

Extraterritorial Scope of EU Digital Strategy

Gabriel Kasper, le 10 octobre 2024

The new regulations of the EU digital strategy, above all the AI Act, Digital Services Act, Data Act and Digital Markets Act, may also impact companies outside the EEA. Swiss companies, in particular, need to prepare for compliance. The flowcharts attached to this article will help guide you through the process.

EU Digital Strategy : A Comprehensive Harmonization of the Digital Single Market

The European Union (EU) has declared the « digital decade » and has established itself as a regulatory powerhouse, leading the way in digital governance. The EU digital strategy aims to harmonize the digital single market, involving over 30 legislative measures, action plans, and initiatives. Many of these are also adopted in the European Economic Area (**EEA**). Key regulations include :

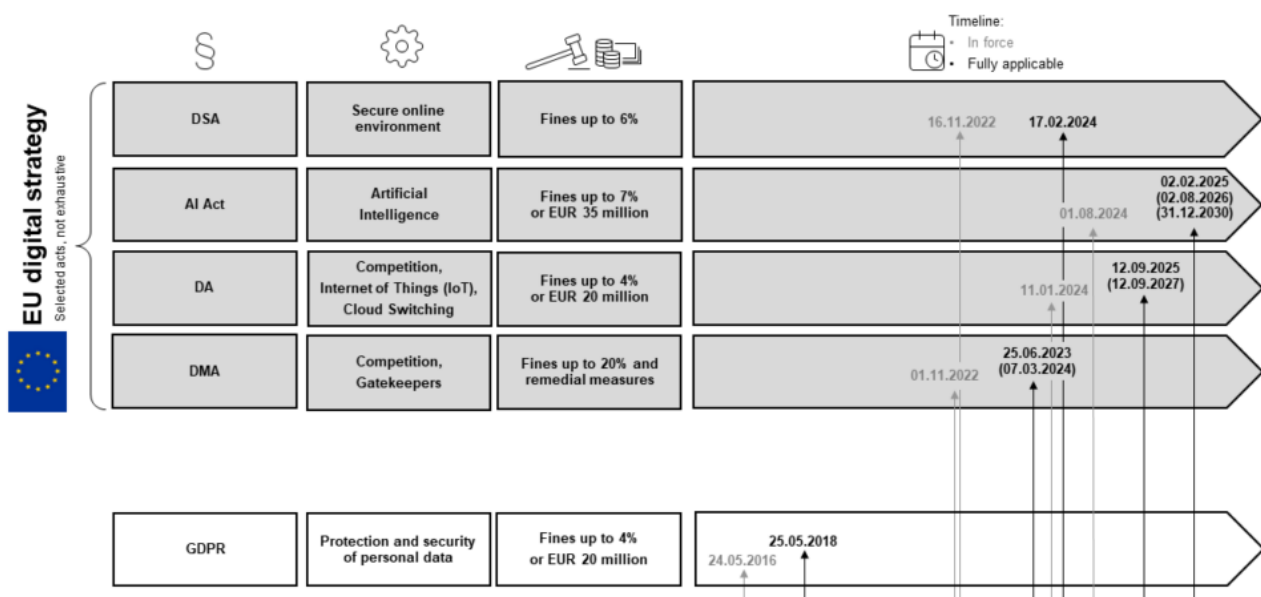
- **Artificial Intelligence Act (AI Act)**: Governing the use of AI to ensure it is human-centred and trustworthy ;
- **Digital Services Act (DSA)**: Designed to enhance safety and transparency in online environments, such as online platforms and online search engines ;
- **Data Act (DA)**: Regulates the use of data in the context of the internet of things (IoT) and facilitates cloud migration ; and
- **Digital Markets Act (DMA)**: Targeting « gatekeepers » to ensure competitive digital markets.

Impact of the EU Digital Strategy on Swiss Companies

What does this regulatory push mean for non-EEA countries like Switzerland ? Swiss companies must understand the EU digital strategy and the common features of these regulations :

1. **Extraterritorial Scope** : The regulations apply to companies outside the EEA (extraterritorially) if their business affects the EEA market (market place principle). In addition, some globally operating companies unilaterally adopt the EU rules worldwide, making them de facto global standards without other countries formally adopting them (so-called « Brussels Effect »). Switzerland has not enacted similar laws, but Swiss companies may be affected by these EU acts.
2. **Horizontal Regulatory Approach** : The AI Act, DSA, DA, and DMA cut across all industry sectors. In principle they also apply regardless of the company size, although small and microenterprises benefit from some exemptions.

