the Commission will provide further specification concerning the Article 6 obligations. However, we would not want to exclude circumstances under which further specification is required for an Article 5 obligation, nor to exclude circumstances where the Commission thinks it already provided sufficient direction for an Article 6 obligation such that no further specification is needed.

We[8] suggest that:

3. **The Commission should be able to further specify measures to comply with any obligation in the Act (including those currently listed under Article 5)**

4. **Gatekeepers should be able to request a specification decision from the Commission concerning any obligation in the Act, but a decision as to whether to provide such direction remains wholly at the discretion of the Commission**

5. **The distinction between obligations in Articles 5 and 6 would be reflected in explicit presumptions (from which the Commission could depart in exceptional circumstances) that:**

    - **The Commission would not normally expect to provide a specification decision in relation to Article 5 obligations.**

    - **The Commission would normally expect to provide a specification decision in relation to Article 6 obligations.**

We also think further consideration needs to be given to the implications of allowing gatekeepers to request and the Commission to provide or not provide specification decision in relation to obligations.

The first question is whether a decision by the Commission not to provide a specification decision when requested by a gatekeeper under Article 7(7) should be capable of being appealed. Although the legal options require further analysis, we think it might be argued that a decision by the Commission not to open proceedings would be an act which had no direct effect on the gatekeeper (or other affected parties) since it would not affect the obligation on the gatekeeper to implement effective measures to comply and nor would it affect the range of measures which are available to the gatekeeper to do so. This is analogous to the position taken in the European Electronic Communications Code and its predecessors, where the Commission may take a decision under Article 7 to approve or reject a proposal it receives from a national regulatory authority. In that case, the European courts have found that the Commission's decision is not appealable and the proposals to regulate have to be subsequently adopted by the national regulatory authority in order for them to

[8] There are some differences in view amongst the CERRE academic team about the best approach but general agreement that the obligations in Article 5 and 6 represent a 'spectrum' rather than dividing easily into two discrete categories, as the Commission proposes.

have effect.[9] The, later, decision by the national regulatory authority can be appealed. By analogy, **we think a decision by the Commission not to act on a request from a gatekeeper to provide a specification decision would (and should) not be appealable, but that subsequent decisions to enforce against a gatekeeper (and require them to adopt measures to comply) or to impose a fine, would both be capable of being appealed**.

The next question is how the provision of specification decisions under Article 7 might relate to the commitments process under Article 23. The current proposals contemplate a gatekeeper being able to offer commitments irrespective of whether or not the Commission has already provided a specification decision on the measures to be taken for compliance.

This is another aspect of the architecture where we think presumptions would serve a useful purpose. We suggest that **if the Commission has provided direction on the specific measures to be taken (whether at the request of the gatekeeper or on its own initiative) then the presumption should be that the gatekeeper knows what it must do to comply and the Commission would be entitled to rely on enforcement action and fines rather than accepting commitments**. In such circumstances, the additional benefit of having the gatekeeper being able to propose commitments seems difficult to justify.

On the other hand, **if the Commission has declined to provide a specification decision then the presumption should be that the Commission will accept commitments that are effective and would not pursue enforcement action or fines**. We think there is also a good case for saying that **in the first instance of non-compliance where no specification decision has been provided, the Commission ought not to impose a fine**. But if, having issued an enforcement decision which directs a gatekeeper to take specified measures the Commission should be able to impose a fine for continued non-compliance with that decision.

So far, we have ignored the question of <u>when</u> a gatekeeper might request a specification decision or when the Commission might provide it. Article 7(2) makes it clear that the Commission can provide guidance either in anticipation of non-compliance (i.e. before a designated gatekeeper is required to implement measures to comply 6 months after having been designated) or after measures have already been implemented. Similarly, Article 7(7) refers to the gatekeeper requesting guidance either before it has implemented any measures to comply, or after it has done so but presumably thinks there is some uncertainty as to whether those measures will be considered effective.

There are two aspects of these arrangements that require discussion. The first is that **requiring the gatekeeper to be compliant 6 months after designation whilst also allowing the Commission 6 months to produce a decision on the measures required to comply does not seem very satisfactory**. It is true that the Commission is required to share its provisional views with the gatekeeper after 3 months, allowing the gatekeeper to have a reasonable idea of the measures the Commission is likely to require them to adopt. But the final decision, against which compliance will be assessed, may only arrive days or hours before the gatekeeper is expected to comply with its obligations. Some of these measures are likely to require a further period of time before they can reasonably be implemented.

This suggests two adjustments. First, the deadline for implementing measures, when the Commission has decided to provide a specification decision and the gatekeeper has only recently been designated, ought to fall after the date on which the Commission's final specification decision must be issued. This would **allow the designated platform enough time to implement any measures contained in the final decision before it is required to come into compliance**.

[9] *Vodafone v Commission* (T–109/06) EU:T:2007:384, para.150 and *BASE v Commission* (T–295/06) EU:T:2008:48, para.109.

