

EDPB Voices Concerns on EU's Digital Services Package and Data Strategy

On 18 November 2021, the European Data Protection Board (**EDPB**) adopted a statement on the Digital Services Package and Data Strategy. The Digital Services Package and Data Strategy is a package of legislative proposals, including the Digital Services Act, the Digital Markets Act, the Data Governance Act, the Regulation on a European approach for Artificial Intelligence and the forthcoming Data Act, which will soon be announced. The proposals aim to: (i) facilitate the further use and sharing of personal data between a greater number of public and private parties; (ii) bolster the use of specific technologies, such as big data and artificial intelligence; and (iii) regulate online platforms and gatekeepers.

In its statement, the EDPB expresses its concern about the package regarding issues including the increased risk of inconsistencies, the general lack of protection mechanisms and the fragmented supervision. According to the EDPB, these issues could negatively impact the fundamental rights and freedoms of individuals and lead to significant legal uncertainty that would undermine both the existing and future legal framework.

First, on the issue of inconsistencies, the EDPB expresses concerns that the new proposals do not clearly state that they leave the current legal framework unaffected and may create ambiguity as to the applicability of the data protection framework in certain cases. For instance, the instruments do not clearly indicate which provisions apply to personal data, non-personal data or both.

Moreover, the legal basis for processing personal data is often not clear from the legal text of the proposals. For instance, the Data Governance Act appears to authorise the re-use of personal data by public sector bodies without providing an adequate legal basis for such re-use. In addition, the Artificial Intelligence Regulation authorises the use of special categories of data for bias monitoring, detection, and correction, but is unclear about the legal basis permitting such use.

In addition to its concerns over inconsistencies, the EDPB explains that the proposed instruments do not provide adequate protection for individuals. In particular, it notes the failure to address its repeated recommendation for the Regulation on a European approach for Artificial Intelligence to include a ban on any use of artificial intelligence for the automated recognition of human features in publicly accessible spaces.

The EDPB also recommends that the Regulation on a European approach for Artificial Intelligence should prohibit the use of artificial intelligence systems that categorise individuals based on biometrics (such as facial recognition) according to ethnicity, gender, political or sexual orientation, or other prohibited grounds of discrimination, and must prohibit any other artificial intelligence systems whose scientific validity is not proven or that conflict with individuals' fundamental rights and freedoms.

Concerning the Digital Services Act, the EDPB notes that it should regulate online targeted advertising more precisely, and push for a less intrusive form of advertising that does not require any tracking of user interaction with content. Notably, the EDPB endorses a phasing-out of targeted advertising that would lead to a ban of targeted advertising based on pervasive monitoring. In addition, the EDPB recommends a general prohibition on the profiling of children.

Furthermore, the EDPB draws attention to the risks of parallel supervision structures (where different authorities supervise the same entities regarding the same (processing) activities without structured cooperation between the supervision authorities) and strongly recommends that each proposal provide an explicit legal basis for the practical cooperation and exchange of information between the competent supervisory authority and the data protection authorities.

The statement on the Digital Services Package and Data Strategy is available [here](#).