

DATA GOVERNANCE ACT (STARTING FROM 24/09/2023)

INSIGHT INTO FUTURE

EU LEGISLATION ON DATA AND ALGORITHMS

Data sharing and the use of algorithms are high on the political agenda in Europe. This has translated itself into a wave of legislative initiatives.

Some of these initiatives, such as the European AI Act and the European Data Act, are still in the legislative process, but other initiatives have already entered into force and will soon be applied in the European Union. This applies to the Data Governance Act, the Digital Services Act, and the Digital Markets Act.

This brAlnfood provides an overview of some key concepts, the potential impact of the new rules, and the obligations associated with them for the parties involved. This is done through several scenarios.



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Carl is the founder of a start-up that trains an AI system for medical use. His systems use medical images to diagnose problems and need a large amount of training material to do so. The government owns these images, but makes them exclusively available to a different private partner.



REUSE OF GOVERNMENT PROTECTED DATA

Under the Data Governance Act, governments will be **prohibited** from making certain data exclusively available for reuse.

These are **data** held by the government and protected by commercial or statistical confidentiality, by third-party intellectual property rights or by protections on personal data.

Moreover, the reuse of these data should not be subject to **discriminatory conditions**. The government will have to end the data exclusivity unless it is needed for a service or good of public interest.

Carl will be able to go to the competent national authorities to demand fair access to the data.

Carl is looking for more data to train his AI system and consults a data marketplace for this purpose. The marketplace can connect him with parties offering training data. However, access fees for start-ups are exceptionally high, a burden that is easier for large companies to bear. There is, however, a discount if Karel would also buy other services from the data marketplace.



ACCESS TO DATA MARKETPLACES AND DATA INTERMEDIATION SERVICES

A data marketplace that seeks to create commercial relationships between data holders and users is a **data intermediation service**. Such service must respect certain obligations.

For example, the **terms** of their services, including price, should not depend on whether or not a customer uses their other services. Access to their services and price must also be fair, transparent and non-discriminatory. Furthermore, they must take measures to ensure adequate data security.

Carl will be able to file complaints with the relevant authorities in the future because of these unfair terms.

Touched by the difficulties he encountered during his search for data, Carl decides to set an example himself and make his own data available for research and further use as much as possible. However, the search for a reliable third party to help him do this is not evident.



RECOGNISED ORGANISATIONS FOR DATA ALTRUISM

Public registers will be established at European and national level for **recognised data altruism organisations** ("making data available voluntarily and free of charge for the public interest").

To be recognised and included in such a register, an organisation must meet certain **conditions**, including transparency requirements and requirements to protect the interests of data altruists. This includes, for example, that the organisation must adequately secure the data, inform the altruist about the purpose for which their data is used, and that they must not use the data themselves for other purposes.

The public registers, and the conditions for being included in these registers, thus provide Carl with assurance that an organisation in the register will handle his data properly.

DIGITAL SERVICES ACT (STARTING FROM 17/02/2024) AND DIGITAL MARKETS ACT (STARTING FROM 02/05/2024)

Eva creates and restores paintings. She sells them through various online platforms, including an online marketplace or webshop for art in Belgium. The marketplace gives automated recommendations to its customers for art that might appeal to them. Eva would like to better understand how the platform gives suggestions to users and what options they have to manage their settings.



RECOMMENDATION SYSTEMS ON ONLINE PLATFORMS

Digital services act

Providers of online platforms (such as an online marketplace) using a **recommendation system** should state in their terms and conditions the **main parameters** of this system, as well as the possible **options** to change these parameters. If there are options to change the parameters, the user should always be able to do so via a direct functionality.

Digital markets act

The Digital Markets Act applies to “**gatekeepers**”. These are businesses with a significant impact on the internal market that are an important gateway for business users to their end-users and are in a durable position. These businesses will be designated by the European Commission and must then follow certain obligations. The marketplace in question is unlikely to be a gatekeeper under the criteria of the regulation.



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Eva also sells her paintings through the marketplace of a giant US platform. She notices, however, that her listings are taken offline one day and she contacts the platform. The platform informs her that their AI system has flagged her paintings as illegal and therefore removed the listings. This surprises Eva even more since the platform itself sells similar paintings, which are also invariably ranked higher.



CONTENT MODERATION ON ONLINE PLATFORMS

Digital services act

As a hosting service under the Digital Services Act, the marketplace must motivate to Eva the restrictions that are imposed on the content Eva posts online. In doing so, the marketplace must state, among other things, whether it used **automated means** in making its decision or in detecting the illegal content. It must also state the legal basis for the removal and the options for appealing the decision (internally, extrajudicially or in court).

As an online platform, the marketplace is obliged to have an **internal complaint handling system**. This system must allow for complaints to be filed against the removal decision and must not take decisions solely by automated means. Recommendation systems of very large online platforms must include at least one option that is **not based on profiling**.

Eva must therefore receive the motivation for the decision to remove her listing and can challenge its removal through the internal handling system. If these obligations are not followed then Eva can file a complaint about this, resulting in possible fines for the platform.

Digital markets act

A large platform with sufficient impact in the European Union could be appointed as a “**gatekeeper**” when the Digital Markets Act becomes applicable. In that case, the platform would be obliged **not to favour its own products** in rankings on its platform. The gatekeeper must ensure that the ranking is done under fair, transparent and non-discriminatory conditions.

A complaint by Eva against these practices may lead to an investigation by the European Commission with accompanying fines for the gatekeeper in case of non-compliance with the obligations.