The deadline for compliance with measures when the Commission has rejected a request from a gatekeeper to provide a specification decision (and has not initiated its proceeding) should remain at 6 months. **This would require the Commission to make its decision about whether to accept or reject a request for a specification decision quickly so that the gatekeeper has sufficient notice of whether it can expect to benefit from a further specification of measures to take or not.** A request for a decision must not in itself extend the deadline for compliance. Whether the deadline is extended beyond 6 months, and by how much, should remain a decision for the Commission, not the gatekeeper, to take[10].

Second, we think the **Commission should state the deadline for implementation of any measures it specifies in the specification decision itself**. This is to reflect the wide variation in measures that are likely to be required to be taken to ensure compliance and the variation in the time required to implement them. Article 25(3) already allows the Commission to specify the deadline for implementation of measures which are specified in an enforcement decision. The same should apply to measures which are specified pursuant a specification decision.

Third, we think a useful distinction can be drawn between most of the obligations in the Act and the **'data sharing' obligations** under Articles 6 (i) and (j) (and possibly 6(h)[11]. We think these are likely to **require both a much higher degree of specification and much longer than 6 months to implement**[12]. For example, they may require the specification of technical standards to be adopted, which may need to be developed in consultation not only with the designated gatekeeper but the intended recipients of the data. It could involve the establishment of a new independent oversight body – itself a form of regulation - as occurred for the data-sharing obligations imposed on banks in the UK (for which the Open Banking Implementation Entity was created)[13] and has been suggested by some observers.[14] It may require the Commission to decide on the level of charges which the gatekeeper is entitled to levy for the data it is required to share and it may involve requiring third parties to adhere to certain obligations before they can receive data, such as commitments to hold the data securely and to manage it appropriately.[15] Engagement and collaboration with other firms will take time but will be necessary if the measures are to be effective in achieving the objectives of the Act.

Thus, **the Commission might require more than 6 months specifying the measures required implementing these obligations and the gatekeeper (and others) might require a further significant time in which to implement them**. Allowing the Commission to specify the deadlines for implementation would recognise these challenges, but the process of specifying the measures might be more akin to a market investigation than the procedure that will be used to produce specification decisions for the other obligations.

Finally, the proposals include the possibility of the Commission providing a specification decision after a gatekeeper has already implemented measures to comply, but outside the context of an enforcement proceeding. This situation might arise if a gatekeeper were to request specifications of the measures required to comply before making changes to certain aspects of its business. Or the Commission, having previously declined to provide further specification, may decide that it is now appropriate to do so.

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[10] This mechanism would also be required when a new obligation is adopted, since the existing designated gatekeepers cannot reasonably be expected to comply immediately and the 6 month deadline from designation would not apply in this context.

[11] The UK Competition and Markets Authority makes this distinction and refers to these obligations as 'pro-competitive interventions' in order to distinguish them from codes of conduct which can be more easily specified. Some of the obligations in the Act may fall between the two.

[12] See https://cerre.eu/wp-content/uploads/2020/09/CERRE_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework_September2020.pdf

[13] https://www.openbanking.org.uk/

[14] See Prüfer, J. and Graef, I. (2021). Governance of Data Sharing: A Law & Economics proposal. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3774912

[15] See Section 5.2.4.1 in https://cerre.eu/wp-content/uploads/2020/08/cerre-the_role_of_data_for_digital_markets_contestability_case_studies_and_data_access_remedies-september2020.pdf