3. **Heavy Penalties** : The EU digital regulations impose significant penalties for non-compliance, exceeding the range of penalties known from the GDPR. The fines can reach up to 6% (DSA) 7% (AI Act) or even 20% (DMA) of global annual turnover, increasing the legal risks faced by companies.
4. **Entry Into Force During Digital Decade** : The rollout of these regulations will take place gradually until 2030. For example, the AI Act's provisions requiring companies to ensure their staff have sufficient AI literacy and prohibiting certain AI practices will enter into force on February 2, 2025. The remaining chapters will become applicable in stages until December 31, 2030. It is important for companies to be aware of which new rules are coming into force at any given time.
5. **Direct Applicability** : The regulations of the EU digital strategy are entitled « Acts », such as the « AI Act », and have the legal nature of a generally and directly applicable regulation. Unlike directives, there is no requirement to transpose them into national law before they become applicable.



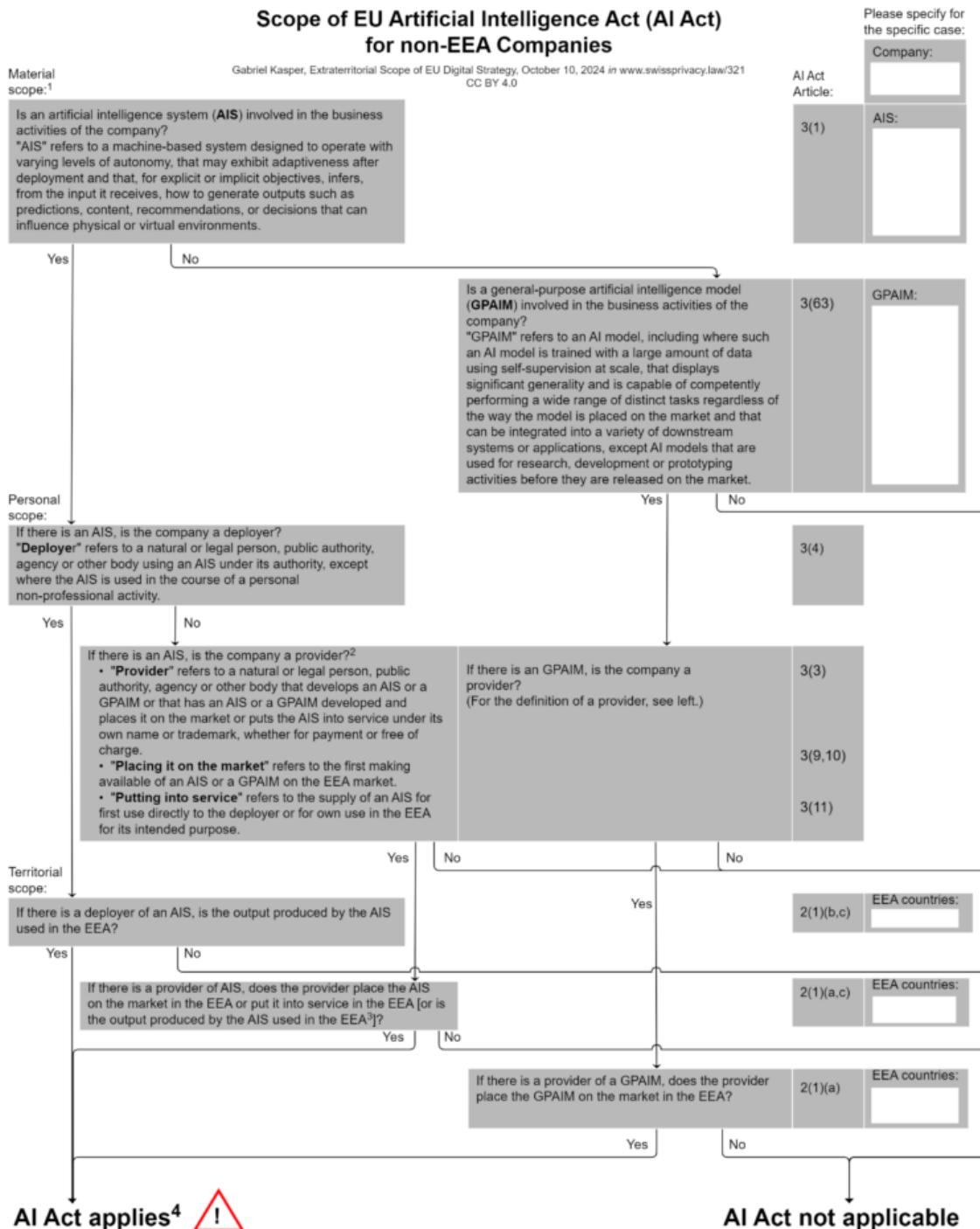
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Fig. 1 : Topics, sanctions and timeline of the EU digital strategy

