



Pinsent Masons

Digital Single Market

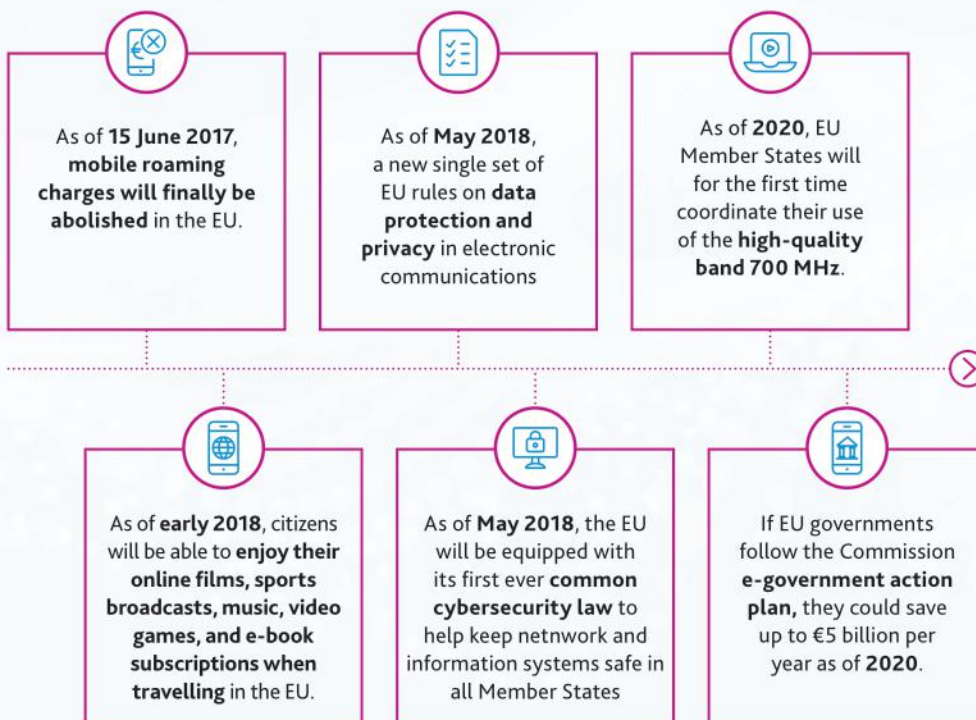
A Europe Fit for the Digital Age

A PURPOSE-LED PROFESSIONAL SERVICES
BUSINESS WITH LAW AT THE CORE

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DIGITAL SINGLE MARKET ACHIEVEMENTS



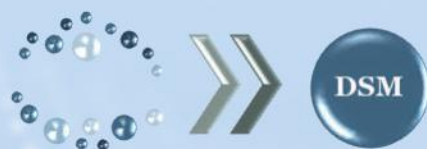
Introduction

The year 2022 marks yet another constitutive step towards a truly existing and functioning "Digital Single Market" ("DSM") within the European Union. The DSM is a long-lasting project originating from an initiative dating back to the year 2015 when the *Juncker Commission* published its communication COM(2015) 192 titled "A Digital Single Market Strategy for Europe". Over the initial five-year period, more than 30 legislative, and even more non-legislative, DSM initiatives got off the ground, most of which have been completed by now.

In late 2019, the new von der Leyen Commission took over, perpetuating the idea of one single economic market not only in the analogue but also in the digital sphere. The new Commission defined ambitious goals in its agenda "A Europe Fit for the Digital Age". The core elements are set out in the communication COM(2020) 67 titled "Shaping Europe's digital future" and the subsequent communication COM(2021) 118 "2030 Digital Compass: the European way for the Digital Decade". Clearly, *Ursula von der Leyen* and her colleagues in Brussels are eager to carry forward the concept of the DSM on many levels and in a multitude of sectors. The Digital Services Act, the Digital Markets Act and the Artificial Intelligence Act are only examples. The European digital economy shall benefit from a legal as well as factual framework allowing for modern communication, data-based business models and resilient online infrastructure.