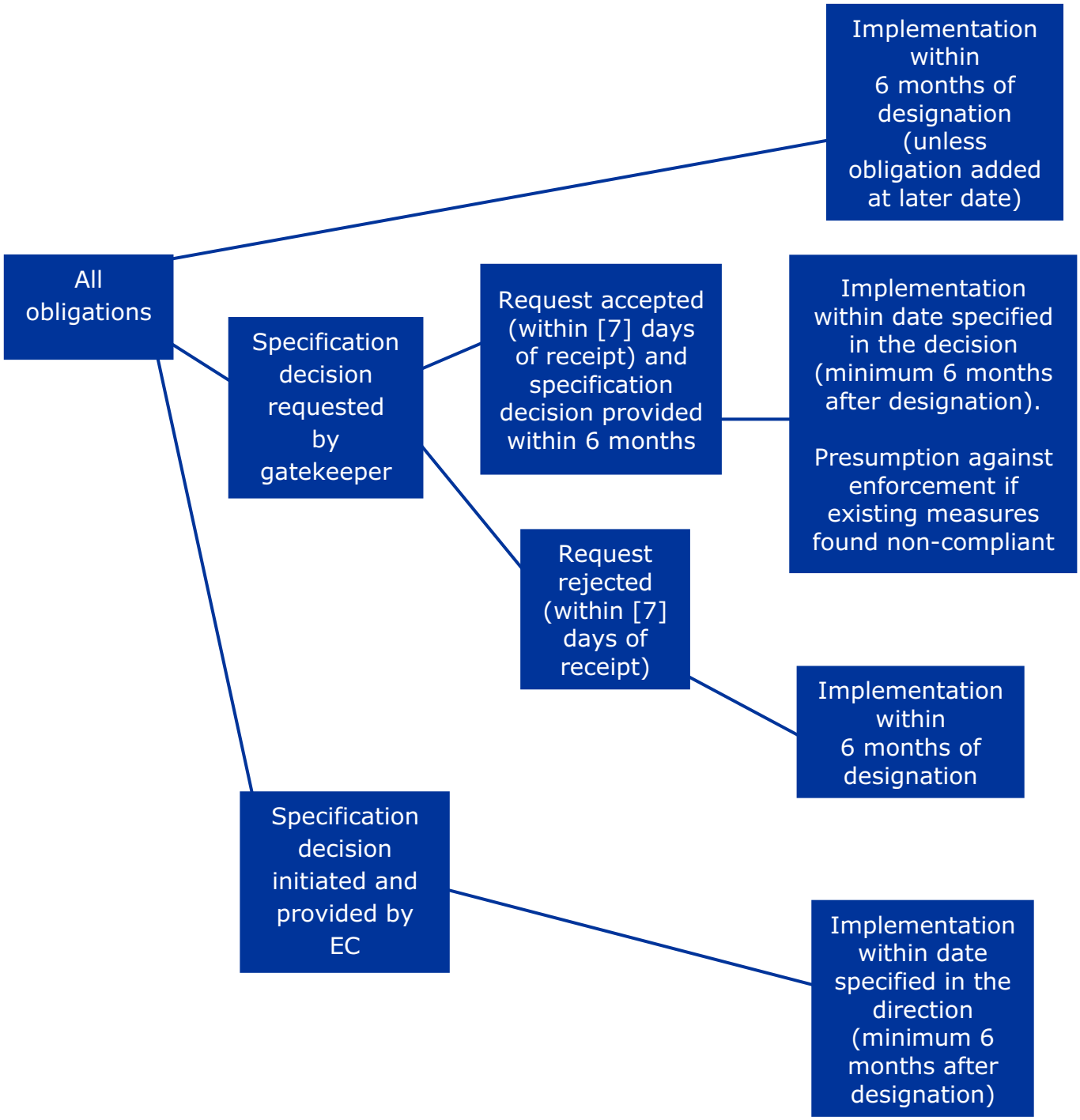
It could be argued that 'ex post' guidance of this kind is neither necessary nor appropriate and that the Commission ought only to specify measures before the gatekeeper is required to comply with the obligation in question. That would simplify the process but also reduce flexibility. It would remove the ability of the Commission to adjust its guidance in light of market or other developments or after having had the experience of how it was being implemented.

We think that **gatekeepers ought to be given incentives to pro-actively seek specific direction from the Commission despite having already implemented measures and despite already being under an obligation to comply**. This would contribute to the more constructive and less adversarial 'regulatory dialogue between the gatekeeper and the Commission which we are seeking to encourage. We are not convinced the Commission's current proposals provide adequate incentives for gatekeepers to actively seek guidance from the Commission in this way.

One way to achieve this would be to **introduce a presumption that a request for further specification would not normally lead to the Commission taking enforcement action if it concluded that the measures previously adopted by the gatekeeper had not been effective**. A gatekeeper that was uncertain about whether the measures it had taken ensured compliance could request further specification from the Commission. As outlined earlier, the Commission could agree to act or could reject the request, with the same presumptions applying. If the Commission declined to provide a specification decision, the gatekeeper would remain subject to the same regime as before it had made the request (i.e. it would be expected to comply without further specification but the Commission would be expected to accept commitments if they were effective). On the other hand, if the Commission accepted the request and issued a specification decision which suggested that the existing measures have been insufficient to ensure compliance, the gatekeeper would be required to comply with the decision (and could be subject to enforcement action if it did not) but could expect to avoid enforcement action concerning its previous non-compliance[16].

[16] We recognise that an issue remains as to whether the gatekeeper could be subject to a private claim for damages under competition law.

The various options presented in this part of the paper can be represented as follows:



5 Third party interests in the process

The current proposals envisage that the measures to be taken to comply with Article 6 may vary as between gatekeepers and may need to be further specified to take these differences into account. This seems to envisage a bi-lateral dialogue between the Commission and the gatekeeper in question (with Article 30 granting the gatekeeper certain rights of defence).

We think the Commission should also be required to consult with interested third parties (which might include other gatekeepers). This will add some complexity and delay into the process, but market testing proposed measures should also help ensure that they are effective. The **Commission should be required to consult with interested parties, both before making a specification decision under Article 7 and before accepting commitments under Article 23**. Enforcement proceedings may be initiated in response to complaints from third parties and it is appropriate that their interests be properly represented and that their views are taken into account. The Commission will no doubt be alive to the risk that designated gatekeepers might intervene in each other's proceedings to divert resources and attention from their own.

We would also expect **any decision of the Commission to be published**, subject to the normal confidentiality provisions. Although a decision under Article 7, 23 or 24 will specify the measures required to be taken by a particular gatekeeper in a particular set of circumstances, we envisage that the Commission's reasoning in many decisions would be relevant to other gatekeepers and may even avoid the need for them to request specification decisions of their own. Consideration should be given to ensuring that the decisions made by the Commission are as informative as possible, not only for the gatekeeper to whom it is addressed but for other gatekeepers and other parties who may be affected by the measures being adopted. This might include:

6. **Requiring non-confidential versions of Article 7 decisions to be published** in full within [7] days (including decisions not to open proceedings, where the reasons for not doing so should be provided in full)

7. Requiring the Commission to produce a **set of guidelines, based on the decisions it has made**, 3 years after the coming into force of the Act. This would guide gatekeepers and others as to the measures which would need to be taken to ensure compliance with each of the obligations in Articles 5 and 6. It would require the Commission to explain in detail how the measures achieve the objectives associated with each obligation, and what those objectives are.

