

Bird & Bird

Data economy and EU regulation

Francine Cunningham, Regulatory & Public Affairs Director,
Bird & Bird LLP (Brussels)

10 May 2022



European Data Strategy

To create a society empowered by data



Europe as a leader in
a data-driven society

Free flow of data
within EU and across
sectors

Availability of high-
quality data to create
and innovate

European rules and
values are respected

The Big Five legislative proposals

Summary of the key elements of each proposal



Data Governance Act (DGA)

Digital Markets Act (DMA)

Digital Services Act (DSA)

Artificial Intelligence Act (AIA)

Data Act (DA)

Data Governance Act (DGA)

Objective & relevance

- Make public sector data available for reuse
- Facilitate exchange of data in EU and with 3rd countries
- Enable data sharing for the common good

Who is in scope?

- Public sector
- Data sharing 'trust' services
- Citizens

Key obligations

- Confidentiality
- One-stop shop mechanism for data requests

Key definitions

- Data
- Data altruism
- Data sharing service

Regulator

- National supervisory authority
- Data Innovation Board (NEW)
- Penalties decided at national level

• Next steps:

- Parliament adopted DGA on 6 April
- After adoption by Council, DGA will enter into force 20 days after its publication in OJ
- Regulation will apply from 15 months after the date of entry into force

Digital Markets Act (DMA)

<p>Objective & relevance</p> <ul style="list-style-type: none"> Promote fair competition in digital markets Give SMEs chance to participate better in the data economy 	
<p>Who is in scope?</p> <ul style="list-style-type: none"> Largest online platforms Social networks Search engines Online marketplaces Advertising services etc. 	<p>Key obligations</p> <ul style="list-style-type: none"> Transparency Due diligence Prohibition of unfair practices Data portability & interoperability Access for business users
<p>Key definitions</p> <ul style="list-style-type: none"> Gatekeeper Core platform service 	<p>Regulator</p> <ul style="list-style-type: none"> European Commission Digital Markets Advisory Committee Fines up to 10%-20% global turnover

- **Next steps:**
- Following political agreement in March, EP expected to adopt text in July/Sept.
- Once officially adopted by two co-legislators, DMA comes into force 20 days after its publication in OJ. (Oct)
- Rules to apply 6 months after this date.

Digital Services Act (DSA)

<p>Objective & Relevance</p> <ul style="list-style-type: none"> Strengthen the responsibilities and supervision of intermediary service providers to ensure less citizen exposure to illegal content and products online 	
<p>Who is in scope?</p> <ul style="list-style-type: none"> Intermediary service providers Social networks Online marketplaces Hosting services 	<p>Key obligations</p> <ul style="list-style-type: none"> Transparency Due Diligence Content moderation Risk management Online advertising rules
<p>Key definitions</p> <ul style="list-style-type: none"> Intermediary services Hosting services Online platforms VLOPs and VLOSEs 	<p>Regulator</p> <ul style="list-style-type: none"> Digital Services Coordinator (national) European Commission European Board for Digital Services Fines up to 6% of global turnover

- **Next steps:**
- Political agreement reached in April.
- Parliament and Council will have to give their formal approval July (?)
- DSA will apply 15 months later or from 1 Jan 2024, whichever is later, after entry into force
- However, DSA will apply to VLOPs and VLOSEs four months after their designation

Artificial Intelligence Act (AIA)

Objective & Relevance

- Ensure that AI systems are safe and respect EU fundamental values
- Create legal certainty to facilitate investment and innovation in AI

Who is in scope?

- Providers placing AI systems on the EU internal market
- Users of AI systems within the EU
- Providers and users of AI in a 3rd country where output used in the EU

Key obligations

- Ex ante risk assessments
- Respect for fundamental rights
- Transparency towards users
- Post-market monitoring and reporting
- Human oversight

Key definitions

- AI System
- High-risk uses

Regulator

- National authority
- European Artificial Intelligence Board
- Fines up to 30m EUR or up to 6% of worldwide annual turnover

• Next steps:

- EP Committees publish draft reports
- Vote on the lead IMCO-LIBE Committee joint report in October
- Plenary vote expected in November
- Council already has compromise proposals on several articles

Data Act (DA)

Objective & Relevance

- Facilitate access to and use of data, including B2B and B2G in exceptional cases
- Ensure fairness in the allocation of data value among actors in the data economy
- Very relevant for SMEs as data portability requirements allow shifting between services

Who is in scope?

