

# DATA AND DIGITAL: REGULATION ROUND-UP IN THE UK AND EU

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**Weil**

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As a raft of data-related legislation has come (or will be coming) into force in the EU and UK, below we take you on a themed whistle-stop tour of the key takeaways of these new laws, highlighting what it is and who it affects.

### DATA PRIVACY: UK DATA PROTECTION AND DIGITAL INFORMATION BILL AND EU EPRIVACY REGULATION

The UK's Data Protection and Digital Information (No. 2) Bill ("**Bill**") is intended to reform UK data protection law, making it simpler for businesses to understand and implement. Still, the need to maintain data adequacy with the EU gives the UK little room to make significant amends.

Some of the main changes under the Bill include removing the need to obtain consent for certain cookies (including cookies for analytics for service improvement and security updates), removing the requirement to maintain an Article 30 record of processing unless engaging in high risk processing, and changing the threshold that must be met for an organisation to refuse to comply with a data subject access request – from manifestly unfounded or excessive to vexatious or excessive.

In summary, the key takeaway is that if an organisation is already compliant with the UK GDPR, then it will not be required to make any changes as a result of the current draft of the Bill. While the Bill is still travelling through UK Parliament, it could potentially be law by early 2024.

Meanwhile, the EU is set to replace the ePrivacy Directive, the legislation governing electronic communications and direct marketing, with the ePrivacy Regulation. The proposal was first introduced in 2017 with the final text yet to be agreed, so we could be waiting a while longer, but this will likely see an expansion in the scope – applying extraterritorially and also to OTT services – and an increase in penalties to GDPR-levels.

### PROTECTING AGAINST ONLINE HARMS: EU DIGITAL SERVICES ACT AND UK ONLINE SAFETY BILL

The EU Digital Services Act ("**DSA**") and the UK Online Safety Bill ("**OSB**") are two parallel pieces of legislation with similar aims – to regulate digital services and user-generated content in order to improve online safety – but separate regimes. As each of the DSA and the OSB have extra-territorial effect, it is likely that many organisations will have the task of navigating compliance with both.

The DSA applies to online intermediary services, with additional cumulative obligations then applying to those online intermediary services that are hosting services, online platforms and/or very large online platforms.

There are clear overlaps with the OSB. This applies to online user-to-user services, search engines and internet services that provide pornographic content. Services classed as category 1 services, i.e. the largest platforms with the most users, will then be subject to more onerous obligations.

In a nutshell, they make providers more accountable for the content shared on their platforms, requiring, amongst other things, the removal of illegal content and transparent content moderation practices.

The DSA came into force in the EU on 16 November 2022 and the majority of its provisions will apply from 17 February 2024. The OSB has reached the end of its parliamentary journey, and is now waiting to receive Royal Assent.

Fines for non-compliance are also large – for the DSA, up to 6% of global turnover, and for the OSB (at the time of writing), fines of up to £18 million or 10% of global turnover, whichever is higher.

### DIGITAL COMPETITION: EU DIGITAL MARKETS ACT AND THE UK DIGITAL MARKETS, COMPETITION AND CONSUMER BILL

The EU Digital Markets Act ("**DMA**") seeks to address anti-competitive practices as it regulates core platform services provided by large providers, known as 'gatekeepers'. Core platform services include online search engines, online intermediation services, social networking services, video-sharing platforms, and cloud computing services.

In total six gatekeepers (covering 22 platform services) have been designated as gatekeepers by the European Commission, including Amazon and ByteDance. Designated gatekeepers have until 6 March 2024 to comply with the DMA.

Under the DMA, there are various obligations and restrictions on gatekeepers relating to access to data, interoperability and 'self-preferencing' (i.e. treating their own products or services more favourably in ranking on the platform than similar third party products or services). Non-compliance could see fines of up to of up to 10% of total worldwide annual turnover, or up to 20% in the event of repeated infringements.

On the UK side, the Digital Markets, Competition and Consumer Bill ("**DMCCB**") was proposed to the UK Parliament on 25 April 2023 and is expected to enter into force in 2024. This is the UK's version of the DMA, placing pro-competitive obligations on organisations that have 'strategic market status' in digital markets, to be overseen and enforced by the new Digital Markets Unit. The DMCCB also goes beyond this, reforming merger control threshold, and significantly enhancing enforcement powers in connection with consumer rights.

## **CYBERSECURITY: EU NISD2, UK NIS REGULATIONS, DORA, CRA AND PSTIA**

In response to the increase in cyber attacks and threats on organisations in the EU and UK, a wealth of new (or updated) cybersecurity-related laws have been introduced or are on the horizon.

The EU NIS 2 Directive ("**EU NISD2**"), which replaces the EU NIS Directive (the first comprehensive EU cyber security law applying to operators of essential services), came into force on 16 January 2023, giving EU Member States until 17 October 2024 to incorporate it into national law. The UK Government has also proposed reforms to the existing UK NIS Regulations (based on the EU NIS Directive). Each seek to broaden the original scope – with the EU expanding to additional sectors such as telecommunications and social media platforms, and the UK to IT managed service providers – with the UK government then being given the ability to add new sectors and sub-sectors in the future. Each also impose stricter cybersecurity incident reporting obligations.

Turning to the financial services sector, given the increasing reliance in financial services on third party service providers for the performance of key functions (in particular IT, cloud and managed services), the EU Digital Operational Resilience Act ("**DORA**") not only builds on the existing EU regulatory regime to manage this risk, but sets out a new regulatory regime for direct supervision of designated critical ICT service providers – the first time such will be supervised by EU financial services regulators.

Organisations that make, import or distribute any internet/network-connectable products (think smartphones and any Internet of Things/ connected devices) are also under scrutiny. The UK Product Security and Telecommunications Infrastructure Act 2022 ("**PSTIA**") sets out minimum security standards that must be met before connected devices for consumers can be sold in the UK. Non-compliance risks fines of up to £10 million or 4% of annual turnover (and daily fines of up to £20,000).

The EU's answer is the EU Cyber Resilience Act ("**CRA**"), which will apply to connected products placed on the EU market. The CRA text will likely be agreed in 2024, with obligations beginning to apply in 2025 or 2026. Currently, non-compliance carries maximum fines of up to €15 million or 2.5% of annual turnover.

## **DATA GOVERNANCE AND USAGE: EU DATA ACT AND EU DATA GOVERNANCE ACT**

The EU Data Act is all about data access and sharing, finding common ground with the DMA in the aim to foster open digital markets and competition. Broadly, it centres around data access for users of IoT devices, data sharing among business, and data sharing with public bodies. However, concerns have been raised, and still remain, regarding the protection of trade secrets. Political agreement on the EU Data Act was reached on 28 June 2023, so the next step is for it to be formally adopted – with it then applying 20 months after it comes into force (likely to be sometime in 2025).

The EU Data Governance Act ("**DGA**") continues the data sharing theme and seeks to boost the re-use of data held by public sector bodies, giving start-ups and other businesses better access to big data that they can use to develop new products and services. The DGA will apply from 24 September 2023.

# FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.



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