6 Whether gatekeepers should comply with all obligations

The Commission's proposals contain a list of eighteen main obligations.[17] Some of these will not apply to some designated gatekeepers because the core services they provide are not of a kind that is addressed by the obligation in question. Obligations such 6(k) are directed at gatekeepers that provide app stores, 6(j) is relevant only to gatekeepers providing online search engines, 5(g) and 6(g) relate only to those gatekeepers that supply services to advertisers and others relate only to those that provide operating systems as a core service, like 6(b), 6(c) and 6(e). Gatekeepers that do not provide these services cannot take any measures that would ensure compliance (and so, in these circumstances, taking no action would seem to be a 'proportionate measure to achieve compliance').

[17] In addition, two transparency obligations apply on acquisitions intentions and on consumer profiling techniques at Articles 12 and 13.

The more difficult question is whether there are or should be circumstances under which a gatekeeper which might be in a position to take measures to comply with an obligation should be exempted from doing so. The Commission's proposals do not currently provide for this.

Under the Commission's proposals, compliance can only be secured through the implementation of measures which are 'effective' in achieving the objectives of the obligation in question. If a measure or set of measures are not effective (irrespective of whether they are specified by the Commission or proposed by the gatekeeper then the gatekeeper implementing them could be subject to enforcement action. If the measures are proposed by the Commission under Article 7(2) then Article 7(5) requires that they should also be 'proportionate in the specific circumstances of the gatekeeper and the relevant service.' This appears to recognise that differences between gatekeepers should lead to different measures being adopted to comply with the same obligation. Once the Commission is making enforcement decisions under Article 25, there is no specific requirement for the measures that it directs the gatekeeper to adopt to be proportionate. This appears to be an inconsistency in the current proposals which should be corrected.

Although measures which the Commission specifies may need to be proportionate and some obligations – notably Articles 6(b) and 6(c) - have exemptions specified within them, for most obligations the gatekeeper may only be exempted from an obligation to comply under very exceptional circumstances. These are specified in Article 8, where compliance would endanger the economic viability of the gatekeeper in question[18], or Article 9, where public health, morality, or security may be in jeopardy[19].

The Commission has argued against any 'objective justification' of conduct which would otherwise be prohibited under the Act, as is provided for in Articles 101/2 or in merger assessments where the parties can advance 'efficiency' claims[20]. In competition cases, conduct which might otherwise be prohibited may be tolerated where the provision of a service is not otherwise possible without the conduct in question (for example because the service has to be bundled with another service) or where contractual restrictions are required and yield benefits which outweigh any anti-competitive harms that might be associated with the restrictions. Similarly, in mergers, cost efficiencies which cannot be realised other than by the merger may, if passed through as benefits to consumers, be sufficient to outweigh any adverse effects arising from a lessening of competition.

It might be argued that it would be inappropriate to include such provisions in the Act as the obligations that are contained in Articles 5 and 6 are generally derived from cases where the Commission has already rejected arguments about objective justifications[21].

On the other hand, it could also be argued that what may be harmful conduct in many circumstances may nevertheless be justified in some and that, given the range and variety of gatekeepers and business models that the Commission proposes to regulate, a prediction that exemption from any obligations in the Act could never be justified for any gatekeeper is too sweeping[22].

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[18] It might be argued that Article 8 would exempt a gatekeeper from having to comply if, by doing so, it was unable to provide the core service in question (i.e. the conduct that the obligation sought to prohibit was indispensable to the provision of the service). However, the focus on Article 8 appears to be the 'operations' of the gatekeeper as a whole and contemplates exempting compliance with the obligation for a number of core services at the same time (see 8(3)). On this basis, Article 8 would only be engaged if the economic viability of the gatekeeper as a whole was in question.

[19] In addition, only a sub-set of the obligations apply to 'prospective gatekeepers' that have been designated under Articles 3 and 15

[20] The Commission's Impact Assessment argues "they are often one-sided and do not seem to match the evidence underlying this Impact Assessment including the calls for regulation raised by an overwhelming majority of respondents to the open public consultations; they have also been rejected by the Courts as being unfounded.", para 158

[21] This is true for some obligations (e.g. in the Google Shopping and Android cases, Google advanced various objective justification arguments, all of which were rejected by the Commission, see https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, para 993-1008, 1155-1183, 1323-1332 and https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, para 653-671)

[22] We note that the UK Competition and Market Authority proposes to exempt gatekeepers from obligations if: ''for example that the conduct is necessary, or objectively justified, based on the efficiency, innovation or other competition benefits it brings. This is in recognition of the fact that conduct which may in some circumstances be harmful, in others may be

An alternative approach - which would be consistent with other proposals in this paper and with CERRE's position in its first assessment[23] - would involve **allowing the gatekeeper to advance a relatively narrowly defined set of objective justification grounds in a request for an 'exemption decision' from the Commission**. This would work in the same way as requests for specification decisions, discussed above[24]. **One proposal is that these requests should be made mutually exclusive so that the gatekeeper could either argue that it should be exempted from taking any measures to comply with the obligation (if it thought it had strong arguments for this) or it could seek further specification from the Commission on what measures it should take to comply (i.e. having accepted that it should do so).[25]**

If it sought an exemption, the gatekeeper would need to show that any attempt to comply with the obligation would result in a failure to achieve the objectives of promoting contestability and fairness over the longer term[26].

