cerre DIGITAL PLATFORMS SUMMIT

WELCOME

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INTRODUCTION

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INTRODUCTION

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RITA WEZENBEEK
KEYNOTE

**DIRECTOR
EUROPEAN COMMISSION**

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First lessons of implementing the DMA and the DSA

PANEL

HOW TO ENSURE EFFECTIVE DSA COMPLIANCE AND ENFORCEMENT

11:30-12:20

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PANEL

HOW TO ENSURE EFFECTIVE DSA COMPLIANCE AND ENFORCEMENT

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PANEL

HOW TO ENSURE EFFECTIVE DSA COMPLIANCE AND ENFORCEMENT

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LUNCH BREAK
LUNCH BREAK
LUNCH BREAK

12:20-13:40

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PLEASE SLOWLY RETURN TO YOUR SEATS

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MARTIJN SNOEP
KEYNOTE

CHAIRMAN AUTHORITY FOR CONSUMERS AND MARKETS (ACM)

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MARTIJN SNOEP

KEYNOTE

**CHAIRMAN
AUTHORITY FOR
CONSUMERS AND MARKETS
(ACM)**

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Views of a national regulator

GEORGIOS GRYLLOS

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RÉFÉRENDAIRE
COURT OF JUSTICE OF THE
EUROPEAN UNION

Facets of judicial review in the Digital Markets Act

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ALL OPINIONS ARE PERSONAL AND DO NOT REFLECT THE VIEW OF THE ECJ

PANEL
DMA COMPLIANCE AND PROCESS

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HOW THE PROCESS IS EXPECTED TO WORK

• GKs decide for themselves which measures to take to comply • Article 5 'self-executing' but additional specification from EC available for Articles 6 & 7 (not sought or provided to date) • *Ex ante* engagement between GKs and EC but more limited engagement directly between GKs and 3Ps to date	IMPLEMENTATION
• EC Template for annual self-assessment Report but GKs likely to approach compliance and reporting in different ways • Non-confidential Report intended to enable 3P scrutiny and feedback *ex post* • Risk of financial penalties intended to incentivise early compliance by GK	ASSESSMENT

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ISSUES ARISING FROM COMPLIANCE PROCESS

Measures required to comply with obligations may be:

- Novel
- Unclear
- Have uncertain impacts and uncertain responses from users or 3Ps
- Involve different trade offs

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ISSUES ARISING FROM COMPLIANCE PROCESS

Specification process intended to provide clarity but uncertainty about how it will work or when applicable

- GK concern: request interpreted as lack of confidence in existing measures?
- EC/3P concern: process delays compliance
- Used:
  - *Ex ante*, to provide clarity on measures GK should implement
  - *Ex post*, to obtain a 'certification of compliance' for existing measures (but what does that mean)?

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ISSUES ARISING FROM COMPLIANCE PROCESS

'Effectiveness' of some measures expected to be contested and difficult to assess
- Impact may accumulate over time and effectiveness may reflect that
- Impact may depend on 3P or user responses, which will vary and may be outside GK control
- GKs and 3P both have incentives to engage in strategic behaviour
- Few instances where EC will certify compliance

Identifying barriers to effectiveness likely to be contested/difficult
- GK actions difficult to identify and impact difficult to assess
- Remedies may therefore be difficult to determine

EC risks becoming intermediary between GKs and 3Ps, with little or no direct engagement
- EC may lack skills and resources to perform this function
- Measures may be less effective and compliance more contested as a result

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OUR RECOMMENDATIONS TO ADDRESS THESE ISSUES

EC should produce guidance to GKs (and 3Ps) on how to improve prospects of compliance, reduce risk of fines and/or reduce costs of compliance, including on:

- Circumstances in which specification request to EC is appropriate and consequences of such a specification (e.g., compliance deadline remains but enforcement approach may vary)
- Ensuring transparency in EC/GK dialogues
- Ensuring protection of 3Ps that complain to EC
- When and how GKs and 3Ps should engage directly with each other and implications for EC enforcement approach, including:
    - **Considering 3P engagement for compliance for some obligations but not others**
    - Standardising and resolving conflicting 3P demands
    - Avoiding unnecessary delay
    - Role of EC in process

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OUR RECOMMENDATIONS TO ADDRESS THESE ISSUES

EC should introduce incentives for GKs and 3Ps to engage in direct dialogue to resolve issues before implementation where appropriate