The idea of a DSM affects us in manifold circumstances. It is not one single piece of legislation that needs to be adhered to, but rather, a multitude of legislative and administrative measures that constantly change both our private and business life. In the same way as we witness and shape technological progress, we need to adapt our legal environment in order to allow for prospering development. A core aspect in all this is the right mix of certainty, security and leeway for the unfolding of creativity. In detail, this means (1) a regulatory framework that safeguards a fair, reliable and predictable playing field, (2) adequate technical and organizational measures shielding off cyber-crime and cyber-attacks, and (3) an adequate atmosphere and funding of innovative ideas and projects.

Pinsent Masons accompanies a great number of international clients in the DSM process. Our team of experienced lawyers, with a technological background from various European offices, monitors the individual measures taken on both a European and domestic level, helping our clients to shape tomorrow's products and propositions. We help reaching the leading edge and to benefit from early-bird moves. This brochure holds a brief summary of where we stand and what the next steps will be on our journey towards a DSM. You will find detailed information about our key contacts at the end of the brochure.



In late 2019, the new von der Leyen Commission took over, perpetuating the idea of one single economic market not only in the analogue but also in the digital sphere. **The new Commission defined ambitious goals in its agenda "A Europe Fit for the Digital Age".**

Digitalization Everywhere

Today's challenges are digital and so are the opportunities. All kinds of businesses depend on digital connectivity, online access to information and electronic platforms allowing business activities beyond the reach of the traditional analogue world. The former president Jean-Claude Juncker phrased it well when pointing out in 2014 that *"we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law."* Others rightly emphasize that the *"industrial revolution of our time is digital"*.

Quite bold words, but they ring true. The European Commission estimates that a connected digital single market within the European Union could generate up to € 250 billion of additional growth in only a few years. Empowering people with a new generation of technologies is therefore the accurate goal the Commission has set out for the next five years. This shall be accomplished by focussing on four core areas: (1) data protection, (2) better access to online goods for consumers and businesses, (3) the right environment for digital networks and services, and (4) economy and society.

The Single Market Concept

The idea of an integrated single market across all Member States is not new. The founding members of the then-called European Economic Community (EEC) aimed to bring together their domestic economies. Accordingly, the notion of a *"Common Market"* was introduced at the very beginning. As early as 1982, the European Court of Justice emphasized that it requires *"the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market."*



Today, this goal is set out in Article 26 TFEU. However, the Internet by its very nature does not recognise domestic borders. This is why the online world very easily reveals the trade barriers artificially implemented. So-called geo-blocking is the most apparent phenomenon of that kind. So, the Commission eventually took on the regulatory challenge by developing its DSM strategy.

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The Guiding Principles

The underlying principles are not completely new. The European Union has a range of established rules which apply to the digital economy. Whilst some are very specific, others apply general European Union law in the particular context. However, the development of the existing regime largely

pre-dated the explosion of digital activity in recent years. The current initiatives build on the existing framework with the aim of modernising the overall regime so that it works effectively for the digital economy as it is today. The DSM will be the product of existing and new rules working together.

Four familiar EU principles run through many aspects of it:



Harmonised Rules: applying the same minimum standards to the same activity (whether that be the terms on which consumers buy from digital commerce businesses, the content of digital content services or the handling of consumers' personal data) across all Member States makes it easier for citizens and business to conduct their activities without regard to national borders.



Reduced Barriers: making it easier for citizens to treat key "assets" of the digital economy, like content they acquire and their own personal data, in a way similar to personal possessions. Increasing rights to move those assets across national boundaries or from one service provider to another.



Coordinated Enforcement: cooperation between those responsible for enforcing the rules locally, at Member State level or EU wide, combined with "passporting" (meaning that compliance with the rules or regulator's requirements in one Member State covers the whole EU) increases day to day consistency and also confidence for business and citizens that they can trade EU-wide. It also reduces costly requirements to establish compliance systems for multiple countries.



Economies of scale and robust competition: to compete on global markets, EU-based businesses should (a) be able to serve the entire EU market without having to duplicate infrastructure or seek local licences, and (b) be subject to robust competition from both EU-based and non EU-based players. Competition for the EU-wide market will lead to the emergence of EU digital champions able to compete on world markets.