As with requests for specification decisions, the Commission could, at its discretion, open a proceeding to address the request from the gatekeeper and issue an exemption decision, or it could reject it without this decision being subject to appeal[27]. If the Commission rejected the exemption application, the gatekeeper would be expected to comply with the obligation without the benefit of being able to obtain further specifications from the Commission at that point[28]. It would remain open to the gatekeeper to seek further specification at some later date (although the Commission may wish or need to guide as to when it would be willing to consider a further request from the gatekeeper to avoid a repetitive cycle of requests and rejections)[29].

If the Commission accepted an exemption request[30], there would **be a question of how long any exemption decision ought to apply for.** The Commission's proposal envisages that suspensions granted under Article 8 should be **reviewed every year**. A similar requirement could apply to any exemption on objectively justified grounds.

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permissible or desirable as it produces sufficient countervailing benefits. We would anticipate guidance clarifying the circumstances when countervailing benefits might be accepted as a justification.' See https://assets.publishing.service.gov.uk/media/5fce73098fa8f54d608789eb/Appendix_C_-_The_code_of_conduct_.pdf, para 35

[23] CERRE p. 22

[24] Other approaches are also conceivable, such as the addition a provision requiring a gatekeeper to take 'all reasonable steps to comply' with an obligation (which might allow a gatekeeper to argue during an enforcement proceeding that there were no reasonable steps it could take) or to rely on the Commission exercising forbearance rather than granting specific exemptions in cases where compliance did not appear to offer any or significant benefits.

[25] Views differ within the CERRE academic team on the merits of this proposal. Some consider that gatekeepers should be allowed to advance objective justification arguments alongside requests for further specification in order to avoid the risk that otherwise they will be advanced sequentially. However, if the Commission wished to provide further specification under Article 7(2), having rejected a request for exemption, it would be free to do so.

[26] This would be necessary to ensure that short-term efficiencies do not frustrate the objectives of the Act, which are to safeguard the competitive process in digital markets over the longer term.

[27] If the Commission did reject the request to consider an exemption, it would be open to the gatekeeper to revisit this aspect of its claim when appealing a subsequent non-compliance decision of the Commission, should that situation arise. Therefore, a gatekeeper could challenge an enforcement decision from the Commission on the grounds that the measures it had taken had been effective in achieving the objectives of the obligation but also on the grounds that, even if ineffective, the measures ought not to have been required by the Commission on objective justification grounds.

[28] Assuming the obligation was relevant to the activities being undertaken by the gatekeeper in question.

[29] This point applies to any application made by the gatekeeper and rejected by the Commission – there clearly has to be some period of time before a further application can be made without the process becoming too inflexible or curtailing the rights of gatekeepers.

[30] This is further complicated by the fact that a decision to open a procedure to consider an exemption request is not the same thing as a decision to grant an exemption. The Commission could very well decide to examine the request for an exemption but conclude, after 6 months, that it was not warranted. As with proceeding relating to specification decisions on measures, the Commission should be required to notify the gatekeeper within [7] days of receiving the request whether it intends to act upon it.

7 Changing the obligations (Article 10)

The Commission's proposal anticipates that the list of obligations in Articles 5 and 6 may need to be supplemented to ensure that new forms of conduct (which may also limit the contestability of core platforms or maybe unfair) can be effectively addressed. Article 10 provides the Commission with the powers to do this, following a market investigation. There are several aspects of these arrangements which might be improved.

First, it should be clear that, in addition to introducing new obligations, the Commission can also amend existing obligations. This might be required it were to be found that compliance was difficult to achieve without being disproportionate, that the obligation could otherwise be better formulated (e.g. to provide for some specific exemptions), or that competitive or other conditions had changed such that original assumptions behind the obligation no longer applied in the same way. The **Commission might be expressly required to review the impact of the obligations during the periodic review** that is required under Article 38 and to propose amendments in light of these findings. The timing of the first review is not specified, but the Commission then envisages a review every 3 years. **We think a 5 yearly review is likely to be more appropriate (and would be consistent with review cycles in other European legislation.)**

Second, we note the current proposals do not seem to anticipate the withdrawal of obligations. It may be that the Article 38 review just referred to would also allow the Commission to propose the removal of obligations in the (highly unlikely) event it thought this necessary. It is not clear to us that any additional procedure should be required.