- Product manufacturers & service suppliers in EU
- Data holders and data recipients in EU
- Public bodies and EU institutions
- Providers of data processing services

Key obligations

- New rules on access and use of non-personal data
- Data portability, facilitating switching and interoperability
- FRAND approach in data sharing contracts
- Public usage of data

Key definitions

- What constitutes fairness in B2B contracts
- Public interest regarding B2G data sharing

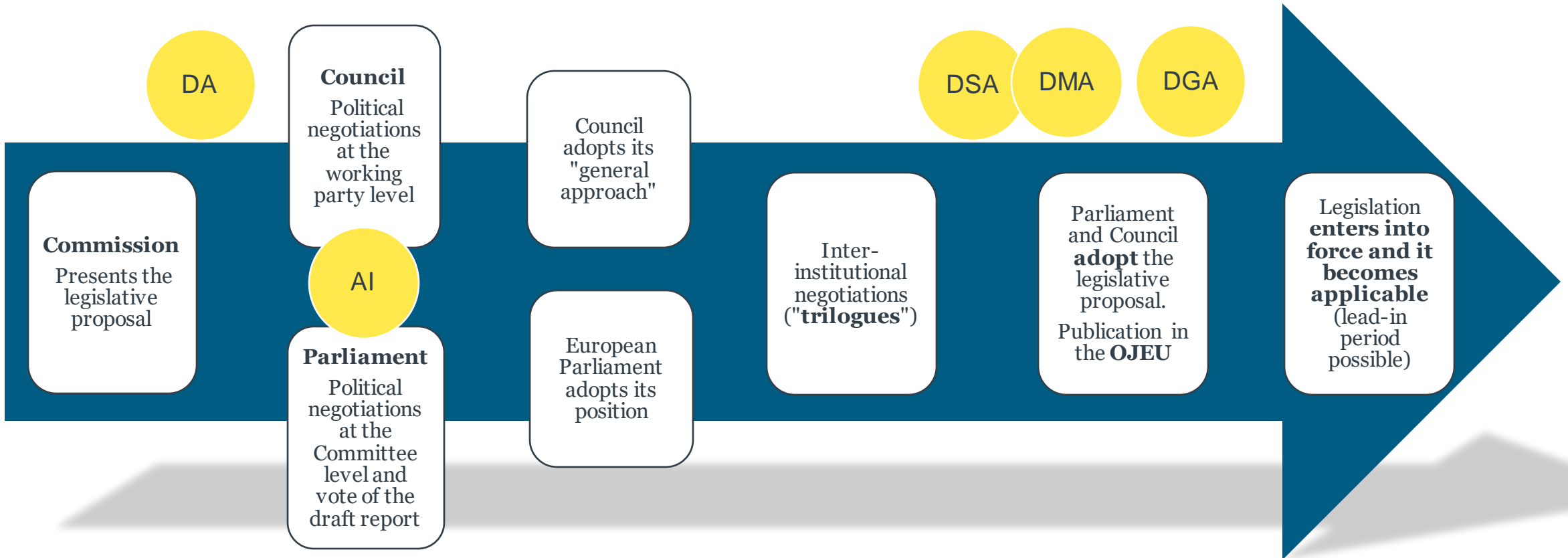
Regulator

- Competent authorities designated by Member States
- Member States to lay down penalties

Next steps:

- Council and Parliament to discuss the proposal in coming weeks
- In Parliament, ITRE Committee expected to draft main report.
- LIBE, JURI and IMCO to provide Opinion Reports.

EU ordinary legislative procedure



Impact of the 'Big 5' on different sectors



What do the Big Five mean for citizens?

What do the proposed measures mean for the public sector?

What do the proposed measures mean for businesses, especially SMEs?

What do the Big Five mean for citizens?

- Strengthen already existing enforceable rights to their data
- Right to data portability: obtain & reused data generated by IoT products
- More information & control over ads shown and 'recommender systems'
- Ability to report illegal content online or dispute decisions to block content
- Protection from AI systems that could manipulate or cause harm

What do they mean for the public sector?



- DGA facilitates public data sharing between the government & citizens
- DGA promotes reuse of public data for benefit of society: personalised medicine, improved services
- AI systems used in public admin (welfare, immigration) would be classified as high-risk
- AIA sets the bar higher for potential use of AI products by public sector
- DGA, DSA, AIA, DA enforcement lies with national supervisory authorities

What do they mean for business?

Impact especially on SMEs

- Businesses to benefit from better access to data
- More level playing field to enable SMEs to emerge & compete
- Data portability to provide more choice of provider and competition
- SMEs to be shielded from unfair contractual terms (DA)
- AIA to have broad impact since applies to any provider & user of AI
- DSA due diligence & transparency rules will affect range of services
- DGA sets new governance model for intermediary service providers
- Environment of trust will promote new business opportunities?

Final bit of advice: start today!



Name responsible persons and identify relevant stakeholders

Allocate budget & resources for compliance project

Map where your business is today (current vs. new legislation)

Identify key proposals, noting 'Big 5' will be backed by sectorial legislation

Prioritise actions and start executing



Francine.cunningham@twobirds.com

Tobias.Bräutigam@twobirds.com

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dusseldorf
• Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris
• Prague • Rome • San Francisco • Shanghai • Singapore • Stockholm • Sydney • Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority (SRA) with SRA ID497264. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.