- EC more responsive to specification requests from GKs who do
- EC approach to enforcement influenced by GK conduct including approach to engagement with 3Ps
- 3Ps expected to engage with GK before complaints to EC

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OUR RECOMMENDATIONS ON OUTPUT INDICATORS

Output indicators intended to supplement other evidence in the compliance assessment and are intended to be:

- Quantitative/objective measures of defined outputs
- Comparable over time for same GK (to assess cumulative effects and variances between periods)
- (Cautiously) Comparable between GKs for same CPS
- Not inflexible benchmarks
- Not targets

GKs expected to interpret figures in the Report and supplement with other data (e.g., surveys of user experience, A/B test results)

Produced at appropriate level of aggregation (EU vs MS, 3P vs aggregate)

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OUR RECOMMENDATIONS ON OUTPUT INDICATORS

Process indicators
Steps taken by individual gatekeeper to implement obligation (not comparable)

Output indicators
Outputs/actions that arise from businesses and end users engaging with an individual gatekeeper (potentially comparable)

Outcome indicators
Consequences of engagement and aggregate gatekeeper measures for market structure or market outcomes

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EXAMPLE

		The aim of this provision is to enable end users to easily uninstall gatekeeper apps and to easily apply default settings for third party (as well gatekeeper) apps.
	A. % of gatekeeper apps (as % of total installed gatekeeper apps at the end of the prior relevant period) that have been uninstalled during the relevant period for each gatekeeper app and each type of OS	Indicator A is a flow measure of the proportion of gatekeeper apps that are uninstalled in the relevant period and, by implication the ease and willingness of users to uninstall gatekeeper apps. It allows assessment of changes over time and comparison between different apps and types of OS.
Art 6(3) Allow uninstallation of apps	B. % of active end users that uninstalled a gatekeeper app, for each gatekeeper app, during the relevant period	Indicator B is a measure of the propensity of users to uninstall gatekeeper apps, whereas A measures the extent to which uninstallation is taking place in aggregate. Indicator B may be a better indication of the impact of changes in choice architecture on the uninstallation process.
	C. % of active end users (as a % of total end users at the end of the relevant period) that initiated uninstallation process for a gatekeeper app (excluding software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a	Indicator C is intended to be a measure of the ease with which uninstallation is achieved and therefore any obstacles which may inhibit uninstallation process for gatekeeper apps by reference to attempts to uninstall apps which do not complete. A similar measure is proposed for Art 6(4)

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OUR RECOMMENDATIONS ON OUTPUT INDICATORS

EC Template asks GKs to explain any indicators they decide to adopt or provide but does not require or seek to standardise what GKs do

Our output indicators could:

- Be adopted voluntarily by GKs (in part or all) and incorporated into the reporting and assessment process over time
- Be produced more frequently than annual Reports (e.g., quarterly)
- Be included (in part or all) in future Templates or otherwise formally incorporated into the compliance process
- Be updated over time

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PANEL

DMA COMPLIANCE AND PROCESS

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COFFEE BREAK
COFFEE BREAK
COFFEE BREAK

15:15-15:45

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PANEL
DMA DATA-RELATED OBLIGATIONS AND INTEROPERABILITY

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OVERALL APPROACH

Purpose of data-related obligations: contestability

- **Limit data fusion** to allow (i) new entry by new CPSs; (ii) new services; (iii) open online advertising market
- **Data silos**: contestability for goods or services provided via CPS; CPS markets more contestable? uncertain
- **Data portability**: contestability of CPS by facilitating switching/multi-homing by consumers and business users

Main challenges in implementation (next slides)

Links to other EU rules

- GDPR – the DMA is not a GDPR+ regime: rules regulating collection and use of data are designed to make markets contestable and fair

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ARTICLE 5(2) – DATA FUSION AND CONSENT

A preferred compliance path: consumers choose between

- A personalised service with data collection
- A less personalised but equivalent service w/o data collection

Three Challenges

- Implementing consent – requirements additional to GDPR
  - User refusal to consent does not deny entitlement to the less personalized version
  - No deception, manipulation, or material distortion of the ability to consent
  - If consent denied, no repeat request more than once a year
- What is a 'less personalized but equivalent service'?
- How to design use choice? Tradeoffs!