There is then a question of the process by which new obligations may be added or existing obligations amended[31]. The current proposals require the Commission to undertake a market investigation under Article 17 before changes can be made to the obligations in Articles 5 and 6. This provides designated gatekeepers with some predictability and assurance that the obligations they have taken measures to comply with will not be changed, or new obligations introduced, at short notice or without proper consideration. On the other hand, a market investigation can take up to 24 months, which could mean that obligations which are not fit for purpose or are difficult to enforce could remain in place for a significant time[32]. Besides, Article 10 allows the Commission to use delegated acts under Article 37 (without having to consult the Digital Markets Advisory Committee[33]) to introduce new obligations to pursue the objectives of the Act (contestability and fairness) which remain very broadly defined. Potentially, a wide variety and a large number of obligations could be introduced by the Commission using these mechanisms. This could represent a significant expansion in regulation for gatekeepers without the Commission itself being subject to much external scrutiny.

One alternative approach would be to retain the Article 10 process for the addition of substantively new obligations but to **allow for a more flexible approach when it comes to modification of existing obligations**. The evidence required to justify changes of this kind ought to already be available to the Commission and to have been gained from its attempts to enforce compliance with the obligations in their current form. Revisions to existing obligations might require 6 or 12 months (since they would require consultation with all existing designated gatekeepers as well as other affected parties) rather than 24.

Another approach would be to **forego Article 10 altogether, limiting the Commission's capacity to expand the scope of the obligations to the periodic review cycle** under Article 38. The problem with this is that no specific preparatory analysis (of the kind undertaken in a market

[31] In addition to the issues considered here, we discussed earlier the need for gatekeepers to be given sufficient time to be able to implement measures to comply with new obligations before they can be subject to enforcement action.
[32] Similar concerns could arise in relation to the designation process if it takes 24 months to designate a new gatekeeper (and at least a further 6 months before it is required to comply with any obligations)
[33] It is odd that the Commission must consult the DMAC before adopting a decision to enforce an obligation but not before adopting a new obligation (although Article 37(4) requires consultation with 'experts designated by each Member State')

investigation) would be required before a new obligation was adopted. This might be appropriate if the Commission had identified additional obligations in the course and as a result of other activities, such as extensive competition law investigations (which is the analytical basis on which the Commission largely relies for the obligations in the current proposals). But we should seek to avoid a situation in which new obligations are introduced into the Act without the Commission having undertaken sufficient preparatory work to ensure their applicability. (We propose to discuss the interaction between competition law and the Act in a later seminar)

The existing list of obligations could also be supplemented (or some even replaced[34]) by a more flexible approach, which may constrain the scope for expansion of regulation. The regulatory design of the Unfair Commercial Practices Directive, with its 'three degrees of discretion' might be a source of inspiration here. Next to the detailed obligations of Articles 5 and 6, **a new Article could be included with a more generic definition of prohibited conducts**. This new Article could include a more generic prohibition of conduct having the object or the effect of limiting users switching or multi-homing, which would sit alongside the existing obligations in Articles 5(b), 5(c), 6 (e), 6(f) and 6(h). It could also include a more generic prohibition of conduct aimed at enveloping existing or potential competitors through bundling and self-preferencing, to sit alongside the detailed obligations in Articles 5(e), 5(f), 6 (a), 6(b), 6(c), 6(d), 6(i) and 6(j).

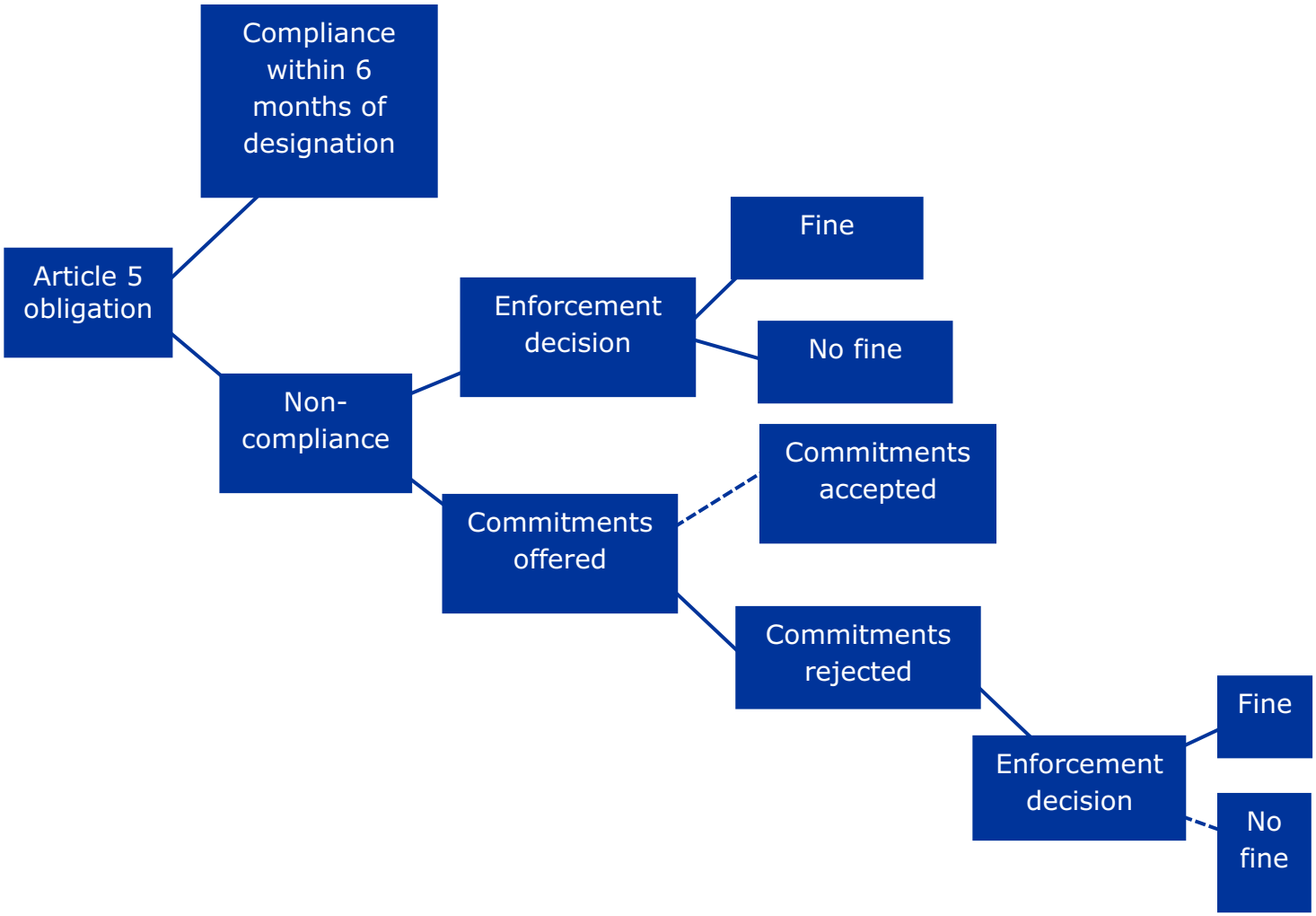
These obligations would be defined more generically, would apply to all gatekeepers, and would be enforced in the same way as the detailed obligations. However, further thought would need to be given as to whether and how the Commission might provide a further specification of the measures required for compliance (and whether, having done so, these would then become 'detailed obligations' like the others in Articles 5 and 6). These generic obligations would replace the Article 10 process.