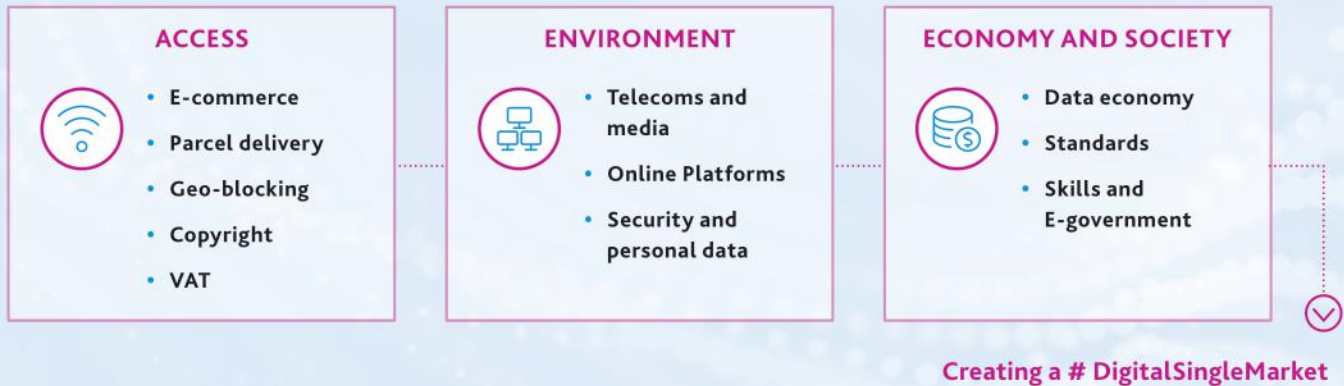


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The Three Pillars

The initial DSM Strategy was built on three pillars: (1) better access for consumers and businesses to digital goods and services across Europe, (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish, and (3) maximising the growth potential of the digital economy. In order to accomplish these goals,

the Commission broke up these pillars in a total of 16 individual initiatives. Those included a variety of legal areas and therefore also impact a wide range of industries that go from E-Commerce via Copyright to Telecoms. The following pages will give you insights into the major areas affected, the key changes and their current status.



The Four Areas

The *von der Leyen* Commission has further developed this concept into four policy areas:



Online Content & Platforms

THINGS TO KNOW

First phase:

- Modernisation and Harmonisation of EU copyright by (1) widening access to digital content across the EU, (2) introducing new and amending existing exceptions and limitations and (3) creating a fairer marketplace and by reducing piracy
- Extension of the Satellite and Cable Directive 93/83/EEC (the SatCab Directive) with regard to an extension of the rules to programmes provided over the internet by the new Broadcasting Directive
- Reform of the Audiovisual Media Services Directive 2010/13/EU (AVMS)

Second phase:

- Reinforcement of citizens' trust through the European Democracy action plan, which aims at promoting free and fair elections, strengthening media freedom and countering disinformation
- Overhaul of the eCommerce Directive through the Digital Services Act. Rethink of the liability rules for platform operators, and creation of a regulatory framework to ensure the fairness and transparency of platforms' content moderation practices.

WHERE ARE WE NOW?

9 December 2015	Action plan "Towards a modern, more European copyright framework" and draft for the Portability Regulation (Copyright Package I)
14 September 2016	Copyright Package II, including drafts for (a) a new copyright directive, (b) a broadcasting regulation and (c) the implementation of the Marrakesh Treaty
10 October 2017	Entry into force of the Regulation (EU) 2017/1563 and Directive (EU) 2017/1564 implementing the Marrakesh Treaty
29 November 2017	IP Package, including three communications regarding the enforcement of IP rights
1 April 2018	Entry into force of the Regulation (EU) 2017/1128 on cross-border portability of online content services comes into force.
26 April 2018	Communication on tackling online disinformation, unveiling the Code of Practice on disinformation. It sets self-regulatory standards on a range of issues, from transparency in political advertising to the closure of fake accounts and demonetization of purveyors of disinformation
17 May 2019	Copyright Directive (EU) 2019/790 and Broadcasting Directive (EU) 2019/789 published in the Official Journal of the EU triggering the implementation period for Member States
19 September 2020	End of implementation phase of AVMS Directive (EU) 2018/1808, EC launches infringement proceedings against 23 Member States
3 December 2020	European Democracy Action plan, including provisions to counter disinformation: Overhaul of the Code of Practice on disinformation into a co-regulatory framework of obligations and accountability for online platforms
15 December 2020	Digital Services Act proposal <ul style="list-style-type: none"> • Amends the E-Commerce Directive as regards platform liability • New transparency and accountability obligations • Asymmetric regulation: the larger the platform is, the heavier the regulatory burden • Dedicated new governance framework, with national and EU authorities, and the Commission overseeing very large online platforms
7 June 2021	End of implementation phase of the Copyright Directive (EU) 2019/790, EC launches infringement proceedings against 24 Member States
7 June 2021	End of implementation phase of the Broadcasting Directive (EU) 2019/789
12 November 2021	Commission calls four Member States to complete the transposition of the AVMS Directive
18 November 2021	Council adopts its General Approach on the Digital Services Act
20 January 2022	Parliament's plenary adopts a negotiating position on the Digital Services Act