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ARTICLE 5(2) – ALTERNATIVES TO COMPLIANCE

DMA does not mandate a single way to comply, GK may select others

- Take-it-or leave it?
- Paid-for services where data is not processed
- GK buys user data
- A variety of less-personalized services, consumer opts-in to how much data collection they prefer

Other legal bases for data fusion:

- Compliance with legal obligation, protect vital interests of data subject; public interest task – restrictive reading in C-252/21

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ARTICLE 6(2) – LIMITING EXPLOITATION OF BUSINESS USER DATA BY CPS

Implementation issues

- Not for all gatekeepers, but it includes all business lines of the gatekeeper to which it applies

Only specific uses of data are forbidden and siloed

- All data that is not publicly available? Or only data which allows the gatekeeper to leverage?

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ARTICLE 6(2) – LIMITING EXPLOITATION OF BUSINESS USER DATA BY CPS

Implementation issues

- *Google/Fitbit* decision as a model of what may be expected:
  - Definitions of data and scope of uses
  - Documenting who has access to the data
  - Anti-circumvention measures
  - Important role for compliance function to have the ability and capacity to test adequacy of implemented measures
  - Modifications by GK allowed if technologies and standards improved

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DATA PORTABILITY: ARTS 6(9) AND (10)

Implementation

- Effectiveness and proportionality but also participation and non-discrimination

- Data access versus privacy and security of users
  - How to ensure that the third party can be trusted and uses the data for the purposes specified
  - How to avoid hold-up by the gatekeeper
  - Educating users on opportunities and risks

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Harmonization of data formats across the gatekeepers?

DATA PORTABILITY:
ARTS 6(9) AND (10)

Participation

- Development of technical tools by GK in cooperation with beneficiaries secures effective compliance
- Technical standards to ensure effectiveness & security best seen as a process than a discrete event

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HORIZONTAL INTEROPERABILITY

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ARTICLE 7 DMA

- Number Independent Interpersonal Communications Services (NI-ICS)
- Currently only WhatsApp and Facebook Messenger designated; iMessage possibly designated later
- Only basic functionalities (at first only text messages)
- Interoperability to be provided upon request of access seeker
- Free of charge

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CONSENT MANAGEMENT REQUIRED

1. Consent for discoverability

- On which other NI-ICS is the user visible?
- Opt-in or opt-out?
- GDPR likely requires opt-in (opt-out by default)

2. Consent for interoperability

- Additional consent required for accepting incoming interoperable communication?

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TECHNICAL CHALLENGES IN THREE MAIN AREAS

1. Identity interoperability
- How can users be discovered across networks?

2. Protocol interoperability
- How can a secure channel be established across networks?

3. Abuse prevention
- How can malicious actors be addressed across networks?

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KEY TRADE-OFFS AND QUESTIONS: API VS. STANDARDISATION

- Analysis shows important benefits of standardisation, especially with multiple GKs
- At a minimum, standardisation required for discoverability
- But standardisation unlikely to result from GK-led process
- How does Art. 7 interact with Art. 48?
  - When can the Commission invoke Art. 48?
  - How should the standard-setting process be organised?

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KEY TRADE-OFFS AND QUESTIONS: API VS. PRIVACY

Art. 7(8) limits to sharing of personal data, but:

- E2EE encryption is meaningless if end nodes are not verified (e.g., linking cryptographic identity to real identity)
- Abuse prevention requires sharing of personal data across networks (e.g., past messages sent, identity of spammer)

Art. 7(3) demands the level of security shall be **preserved**

Two provisions likely at odds. Interoperability inevitably lowers level of security and/or privacy

Under which circumstances can the GK reject interoperability with some or all access seekers using **Art. 7(9)**?

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KEY TRADE-OFFS AND QUESTIONS: API VS. USABILITY

Choice architecture and interface design will be key

- How many providers are visible?
- How many search results does the discovery service provide?
- How are users from outside the EU affected/discoverable?
- How are messages displayed coming from different NI-ICS?

