

大成 DENTONS

Europe TMT Series

Webinar 1: Digital Markets Act (DMA) and Digital Services Act (DSA)

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Grow | Protect | Operate | Finance

Welcome

Today's Speakers



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Agenda

- Introduction of Dentons Roadmap of EU TMT Regulations
- Digital Markets Act (DMA)
- Digital Services Act (DSA)
- Data aspects for DMA and DSA
- US or in-house counsel impact?
- Q&A



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Upcoming EU TMT regulations

Roadmap of upcoming EU TMT regulations



**Check out
our guide!**

1. Artificial Intelligence Act
2. AI Liability Directive
3. Chips Act
4. Cyber Resilience Act
5. Data Act Regulation
6. Data Governance Act
7. Digital Markets Act
8. Digital Operational Resilience Act
9. Digital Services Act
10. European Digital Identity Regulation
11. E-Evidence Agreement
12. ePrivacy Regulation)
13. The Pillar Two Directive
14. Media Freedom Act
15. Network and Information Security Directive 2
16. Product Liability Directive
17. Privacy Shield 2.0. Trans-Atlantic Data Privacy Framework
18. Regulation on Machinery Products
19. Regulation on targeting of political advertising
20. Interoperable Europe Act
21. MiCA (Markets in Crypto-assets)

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Digital Markets Act (DMA)

From ex-post antitrust battles to ex-ante regulation -
How Europe heightened the stakes and enforcement against the
digital gatekeepers

DMA

Where have we come from?

- **Origin and ambition behind the DMA**

- Perceived limits of EU antitrust enforcement to reign in on the GAFAM
- Reform of EU competition law or new instrument?
- Choice for an ex-ante instrument

- **DMA not an antitrust tool or instrument**

- Contestability and fairness **vs.** Competitive effects and efficiencies
- Protecting business and end users **vs.** Consumers / competitive process

DMA

Timeline?

Legislation

- Adoption on 14 September 2022, published on 12 October and entry into force on 1 November 2022
- Apply from 2 May 2023

Key implementation milestones (Best case)

- Within two months of DMA application (3 July), self-declaration as gatekeepers using thresholds of Article 3.2
- Within 45 working days (by 6 September), EC designates gatekeepers
- Between September 2023 and March 2024, EC and gatekeepers engage in dialogue on compliance with DMA
- March 2024, starting point for designated gatekeepers to comply with DMA

DMA

Scope?

Gatekeepers defined as undertaking providing 'core platform services' (Article 3) - Presumptions

- Significant impact: (i) EU turnover \geq EUR 7,5 B for 3 years; or (ii) market cap \geq EUR 75 B in 2022; and provides core platform services in at least 3 M.S.
- Gateway for business users to reach end users: 45 Mio active EU users in 2022 and 10K EU business users
- Entrenched and durable: gateway threshold satisfied for last three years

EC may define gatekeepers below thresholds

Core platforms services (Article 2): online intermediation, search engines, social network, video-sharing, OSs, web browsers, virtual assistants, cloud, online advertising, and number independent communications services

DMA

What?

Gatekeepers subject to obligations in Articles 5 & 6, where dialogue is contemplated for defining how gatekeepers ought to comply with obligations under Article 6

- **Article 5**

- Restrictions on use of personal data (combination, cross-use, sign-in to other services) unless explicit user consent is obtained
- Ban on MFNs
- Allow business users to get direct connect with end users
- Open-up app payments
- Transparency in ad markets for both advertisers and publishers

- **Article 6**

- Self-preferencing
- FRAND terms and conditions of service
- Dual role in competition with business users (restriction on use of data)
- Fragmentation of ecosystems BUT caveats for security and integrity (App stores, or uninstall or switching apps of gatekeeper)
- Data portability
- Interoperability with gatekeeper (e.g. wearable devices)
- Check ad performance of gatekeeper

DMA

EC powers & cooperation with MS

- **Role to designate gatekeepers and adequacy of gatekeepers' measures to comply with DMA**
- **Keep the DMA up-to-date by adding other core platform services (ChatGPT?) or other obligations**
- **Investigation powers aligned with EU competition law (including sanctions)**
- **Intersection with Merger control**
- **Role of Member States antitrust authorities in receiving complaints/whistleblowers**

DMA

Today

- Latency period
- **EC now vested with dedicated unit residing at DG COMP**
- **Organization of workshops with stakeholders**
 - Workshop on 5 December on self-preferencing
 - Workshop on 6 March on app stores FRAND terms and conditions, including payment services

The image features a background of lavender flowers in various shades of purple and blue. A semi-transparent purple overlay covers the left and center portions of the image, with a white arrow shape pointing to the right. The text "Digital Services Act (DSA)" is written in white, bold, sans-serif font within this arrow.