WHAT'S NEXT?

February 2022	Kick-off of the three-way negotiations between Council, Parliament and Commission. Key points of discussion: <ul style="list-style-type: none">• Tension around the classification as a very large online platform• Governance structure• Content moderation of online hate speech and disinformation• Targeted advertising as a business model
In 2022	Member States to progress with their implementation of the Copyright Directive
Late 2022	Code of Practice on Disinformation to become a co-regulatory instrument with the enactment of the Digital Services Act

WHO IS IMPACTED AND HOW?



Content owners and licensees need to review the entire production chain starting with the acquisition of content, the making available of content, the structuring of websites, the protection of content, etc. Everyone in the (social) media industry – from the user who uploads content to the platform operator, publishers and broadcaster – will be affected by the new copyright rules.



Content services on demand are affected by the portability regulation which already entered into force in April 2018.



Changes to the AVMS Directive will increase the regulatory burden on online video sharing platforms as well as introduce additional regulation for content provided via audio visual media services.



Clients will have to review their current business models, looking at whether those will work in future because of added regulatory burdens, and changes in sourcing costs due to different exploitation rights and different exemptions/limitations (e.g. news aggregators and online platforms).



Online platforms will face a series of new obligations related to the way they offer and police the content on their platform, and need to comply with new extensive reporting and transparency rules.

E-Commerce

THINGS TO KNOW

First phase:

- Harmonization of the rules on the conformity of goods and digital content (products and services) sold online
- Abolition of territorial blocking of online sales sites ("geo-blocking") to end discrimination of consumers and businesses
- Reform of the cross-border parcel sales market and new VAT rules for cross-border online sales
- Creation of a representative action mechanism

Second phase:

- New measures to protect consumers from unfair commercial practices, for example through dark patterns and hidden advertising
- Review of the product safety rules to make them fit for the connected and digital age
- Due diligence obligations for marketplace operators as regards their business customers' identity and product offering to end-users.

WHERE ARE WE NOW?

9 December 2015	Commission published draft directives on contracts for goods and digital content sold online
7 April 2016	VAT Action Plan
25 May 2016	Drafts on regulations on geo-blocking, parcel delivery and consumer protection
10 May 2017	Final report on e-commerce inquiry
16 January 2018	Entry into force of the Regulation (EU) 2017/2394 on consumer protection
18 January 2018	Entry into force of the Directive (EU) 2017/2455 on VAT for supplies of services and distance sales
11 April 2018	Presentation of the New Deal for Consumers including (a) a Representative Actions Proposal and (b) a Proposal on better enforcement and modernisation of Union consumer protection rules
22 May 2018	Entry into force of Regulation on cross-border parcel delivery services (EU) 2018/644
3 December 2018	Entry into force of the Geoblocking Regulation (EU) 2018/302
12 July 2020	Entry into force of Regulation (EU) 2019/1150 on fairness and transparency for business users of online intermediation services
13 November 2020	Communication on a New Consumer Agenda <ul style="list-style-type: none"> • New instrument to tackle online commercial practices disregarding consumers' right to make an informed choice, abuse their behavioural biases or distort their decision-making • Review of the Product Safety Directive 2001/95/EC to adapt current rules to the ongoing digitalisation and the increase of connected products • Review of directives 2008/48/EC and 2002/65/EC respectively on consumer credit and marketing of financial services, to reinforce consumer protection
15 December 2020	Presentation of the Digital Services Act proposal, introducing a new set of obligations for marketplace operators and creating a Know Your Business Customer principle
24 December 2020	Entry into force of the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers
31 December 2020	End of implementation phase of Council Directive (EU) 2019/1995 into national law and entry into force of Council Regulation (EU) 2019/2026
1 July 2021	End of implementation phase of the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and of Directive (EU) 2019/771 on contracts for the sale of goods
1 July 2021	Entry into force of the new VAT rules for e-commerce
18 October 2021	Presentation of the EU-US Trade and Technology Council and launch of the consultation platform for stakeholder's involvement to shape transatlantic cooperation
28 November 2021	Deadline for transposition of the Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules

WHAT'S NEXT?

February 2022	Kick-off of the three-way negotiations between Council, Parliament and Commission. Key points of discussion: <ul style="list-style-type: none">• Tension around the classification as a very large online platform• Governance structure• Content moderation of online hate speech and disinformation• Targeted advertising as a business model
25 December 2022	Deadline for transposition period of the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

WHO IS IMPACTED AND HOW?



Everyone in the E-Commerce (retailers, infrastructures and transportation businesses consumers) industry will have to comply with the new minimum standard rules for the provision of digital content and parcel delivery; review of the contractual terms necessary



Online marketplaces due to the new restrictions regarding geoblocking and discriminatory pricing. New obligations to collect information on the traders using their platform and ensure their accuracy, under the Know Your Business Customer principle.



Simplification of current VAT rules for cross-border activities are supposed to result in 95% less costs for e-Commerce companies



Everyone in the E-Commerce (retailers, infrastructures and transportation businesses consumers) industry **will have to comply with the new minimum standard rules for the provision of digital content and parcel delivery; review of the contractual terms necessary.**

Telecoms

THINGS TO KNOW

The electronic communication policy of the European Union aims to improve competition, innovation and consumer rights. As part of its digital strategy, the EU will accelerate the rollout of ultra-fast broadband. 5G shall become one of the most critical building blocks for the digital economy in the EU

The EECC is at the core of massive changes in the telecom laws throughout the EU. In a nutshell, the EECC:

- Promotes investment in very high-capacity networks, such as optical fibre and 5G,
- Updates the rules for radio spectrum management across the EU
- Broadens powers of the national regulators to impose access obligations on network operators,

- Extends regulation to providers which were not previously regulated, e.g., over-the-top providers,
- Promotes competition in various ways, including an "efficient infrastructure-based competition" or by lowering switching barriers for bundles (all-in-one packages),
- Provides for more consumer protection, *inter alia*, maximum harmonisation, enhancing user rights, rules on bundling of services, and others,
- Enhances cybersecurity in the telecoms industry

Even after the expiration of the transposition period, the majority of the Member States haven't (fully) implemented the EECC in their national legislations yet

WHERE ARE WE NOW?

4 December 2018	Adoption of the Regulation (EU) 2018/1971 establishing the Board of European Regulators for Electronic Communications (BEREC) and its entry into force
11 December 2018	Adoption of the Directive (EU) 2018/1972 establishing the European Electronic Communications Code (EECC)
15 May 2019	Cap on prices of international communications within the EU (intra-EU calls and text messages) took effect
17 December 2019	Commission adopts an Implementing Regulation (EU) 2019/2243 establishing a template for the contract summary that publicly available electronic communications services operators shall provide to consumers, microenterprises, small enterprises and not-for-profit organisations in the EU
29 January 2020	Commission adopts the EU toolbox on 5G Cybersecurity which identifies a coordinated European approach based on a common set of measures, aimed at mitigating the main cybersecurity risks of 5G networks
11 June 2020	BEREC Guidelines on the Implementation of the Open Internet Regulation
15 September 2020	First ECJ ruling on the Net Neutrality rules enshrined in Regulation 2015/2120
18 December 2020	Commission adopts a revised version of its Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation
21 December 2020	Most EU countries missed the implementation deadline for the EECC in December 2020
4 February 2021	Commission launches infringement proceedings against 24 Member States for failing to implement the EECC into national law. Only Greece, Hungary and Finland have notified the Commission of their transposition measures on time
24 February 2021	Commission proposes a new Roaming Regulation to extend existing rules and introduce new rules. The current Roaming Regulation will expire on 30 June 2022.
17 June 2021	Decision harmonising the use of the 6 GHz band for wireless networks across the EU, which will support a growing number of devices, online applications and innovative services that require larger bandwidth and faster speeds. This should enable better, faster, and more stable Wi-Fi connections across the EU.
30 June 2021	Communication on the "Long term vision for rural areas" by 2040 Connectivity as a key element in revitalising local communities
7 July 2021	Adoption of the regulation establishing the next Connected Europe Facility (CEF) programme, which will support investments, <i>inter alia</i> , in Europe's digital infrastructure networks. The program will fund connectivity projects of common EU interest and contribute to deploying Gigabit and 5G networks across the EU with a budget of 2.07 bn EUR.



