

An Update on a Trio of European Union Data Acts

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At a glance:

- Part of the implementation of the European Commission's 2020 Strategy for Data includes the proposal of the Digital Services Act, Digital Markets Act and Data Governance Act.
- The Digital Services Act, Digital Markets Act and Data Governance Act will place restrictions and obligations on certain actors, and seek to promote fairness, customer protection, trust, and openness in the European digital arena.

Introduction

On 19 February 2020, the European Commission (the "**Commission**") published its European Strategy for Data (the "**Strategy**") which sets out measures to realise its aim of capturing the wide-ranging benefits of better use of data, including greater productivity and competitive markets, as well as making improvements to health and well-being, the environment and public services. Part of the implementation of the Strategy includes the proposal of the Digital Services Act ("**DSA**"), Digital Markets Act ("**DMA**") and Data Governance Act ("**DGA**"), each of which will be explored below.

Digital Services Act

What is it? The DSA was proposed by the Commission on 15 December 2020, and will take the form of an EU Regulation, meaning it will contain obligations that are directly applicable in all European Union ("**EU**") Member States.

The DSA will apply to all digital services that connect consumers to goods, services, or content, such as social media, online market places, and other online platforms that operate in the EU. In particular, the DSA will introduce a series of new obligations for these digital services, such as rules for the removal of illegal online content, safeguards for users whose content has been erroneously deleted by platforms, obligations for very large platforms to take risk-based action to prevent abuse of their systems, transparency reporting, and access for researchers to key data of the largest platforms.

The DSA will also introduce an oversight structure that will apply to, among other things, very large online platforms with a significant reach, which is considered by the Commission to be where the number of recipients exceeds an operational threshold of 45 million, or 10% of the EU population.

Why was it proposed? At its core, the DSA seeks to better protect consumers and their fundamental rights, as well as to uphold the European values of freedom, democracy, equality and rule of law in an era where online platforms have assumed a central role. In this respect, the DSA has introduced new obligations, systems for sanctions and greater oversight, especially for very large online platforms.

What is the likely impact? The obligations under the DSA will affect different online players depending on their role, size and impact in the online ecosystem. Asymmetric obligations, such as the supervised risk management approach, are imposed only on very large online platforms, which not only have the broadest reach but the highest turnover, thereby enabling them to comply with more restrictive measures.

Digital Markets Act

What is it? The DMA is an EU Regulation that was proposed by the Commission on 15 December 2020 which will address the negative consequences stemming from certain behaviours by platforms acting as digital “gatekeepers”.

These are defined in the proposal as platforms that (i) have a significant impact on the internal market, (ii) operate a core platform service which serves as an important gateway for business users to reach end users, and (iii) enjoy an entrenched and durable position in its operations or will foreseeably enjoy such a position in the near future.

Most prominently, the DMA will apply to large providers of core platform services that meet the conditions to be designated as gatekeepers. It will prohibit a number of unfair practices, such as preventing users from un-installing any pre-installed software or apps, and require gatekeepers to allow third parties to inter-operate with the gatekeeper’s own services in certain specific situations. Sanctions will be imposed for non-compliance with the DMA, which could include fines of up to 10% of the gatekeeper’s worldwide turnover, while recurrent infringers may be obligated to take structural measures which could extend to the divestiture of certain businesses.

Why was it proposed? The DMA addresses the concern that platforms acting as gatekeepers are granted the power to act as private rule-makers and operate like bottlenecks between businesses and consumers. As spelt out in the Commission’s proposal, the primary objective of the DMA is to allow end-users and businesses to reap the full benefits of the digital economy in a contestable and fair environment.

What is the likely impact? As mentioned in the Commission’s proposal, the DMA is poised to improve contestability in the digital sector, helping businesses overcome the barriers stemming from gatekeepers’ unfair business practices while creating fairer and more equitable conditions for all players.

Data Governance Act

What is it? The DGA was proposed by the Commission on 25 November 2020, and will take the form of an EU Regulation, meaning it will be directly applicable in all Member States.

The DGA will set out rules for the re-using of public sector data and obligations of providers of data sharing services. For the former, the DGA will set out a series of obligations and restrictions that public sector bodies (e.g. the State, regional or local authorities) are subject to if they allow for the re-using of certain data they hold. For the latter, a new notification and compliance framework will be established for data intermediaries to ensure that they will act transparently and neutrally.

The DGA will further introduce the concept of data altruism, where individuals or companies make data voluntarily available for the common good, and establish a European Data Innovation Board, a new expert group which will have several aims, including oversight of data sharing service providers.

Why was it proposed? The aim of the DGA is to foster the availability of data for use by increasing trust in data intermediaries and by strengthening data sharing mechanisms across the EU. The DGA provides for this through the aforementioned measures, for instance by setting up a mechanism to facilitate the re-use of protected public sector data, as well as setting out a framework to monitor compliance of data intermediaries.

What is the likely impact? The DGA will set a clear policy tone with respect to opening up public sector data and providing a framework for data sharing. The choice of an EU Regulation as the legal instrument will ensure uniform

application across the European Single Market and leave no margin for interpretation or implementation to the Member States. It is clear as well that certain data sharing intermediaries will have to re-plan their operations in order to comply with the new notification and compliance framework.

Conclusion

The package of recently proposed regulations provides strong evidence of activism on the part of the Commission to not only prepare Europe for the digital age, but to protect and support small-to-medium businesses. In 'The Political Guidelines for the next European Commission 2019-2024', the President of the European Commission Ursula von der Leyen set out her agenda to ensure that small-to-medium businesses can thrive by reducing red tape and improving their access to the market.

On the other hand, the Commission is faced with the challenge of reining in large online platforms that are able to control increasingly important platform ecosystems in the digital economy. As highlighted by the Commission in the Strategy, large online platforms may accumulate large amounts of data, thereby benefitting from a "data advantage" when developing new products and services, which could affect the contestability of markets in certain cases.

Through the trio of proposed regulations, the Commission has sought to improve customer protection, fairness and openness in the digital market. More importantly, while poised to correct power imbalances in the digital market, the DSA, DMA and DGA support the Commission's larger vision to uphold European core values in the digital age.

Jeffrey Lim
Director, Joyce A. Tan & Partners LLC
jeffrey@joylaw.com
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CONTACT

For more information, please contact us at all@joylaw.com or at +65 6333 6383

Joyce A. Tan & Partners LLC

8 Temasek Boulevard
#15-04 Suntec Tower 3
Singapore 038988
www.joylaw.com

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