In sum, the EU digital strategy represents a profound shift in how the digital economy is regulated. Its direct, extraterritorial scope and horizontal approach mean that potentially **all Swiss companies could be affected**. Therefore, all should check if they fall within the

scope of these EU regulations.

Tool for Practitioners : Flowcharts on the Extraterritorial Scope of the EU Digital Strategy
Compliance will become more complex. To assist, this blog post includes four interactive flowcharts to help determine if a company falls under the AI Act, DSA, DA, or DMA.



¹ The AI Act provides for exemptions for AI used for military purposes, scientific research, prototypes, purely personal non-professional activities as well as AI used by public authorities of a third country and open source AIS (article 2(3), (4), (6), (8), (10), (12) AI Act).
² A provider is also a person who behaves as such (cf. article 25(1)(a)-(c), consideration 84(2) AI Act).
³ It is unclear whether a company can be subject to the AI Act as a provider if an AIS is not placed on the market or put into service in the EEA and only the output of the AIS is used in the EEA (cf. article 3(3) AI Act).
⁴ Certain obligations under the AI Act do not apply to micro or small enterprises (cf. articles 11(1)(2)(2), 34(2)(1), 63 AI Act).

Fig. 2 Scope of AI Act for non-EEA Companies

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Scope of EU Digital Services Act (DSA) for non-EEA Companies

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Please specify
for the specific
case:

Company:

Material
scope:

DSA
Article:

Is there an intermediary service involved in the business activities of the company?

- **"Intermediary service"** refers to one of the following information society services:

i. a "mere conduit" service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;

ii. a "caching" service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request; or

iii. a "hosting", consisting of the storage of information provided by, and at the request of, a recipient of the service.

- **"Online platform"** refers to a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of the DSA.

- **"Online search engine"** refers to an intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.

3(g)

Intermediary
service:

3(i)

3(j)

Personal
scope:

Yes

No

If there is an intermediary service, is the company the provider of such service?

2(1)

Territorial
Scope:

Yes

No

If there is a provider of an intermediary service, is the intermediary service offered to recipients of the service that have their place of establishment or are located in the EEA?

2(1)

EEA countries:

- **"Recipient of the service"** refers to any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible.

- **"To offer services in the EEA"** refers to enabling natural or legal persons in one or more EEA member states to use the services of a provider of intermediary services that has a substantial connection to the EEA.

3(b)

3(d)

Yes

No

DSA applies 

DSA not applicable

Note: Certain obligations under the DSA do not apply to micro or small enterprises (cf. articles 15(2), 19 DSA). Stricter rules apply to B2C market places (articles 29–32 DSA), very large online platforms (VLOP) and very large online search engines (VLOSE; articles 33–43 DSA).

Fig. 3 Scope of DSA for non-EEA Companies

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Scope of EU Data Act (DA) for non-EEA Companies

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Please specify
for the specific
case:

Company:

DA Article:

1(3)(a)

2(5)

2(1)

2(12)

Connected
product:

Material scope:

Is there a connected product involved in the business activities of the company?

- **"Connected product"** refers to an item that obtains, generates or collects data concerning its use or environment and that is able to communicate product data via an electronic communications service, physical connection or on-device access, and whose primary function is not the storing, processing or transmission of data on behalf of any party other than the user.
- **"Data"** refers to any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording.
- **"User"** refers to a natural or legal person that owns a connected product or to whom temporary rights to use that connected product have been contractually transferred, or that receives related services

Yes

No

Is there a related service involved in the business activities of the company?