WHAT'S NEXT?

Early 2022	Adoption of the new Roaming regulation
In 2022	All Member States to transpose the EEC into their national legislations

WHO IS IMPACTED AND HOW?



Traditional network operators and other communication service providers will have to adjust their businesses (including pricing models) to the new telecommunication rules, notably to consider the concept of Universal Service



Market players to experience the simplification of investment in new network infrastructure



Due to the consistent rules in the network area in order to create a fair market, over-the-top content (OTT) and other online providers will have to comply with the regulation as well



All businesses and consumers shall experience enhancement of Internet connectivity throughout the EU



Traditional network operators and other communication service providers will have to **adjust their businesses (including pricing models) to the new telecommunication rules, notably to consider the concept of Universal Service**

Privacy, Data & eGovernment

THINGS TO KNOW

- Reduce barriers to the free flow of data
- Localisation of data
- Transfer of data
- Adjustment of the ePrivacy Regulation to the new requirements of the General Data Protection Regulation
- Personal data
- Machine generated data
- New cybersecurity rules
- Modernization of public administration in order to achieve cross-border interoperability and to simplify the governments services for citizens

WHERE ARE WE NOW?

19 April 2016	European Cloud Initiative – "Building a competitive data and knowledge economy in Europe" and EU eGovernment Action Plan 2016-2020
27 April 2016	Data Protection Directive 2016/680 for the police and criminal justice sector
5 July 2016	Commission and European Cyber Security Organisation sign contractual Public-Private Partnership (cPPP)
10 January 2017	Draft ePrivacy Regulation
13 September 2017	Draft Regulation on the free flow of non-personal data in the EU and Cybersecurity Package, including (a) a Directive on combating fraud and counterfeiting of non-cash means of payment, and (b) a Regulation on ENISA, the "EU Cybersecurity Agency"
13 October 2017	Parliament reaches a common position on the ePrivacy Regulation proposal
6 May 2018	Deadline for implementation of the Data Protection Directive for the police and criminal justice sector proposal
9 May & 9 Nov 2018	Deadline for implementation of the NIS Directive
28 May 2019	Regulation on the free flow of non-personal data in the EU becomes applicable
27 June 2019	Regulation on ENISA (the EU agency for Cybersecurity) and voluntary cyber security certification enters into force
16 July 2019	Open Data Directive – (replacing the PSI Directive of 2003) enters into force
January 2020	Commission Report from the Expert Group on Liability for Artificial Intelligence and other emerging digital technologies <ul style="list-style-type: none"> • Conclusion that there is no need for a new legal personality to be created to account for autonomous systems, • That existing rules on liability do not need to be rewritten to accommodate the use of AI. • That "certain amendments" are necessary to address the "specific characteristics" of the technology and its applications
19 February 2020	Commission launches consultation on "A European Strategy for Data".
24 June 2020	Commission's first evaluation report on the GDPR.
25 November 2020	Commission publishes draft Data Governance Act <ul style="list-style-type: none"> • Designed to encourage the creation of new infrastructure for sharing data, and in turn help build a digital single market for data across EU Member States. • Four pillars: the re-use of sensitive public sector data; establishing a framework for new data intermediaries; corporate and individual data altruism; and fostering coordination and interoperability through the European Data Innovation Board.
15 December 2020	Commission publishes proposal for a Regulation on Digital Markets Act <ul style="list-style-type: none"> • Proposal introduces new rules for certain large online platforms / "gatekeepers". • Aims to create A fairer business environment, encourage innovation, offer consumer choice and remove unfair business practices.