[34] In our first assessment, CERRE suggested that the Article 5 list be further restricted to a sub-set of obligations, with everything else involving the further specification of the measures required to ensure the achievement of a set of four overarching objectives (see below), p.21. Views of the CERRE academic team may differ on the merits of this approach.

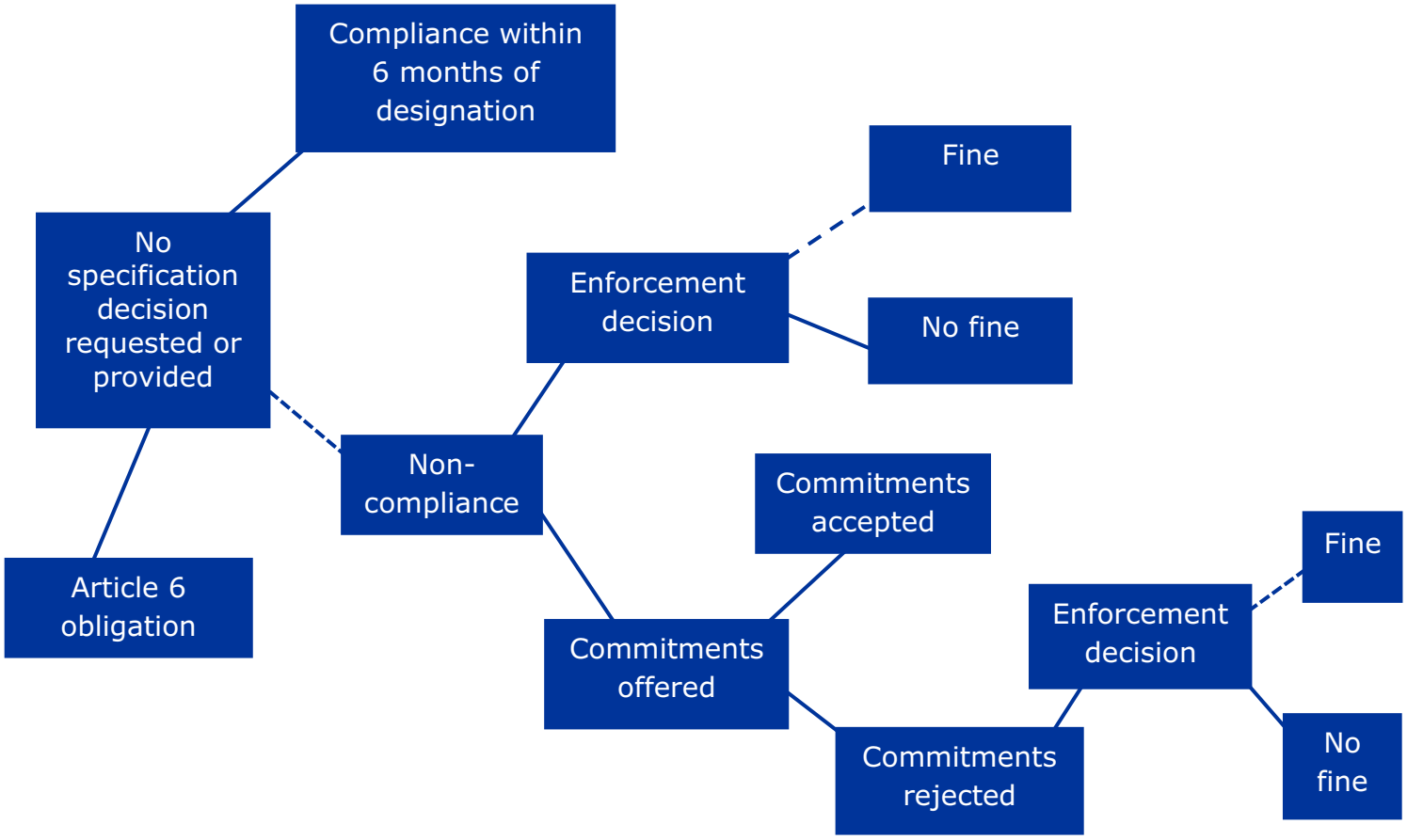
Annex