"Related service" refers to a digital service, other than an electronic communications service, including software, which is connected with the product at the time of the purchase, rent or lease in such a way that its absence would prevent the connected product from performing one or more of its functions, or which is subsequently connected to the product by the manufacturer or a third party to add to, update or adapt the functions of the connected product.

1(3)(a)

2(6)

Related Service:

Yes

No

Personal scope:

If there is a connected product, is the company the manufacturer of such product?

Yes

No

1(3)(a)

If there is a related service, is the company the provider of such service?

1(3)(a)

Yes

No

Territorial scope:

If there is a manufacturer of a connected product, does the manufacturer place it on the market in the EEA?

"Placing on the market" refers to the first making available of a connected product on the EEA market.

Yes

No

1(3)(a)

2(22)

EEA countries:

If there is a provider of a related service, does the provider offer such service to customers in the EEA?

1(3)(a)

EEA countries:

Yes

No

DA applies 

DA not applicable

Note: The DA may also apply to other legal entities, in particular data holders and providers of data processing (including cloud computing) services located outside the EEA (cf. article 1(3)(c), (f) DA. Certain obligations under the DA do not apply to micro or small enterprises (cf. articles 7(1), 15(2), 20(1) DA).

Fig. 4 Scope of DA for non-EEA Companies

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Scope of EU Digital Markets Act (DMA) for non-EEA Companies

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Please specify for
the specific case:

Company:

Material scope:

Is there a core platform service involved in the business activities of the company?

Specify the core platform services.

"Core platform service" refers to any of the following:

- a. online intermediation services
- b. online search engines
- c. online social networking services
- d. video-sharing platform services
- e. number-independent interpersonal communications services
- f. operating systems
- g. web browsers
- h. virtual assistants
- i. cloud computing services
- j. online advertising services

1(2) DMA

2(2),
2(5)-(13),
DMA

Core platform
services:

Yes

No

Personal
scope:

If there is a core platform service, has a gatekeeper been designated by the EU Commission?

"Gatekeeper" refers to an undertaking providing core platform services and designated by the EU Commission. The following companies have been designated for the following core platform services:

- a. Alphabet: Google Maps, Google Play, Google Shopping, Google Ads, Chrome, Google Android, Youtube, Google Search
- b. Amazon: Amazon Marketplace, Amazon Ads
- c. Apple: App Store, Safari, iOS, iPadOS
- d. Booking.com: Booking.com
- e. ByteDance: Tiktok
- f. Meta: Facebook, Instagram, Meta Marketplace, Meta Ads, Whatsapp, Messenger
- g. Microsoft: LinkedIn, Windows PC OS

1(2), 2(1),
3(4) DMA

Commission
Decisions
C/2023/548,
549, 551,
552, 905,
1092 and
C/2024/4360

Gatekeeper:

Yes

No

If there is no designation as gatekeeper, does the company meet the thresholds to be designated as a gatekeeper, i.e.:

- i. It has a significant impact on the internal market, i.e., it achieves an annual EEA turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three EEA member states;
- ii. It provides a core platform service which is an important gateway for business users to reach end users, i.e., it provides a core platform service that in the last financial year had at least 45 million monthly active end users established or located in the EEA and at least 10'000 yearly active business users established in the EEA, identified and calculated in accordance with the methodology and indicators set out in the Annex to the DMA; and
- iii. It enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future, i.e., the thresholds mentioned immediately above (ii.) according to article 3(2)(b) DMA were met in each of the last three financial years.

3(1)-(2)
DMA

Thresholds:

Yes

No

Territorial
scope:

If there is a core platform service of a gatekeeper, is the core platform service being offered or provided to business users established in the EEA or end users established or located in the EEA?

1(2) DMA

EEA countries:

Yes

No

DMA applies 

DMA not applicable

Fig. 5 Scope of DMA for non-EEA Companies

The flowcharts are English translations of those published originally by the same author in German in : *Kasper Gabriel, Extraterritorialer Geltungsbereich der EU-Digitalstrategie, Jusletter, September 23, 2024.* For a detailed explanation, refer to the mentioned original article. A free copy and an English machine translation of the original article can be obtained from the author.

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