21 December 2020	Deadline for Member States to transpose the European Electronic Communications Code into national legislation. This introduces legislative changes which bring providers of "interpersonal communications services" within scope of the ePrivacy Directive. The so-called "over-the-top" (or OTT) services, such as VoIP and web-based email and messaging services, will for the first time be subject to communications content and traffic data confidentiality obligations and interception prohibitions under existing law.
4 February 2021	Commission opens infringement procedures against 24 Member States for not transposing the European Electronic Communications Code into national legislation.
10 February 2021	Council reaches General Approach on the ePrivacy Regulation proposal <ul style="list-style-type: none"> • Defines cases service providers may process electronic communications data or gain access to data stored on end-users' devices. • Emphasises the confidentiality of electronic communications. • Opens up potentially far-reaching processing powers, especially for metadata, even without user consent, including processing of pseudonymised data for statistical purposes and for purposes for which the data were not collected, known as further processing. • Refers to the GDPR for various aspects, e.g. remedies, liability and sanctions.
21 April 2021	Commission Communication on European Approach to Artificial Intelligence
21 April 2021	Coordinated Plan with Member States: 2021 update <ul style="list-style-type: none"> • Objective is to gradually increase public and private investment in AI to a total of EUR 20 billion per year over the course of this decade. • Move from intentions to concrete actions, as outlined in the Plan. • Alignment of national actions and EU actions.
21 April 2021	Commission Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)
28 May 2021	European Commission's launches consultation on the Data Act
3 June 2021	Commission proposes the Digital Identity Regulation to create a secure, widely useable digital identity system
16 July 2021	Member States' deadline to transpose Directive (EU) 2019/1024 on Open Data and the Reuse of Public-Sector Information
29 October 2021	Commission adopts delegated act to strengthen the cybersecurity of wireless devices and products
5 November 2021	Council adopts its General Approach on the Digital Markets Act
30 November 2021	Political compromise between the Parliament and the Council on the text of the Data Governance Act
15 December 2021	Parliament's plenary adopts its negotiating position on the Digital Markets Act.

WHAT'S NEXT?

January 2022	Kick-off of the three-way negotiations between Council, Parliament and Commission on the Digital Markets Act
Early 2022	Enactment of the trilogue agreement on the Data Governance Act by the Parliament and Council
Early 2022	Commission to release its Data Act proposal to facilitate data access and use and review the rules on the legal protection of databases
In 2022	Update on: <ul style="list-style-type: none"> • Artificial Intelligence Act, • ePrivacy Regulation • Data Act

WHO IS IMPACTED AND HOW?



All industries engaged in data management or processing are affected, in particular the cloud industry and those using AI or significant data analytics, Internet of Things and other connected devices and emerging technologies;



New rules for AI through guidance and legislation



High fines with regard to data protection infringements need to be kept in mind when handling personal data; the data protection authorities are 'flexing their muscles' and are demonstrating they expect those who process personal data to be GDPR compliant



Less restrictions on the data flow of non-personal data between businesses



Encouraging the opening and sharing of data between business and the public sectors