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VERTICAL INTEROPERABILITY

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TWO VERTICAL INTEROPERABILITY OBLIGATIONS

1. Art. 6(4): Sideloading of applications and app stores

2. Art. 6(7): Access to essential operating system functionalities

- Not a narrow scenario, like in Art. 7, but wide and open ended application scope
- Inherent to vertical interoperability that GK controls bottleneck resource

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FIVE PRINCIPLES FOR IMPLEMENTATION OF VERTICAL INTEROPERABILITY PROVISIONS

1. Screening access requests
- Vertical integration: a necessary but not a sufficient condition for mandating vertical interoperability
- Are the features "essential" for 3P? Possible approach: three-criteria test

2. Screening access seekers
- GK allowed to take "strictly necessary and proportionate measures" to protect security and integrity of hardware or software
- Granting (and revoking) access licenses using objective criteria

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FIVE PRINCIPLES FOR IMPLEMENTATION OF VERTICAL INTEROPERABILITY PROVISIONS

3. GK-led definition of interfaces

- ○ GK shall propose and manage interfaces
- ○ Standardisation where possible (but same questions and issues as with Art. 7)

4. Equivalence of Input

- ○ GK provides same functions on the same terms as for its own services

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FIVE PRINCIPLES FOR IMPLEMENTATION OF VERTICAL INTEROPERABILITY PROVISIONS

5. Neutral choice architecture

- Equivalence of input also relates to neutral choice architecture. Switching to alternative provider is as easy as choosing the GK.
- Art. 6(4) gives additional guidance on choice architecture (ability to prompt end users). Same principle should apply to Art. 6(7)

Possible interactions between five principles

- e.g., "security warning" messages not proportionate under strict licensing regime

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DMA: DATA-RELATED OBLIGATIONS AND INTEROPERABILITY

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PANEL
DMA: CHOICE ARCHITECTURE

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PRESENTATION OF ISSUE PAPER

DMA CHOICE ARCHITECTURE

AMELIA FLETCHER

CERRE RESEARCH FELLOW
UNIVERSITY OF EAST ANGLIA

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DMA CHOICE ARCHITECTURE: RECAP

- Choice architecture can have an important role in steering end user decision-making, subtly but powerfully.
- It is a neutral term. It can have both positive and negative effects (aka 'dark patterns').
- Digital gatekeepers are well-positioned to identify and implement choice architectures that achieve the effects they want.
- The DMA specifically seeks to ensure that choice architecture plays a helpful (or at least not unhelpful) role in achieving its objectives.

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A FEW EXAMPLES

- End users likely to choose the pre-installed browser or search engine and then stick with it (default and status quo effects).
    - Thus Art. 6(3) requires mandated choice of browser/search engine and easy switching of default settings.

- End users likely to choose the first or most prominent option in any ranking (ranking and salience effects).
    - Thus Art. 6(5) prohibits self-preferencing in ranking.

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A FEW EXAMPLES

- End users can be deterred by complexity.
  - Thus several DMA provisions require that end users be able to carry out certain actions easily.

- Plus DMA provisions re effectiveness and non-circumvention.

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DMA CHOICE ARCHITECTURE: THREE LEGAL PRINCIPLES

1. Effectiveness
   - **Effective user choice** is critical for delivering both contestability and fairness and choice architecture is critical for this
2. Proportionality
   - Compliance **while respecting end user autonomy**
3. Non-discrimination
   - **Two key elements** in the context of choice architecture
     i. The design element: limit steering of end users
     ii. The allocation element: ensure non-discriminatory

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DMA CHOICE ARCHITECTURE: THREE ECONOMIC PRINCIPLES

1. Employ the '**Attend, access, assess, act**' choice framework.
   - Recognising the implications of behavioural insights for each of these steps.

2. *Ex ante* **testing** is critical for assessing likely impact.
   - Compliance reports should be transparent about what the GKs have done to test this.
   - GKs should have primary responsibility for such testing, overseen by the Commission.

3. Evaluation of **impact *ex post*** also valuable.
   - Not just output indicators but additional *ex post* evidence.

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THE 4 AS FRAMEWORK: EXAMPLES

- For mandated choice, end users must pay sufficient **attention**.
  - Choice should be prominent, well-timed, and impossible to skip.

- End users should be able to easily and intuitively **access** relevant settings, or perhaps multiple alternative ways.

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THE 4 AS FRAMEWORK: EXAMPLES

- End users should be able to **assess** the available options.
  - Info should be not only true, but also 'graspable'; enough info but not too much; no unfair framing that favours the GK in terms of defaults, prominence, rankings, etc.

- End users should be able to **act** on their choice easily.
  - No further changes needed to settings; no disproportionate warnings; no nudges/prompts to change their minds.

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DMA: CHOICE ARCHITECTURE

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ALBERTO BACCHIEGA

KEYNOTE

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CLOSING WORDS

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RECEPTION
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