Digital Services Act (DSA)

Digital Services Act

Welcome New Regulation



Digital Services Act

Applicability

- **Mere conduit**
- **Caching providers**
- **Hosting providers**

Apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union

- a significant number of recipients of the service in one or more Member States in relation to its or their population; or
- the targeting of activities towards one or more Member States

Digital Services Act

Transparency obligations

- **Points of contact for Member States' authorities, the Commission and the Board**
- **Points of contact for recipients of the service**
- **Legal representatives**

- **Terms and conditions**

- **Reports**

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Data aspects for DMA and DSA

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Costs and metrics associated with digital advertising

So far: opaque RTB algorithms. **From now on:** DMA imposes transparency obligations (free of charge).

- Publishers and advertisers are informed of the **costs** associated with a relevant ad (including through disclosure of the remuneration received by the publisher – or the average remuneration)
- It is made clear to them what **criterion** is used to calculate the pricing model (e.g. price for impression, per view, etc.)
- **Similar dilemma** under the GDPR – profiling logic transparency – potentially exposing trade secrets, consequences: platforms taking baby steps until case law is there.
- **Examples of key ad sales metrics** (big players practice turned market practice):

$$\text{CPA} = \frac{\text{Cost}}{\text{Conversions}}$$

Cost-per-view (CPV)

CTR (Click-through-rate)

$$\text{CPC} = \frac{\text{Total Cost}}{\text{Total no. of Conversions}}$$

Data aspects for DMA and DSA

Expected limitations in targeting – “age of consent”?

- **DMA prohibits: processing end users’ personal data for the purpose of providing advertising services, if such data is retrieved from the use of services offered by third parties making use of core platform services of the gatekeepers**
- **Combining personal data derived from multiple services offered by the gatekeeper or by third parties**
- **Cross-using personal data (derived from a core platform service) in other services offered separately by the gatekeeper and vice-versa**
- **Signing in end users to other services of the gatekeeper in order to combine personal data**

+ (DSA): Limitations on targeting minors & relying on special categories of data

- **Similar dilemma** under the GDPR: advertisers and publishers had to make sure not to fall into automated decision making,
- **Limited complexity of targeting: no third-party cross-matching, no data enrichment (affluence, radius etc.), solution – contextual advertising, cookieless ID-less advertising**
- **Single opt in for multiprocessing – arguable, intersection of DMA/GDPR**
- ***Meta decision – contract performance as a legal basis is out of the picture**

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US or in-house counsel impact?

The Potential Impacts of the DMA and DSA on US Companies and the US Market are Enormous

- Agreement that issues must be addressed; disagreement on how to address (e.g., *ex ante* v. *ex poste*)
- Objections from the US include, for example, that the new regulations will:
 - Unfairly and unjustly target US companies
 - Exacerbate regulatory fragmentation
 - Require some companies to fundamentally change their value proposition, but materially impact all
 - Require actions that contradict other regulations
 - Stifle innovation without achieving the desired impacts, and breach the EU principle of proportionality
 - Entail from \$22B to \$50B in new compliance and operational costs (8-17% of EU revenues)

The Potential Impacts of the DMA and DSA on US Companies and the US Market are Enormous

- **Efforts by the US government and industry to change the regulations are ongoing**
- **US companies should prepare not only for the DMA, DSA and other regulations, but also for future change arising from the concerns and trends that these regulations reflect**
- **Flexibility, transparency, and granularity by design may help companies adapt more effectively to further regulatory change**

A close-up photograph of a lavender field with a semi-transparent purple overlay on the left side. The text "Questions?" is written in white on the overlay.

Questions?

Join our next sessions

February 23 The two dimensions of European cybersecurity regulation - Network Infrastructure Security Directive (**Directive NIS2**) and Digital Operational Resilience Act (**DORA**).

March 1 **AI** – global insights on emerging regulation and the key challenges for in-house legal to manage.



Thank you



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