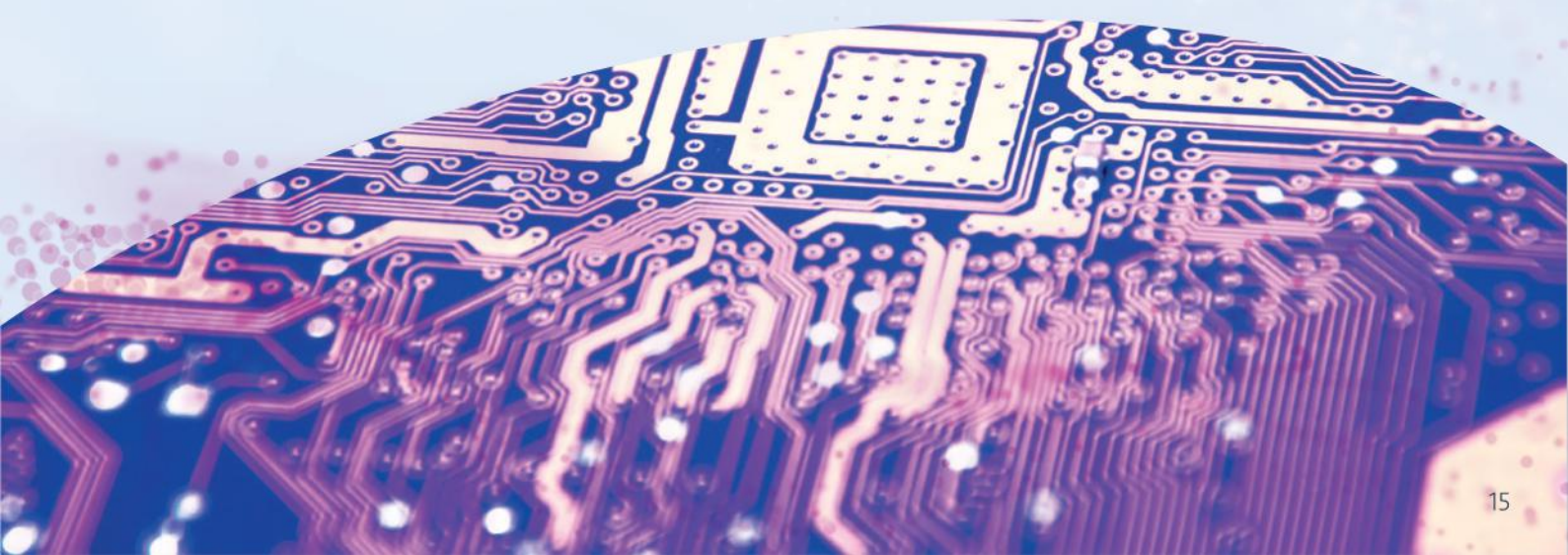
Scope of ePrivacy Rules to be expanded, irrespective of progress on the proposed ePrivacy Regulation



Businesses depending on data need to consider the new requirements regarding data breaches in light of the NIS Directive



Less administrative burden for businesses and citizens regarding government services



Key Contacts



Nils Rauer
Partner, Digitisation & Copyright
☎ +49 69 506026 012
☎ +49 177 447 59 93
✉ nils.rauer@pinsentmasons.com



Florian von Baum
Partner, Telecoms & Outsourcing
☎ +49 89 201043 537
☎ +49 172 368 01 88
✉ florian.vonbaum@pinsentmasons.com



Diane Mullenex
Partner, Telecom & Regulated Industries
☎ +44 (0)20 7490 9250
☎ +44 (0)7979 477 965
✉ diane.mullenex@pinsentmasons.com



Annabelle Richard
Partner, e-Health & e-Commerce
☎ +33 1 53 53 02 23
☎ +33 6 21 17 64 05
✉ annabelle.richard@pinsentmasons.com



Emmanuel Gougé
Partner, Media & Technology
☎ +33 1 53 53 02 80
☎ +33 6 80 70 34 05
✉ emmanuel.gouge@pinsentmasons.com



Andreas Carney
Partner, e-Commerce & FinTech
☎ +353 1 553 8603
☎ +353 87 187 9584
✉ andreas.carney@pinsentmasons.com



Wouter Seinen
Partner, Media & Technology
☎ +31 20 7977 710
☎ +31 611 34 30 61
✉ wouter.seinen@pinsentmasons.com



Andre Walter
Head of Data Law Solutions Netherlands
Data Privacy
☎ +31 20 7977 712
☎ +31 655 31 58 10
✉ andre.walter@pinsentmasons.com



Sarah Cameron
Legal Director, Technology Know-how
☎ +44 (0)20 7490 6335
☎ +44 (0)7920 270 992
✉ sarah.cameron@pinsentmasons.com



Rémi Bresson Auba
Associate, Telecoms
☎ +44 (0)20 7054 2548
☎ +44 (0)7770 702 697
✉ remi.bressonauba@pinsentmasons.com



Wesley Horion
Senior Paralegal, Technology Know-how
☎ +49 69 506026 040
☎ +49 162 202 68 05
✉ wesley.horion@pinsentmasons.com



Pierre-Emmanuel Froge
Associate, e-Commerce
☎ +33 1 53 53 08 69
☎ +33 7 87 93 49 95
✉ pierre-emmanuel.froge@pinsentmasons.com





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