The implementation and enforcement process in the Commission proposal

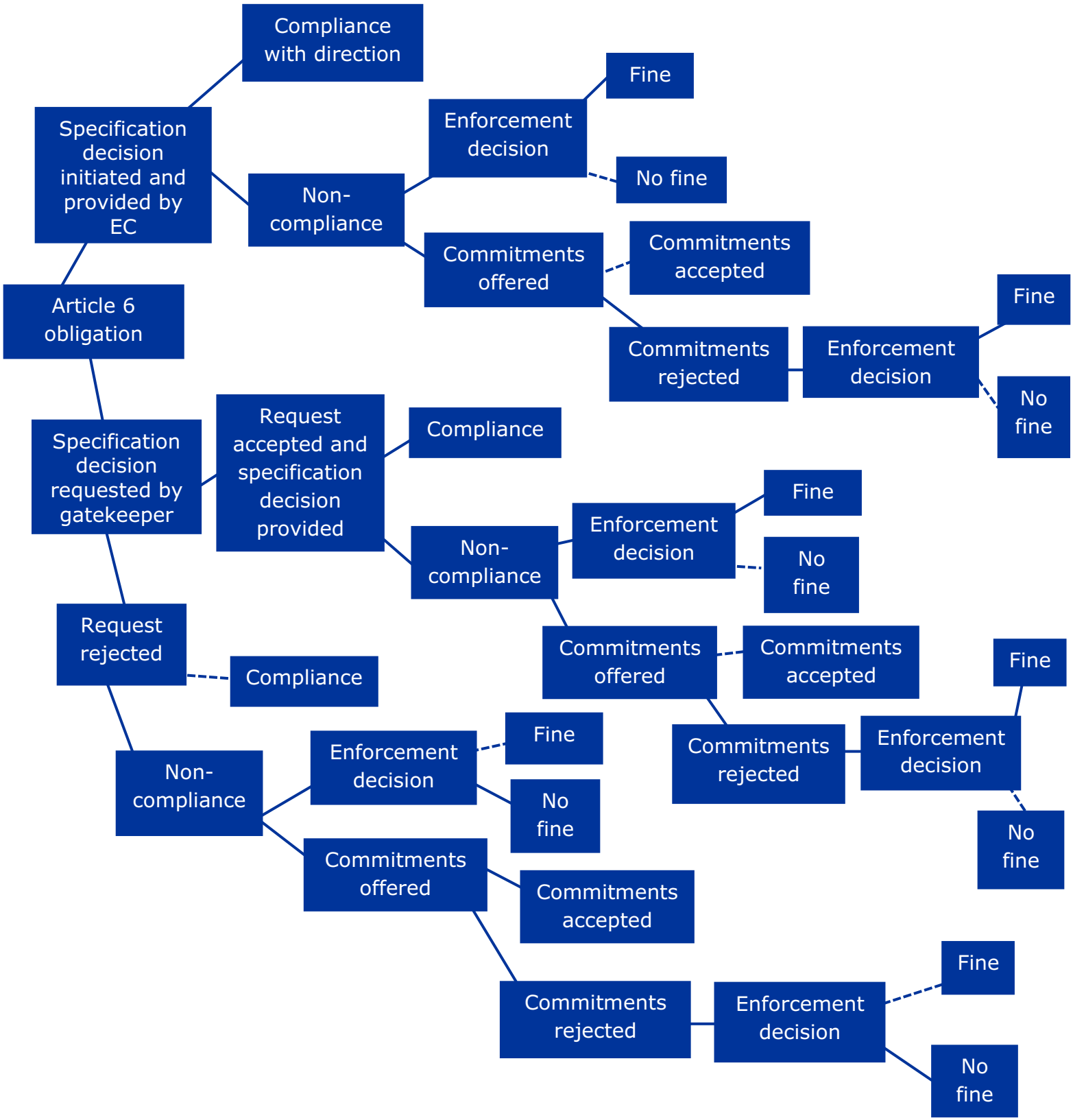
Article 5 obligations



Article 6 obligations – in absence of specification decision request or provision



Article 6 obligations – if specification decision requested and/or provided



cerre

Centre on Regulation in Europe

Avenue Louise, 475 (box 10)
1050 Brussels, Belgium

+32 2 230 83 60

info@cerre.eu

cerre.eu

@CERRE_ThinkTank