



## The EU's approach to regulating artificial intelligence

Robert Gould, Carleton University

### Summary

- \* *With its draft bills for regulating artificial intelligence (AI), the European Union (EU) is proposing nothing less than a total system reset in this crucial policy area. The aim is (i) to protect EU residents and society from the problematic effects of digital communication and (ii) to create fair competition rules for online business.*

### Background/Challenge

- In 2020 the European Commission released drafts of its proposed Data Governance Act (DGA, November 25, 2020), Digital Services Act (DSA, December 20, 2020), and Digital Markets Act (DMA, December 20, 2020). These were followed by the draft of the Artificial Intelligence Act (AIA, April 21, 2021).
- These legislative proposals form the first coherent approach to a wide-scale and far-reaching regulation of administrative, commercial, and personal online services. Once passed, the bills will have force of law within the EU. Together with the General Data Protection Regulation (GDPR), they will serve as a world-wide model for countries to follow, thus reinforcing the “Brussels Effect” of EU legislation.
- The long-debated creation of these bills was made necessary on the one hand by the largely unchecked aggressive commercial activities of very large US-based digital corporations, and on the other hand by the realization that leaving regulation to individual member states would create the significant risk of having contradictory legal rules within the EU. This would lead to legal uncertainty, hampering cross-border trade and protection of persons. Of particular importance was the consideration that only by acting at the EU level would it be possible to reach a critical mass capable of confronting the two digital great powers: China and the US.

### KEY FINDINGS

- ◇ **Artificial intelligence (AI)**, and particularly automated/algorithmic decision-making, is, together with vast amounts of data, the foundation of virtually all digital activities available to individuals, businesses, and administrations.
- ◇ The development and expansion of AI worldwide is unstoppable. Some AI applications and activities are foreseeable, some not. In addition, **most important AI actors are located outside the EU**, but operate in its Single Market. Faced with this situation, the EU is obliged to act to protect its residents and businesses, including digital enterprises and future start-ups, and its position as a global actor representing a set of human-centric values.
- ◇ In the words of Competition Commissioner Margarete Vestager when introducing the AIA, “no matter how fast technologies evolve, AI is always aligned with who we are and what we stand for.” This means also that in some circumstances, **business activities will have to be circumscribed or even prohibited**. The freedom to conduct business is not absolute.
- ◇ The **AIA** aims to protect the human rights codified in the EU Charter of Fundamental Rights by classifying the uses of AI systems into three categories: (i) prohibited, (ii) high risk, and (iii) others. Category (i) refers to systems directly negating any of the fundamental rights; category (ii) applies to systems potentially impacting such rights or forming part of a safety component of a product; and category (iii) to systems viewed as potentially harmless.
- ◇ Before making any systems available within the Union, distributors, owners, lessors, users etc. are to submit their systems for certification. Oversight of use and impacts will follow.



## KEY FINDINGS (continued)

- ◇ Robust penalties are envisaged for infractions. The results of investigations for alleged infractions are to be public, as will also the evidence – including the algorithms themselves.
- ◇ The DGA, DMA, and DSA regulate particular areas of AI activities within the EU. The **DGA**, pertaining largely to public authorities, appears to be the least controversial measure. The reach of the DMA and DSA, on the other hand, extends to the widely-used services of such corporations as Meta, Alphabet, Microsoft, Apple, Amazon and other large entities.
- ◇ The goal of the **DMA** is to create equal and equitable conditions for digital cross-border commerce in the EU Single Market. Starting from a recognition of “the particular impact of very large online platforms on our economy and society”, the **DSA** aims to reduce illegal content, harms and injury to established rights and to “set a higher standard of transparency and accountability”. There are to be far-reaching monitoring, investigatory and prosecutorial powers exercised by the Commission, with robust fines for infractions and publication of the evidence including algorithms.
- ◇ Broadly speaking, **European civil society organisations** are in favour of the legislation and have argued for strengthening it. Likewise, on December 15, 2021 the **European Parliament** approved a series of amendments to the DMA explicitly extending its range.
- ◇ However, the legislation will be **difficult to reconcile with US positions**. American businesses which feel targeted have long been lobbying against the legislation, and US business organizations have strongly opposed the DMA and DSA. On November 10, 2021, Reuters reported that the US government had circulated a paper warning against provisions in the draft legislation which would reveal proprietary information. Similarly, on December 22, 2021, Reuters reported that the US Secretary of Commerce herself had expressed concerns about the drafts.

## Policy Implications

- ◇ The EU’s proposed legislation is an act of self-assertion by the EU to protect residents, to promote and support European business, and to avoid being overwhelmed by the value systems of the two digital great powers intensively operating and developing AI. They are an expression of sovereignty and geopolitical thinking; they suggest a path for other countries to follow, thus recruiting allies in the resistance to the dominance just mentioned.
- ◇ The DSA and DMA proposals and, when finally passed (2023?), the resulting regulations themselves will continue to face US-based opposition, including from government circles. It is conceivable that the AIA will also become a target. The significant policy implication of this is that when other countries (including Canada?) draft similar legislation, they must be prepared to face pressure from business, civil society, and governmental sources within the US. Opposition from China is to be expected also.

### Further Reading

Annegret Bendiek. 2020. “European Digital Sovereignty: Combining Self-Interest with Due Diligence”, *EU Policy Brief Issue #5*, Centre for European Studies, December 2020.

Rob Reich, Mehran Sahami, and Jeremy M. Weinstein. 2021. *System Error: Where Big Tech Went Wrong and How We Can Reboot*. New York: HarperCollins.



### Author Information

- ◆ Dr. Robert Gould is Adjunct Research Professor in the Institute of European, Russian, and Eurasian Studies, Carleton University
- ◆ Email: robert.gould@carleton.ca



### Contact

- ◆ **Email:** ces@carleton.ca
- ◆ **Phone:** (613) 520-2600, Ext. 1087
- ◆ **Website:** www.carleton.ca/ces



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