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# Table of Contents

- Introduction ..... 1
- 1. Theoretical and conceptual framework ..... 5
  - 1.1 Digitization and digitalization ..... 5
  - 1.2 Digital space ..... 10
  - 1.3 Information society ..... 12
  - 1.4 Digital single market ..... 15
  - 1.5 Partial conclusion ..... 16
- 2. Delineating foundations of the digital single market ..... 18
  - 2.1 Historical and social foundations: from information, through knowledge, to data society 19
    - 2.1.1 With common market towards information society ..... 19
    - 2.1.2 With internal market towards knowledge society ..... 25
    - 2.1.3 Single market and digital single market ..... 30
  - 2.2 Substantive and institutional foundations: drawing from the regulatory experience of the single market ..... 34
    - 2.2.1 Technique of integration ..... 34
    - 2.2.2 Competence ..... 41
    - 2.2.3 Legal basis ..... 47
    - 2.2.4 Institutions and other actors ..... 53
      - 2.2.4.1 EU institutions and bodies ..... 54
      - 2.2.4.2 National institutions and bodies ..... 60
      - 2.2.4.3 Interest groups ..... 65
  - 2.3 Partial conclusion ..... 66
- 3. The state of play of the digital single market ..... 71
  - 3.1 Digital agenda for Europe: a vibrant digital single market ..... 71
  - 3.2 Digital single market strategy: a connected digital single market ..... 75
  - 3.3 Mid-term review of the digital single market strategy ..... 81
    - 3.3.1 Four criticisms of the digital single market strategy ..... 83
      - 3.3.1.1 Vested interests on the example of modernized copyright package ..... 84
      - 3.3.1.2 Lack of economic liberalization on the example of e-commerce ..... 86
      - 3.3.1.3 Regulatory overlap on the example of reviewed telecom rules ..... 87
      - 3.3.1.4 Over-regulation on the example of data economy ..... 88
    - 3.3.2 Towards the fifth freedom: the free movement of data ..... 91
  - 3.4 Partial conclusion ..... 97
- Conclusion ..... 100
- Annexes ..... 106

## Introduction

Following the Cambridge Analytica scandal over misuse of data tied to more than 87 million Facebook profiles, which involved up to 2.7 million Europeans, the testifying of its CEO Mark Zuckerberg before the United States Congress in April and his hearing before the European Parliament later in May this year revealed among others one important element – representatives are still learning to talk tech. The Senate and House questionings were under criticism for revealing a lack of knowledge of the functioning of the Internet, in particular Facebook’s ad-driven business model. Fewer instances of members struggling with technological terms and concepts were also included in the long-awaited hearing in Brussel, which had been billed as a showdown between one of the US tech giants and the EU legislator who elaborated the world’s stringent privacy rules. Despite the obvious preparation of the Parliament for the encounter and much sharper tone of questions than the Capitol Hill in Washington with remarks such as “*you have to remember that you’re here in the EU where we created GDPR*”<sup>1</sup>, the event’s format failed to satisfy the demand for answers, nevertheless, the hearing was another important milestone on the EU’s path towards better understanding the digital age.

The Internet is borderless by definition based on data flowing freely with an inherent potential to be processed *ad infinitum* allowing for perpetual innovation and the creation of new business models on a daily basis. The emerging digital economy increases the speed of the technological progress, in which start-ups are able to turn into global tech giants within few years, if the right regulatory framework is in place. The EU with the largest single market in the world could potentially be an ideal place to foster a development of businesses of the likes of Google, Amazon, Facebook or Apple. However, when it comes to regulation of the digital space, the EU has turned out not be borderless at all. For instance, only four percent of all digital services consumed in the EU are provided cross-border, yet more than fifty percent are delivered by US-based companies and the rest is supplied by national online services.<sup>2</sup> In this regard, the EU faces many obstacles pointing to a simple cause – a lack of a digital single market.

Where both terms *digital* and *single* inherently aim for convergence, approximation or even uniformity, it is all the more important to exploit the potential of the digital single market as an instrument of European integration, but will the EU be able to reach its objective of future proof regulatory framework ready for the digital age? The overall research question of this master’s

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<sup>1</sup> Comment by Claude Moraes, the chairman of the Committee on Civil Liberties, Justice and Home Affairs, who led the preparatory works on the General Data Protection Regulation.

<sup>2</sup> European Commission. *Why we need a Digital Single Market Fact Sheet*. [online]. [cit. 2018-01-15]. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet_en.pdf)

thesis was formulated based on the author's assumption that law is forced to "digitalized" in order to be able to move together with technological development, in the sense that it is primarily its form of legal regulation, which needs to be adapted to conditions in the digital space, and not the nature of law itself, as legal values or essence of questions remain the same. It is clear that bringing down digital barriers and connecting sectoral regulations in order to achieve digital plus single market will be a labour of Hercules. It should not be forgotten that on the success of finding the right formula not only depends whether the connection of both adjectives will turn into an evident paradox, but the potential failure may hinge the future existence and social relevance of law itself.

The overall objective of this master's thesis is to answer this question through delineation of historical, social, substantive and institutional foundations of the DSM and based on them through assessment of the state of play of the DSM, as the reaction to the technological development, notably but not exclusively by exploring whether legislative acts presented under the umbrella of latest digital policies are steps in the right direction to deliver on its promise and formulate concrete recommendations to the EU legislator to help reveal and shape a future-proof regulatory framework for the DSM. In an aspiration to contribute to the current state of jurisprudence, the author delivers also on numerous partial objectives to place the phenomenon of the DSM transcending law, economy and society in the context of the EU, which are summarized within the structure of the thesis.

As for the reasons behind the choice of this particular topic, the author acknowledges the gap between the contribution of the DSM and the recognition of its significance in legislation, jurisprudence or public discourse. This may result in, on the one hand, a loss of the economic and social potential of the digital economy and, on the other hand, in a destructive impact of new business models on conventional market players, where there is no specific regulation to restore the balance. As to the author's knowledge there is yet no work covering this topic in holistic and comprehensive manner, therefore, this thesis aspires to overcome this shortcoming and contribute to the understanding the significance of the DSM.

With regard to the master's thesis' structure, the thesis is divided into three parts. In the first part, the theoretical and conceptual framework of the DSM is discussed by presenting its theoretical principles, as any digital initiative stems from globalization and liberalism, and conceptual cornerstones such as digitalization and digitization, digital space and information society (Chapters 1.1 - 1.3). The partial objective of the first part is to define phenomena constituting the DSM, which are later outlined in time. Subsequently, the second part delineates the foundations of the DSM with regard to its historical, social, substantive and institutional aspect. Its first chapter on historical and social foundations outlines different approaches adopted towards



the digital agenda, notably within the evolution of the regulatory framework of the information society, on the background of European integration process up to the breaking point of establishing the DSM as part of the single market (Chapter 2.1). The second chapter compares substantive and institutional foundations of the DSM and the single market to assess their relationship, notably their differences. The regulatory comparison demonstrates that the single market's regulatory framework is a point of reference for the DSM, which faces today the challenge to adapt the form of legal regulation to conditions in the digital space while navigating around competences and legal bases, lastly updated over a decade ago (Chapter 2.2). In total, the second part presents three partial objectives – a compilation of material sources of law of the DSM, a comparative study between the single market and the DSM and identification of its unique challenges, which needs to be addressed by digital policies. Finally, the third part of the thesis uses the context provided by the delineation of the DSM's foundations to assess the state of play of the DSM through the EU's most advanced digital policies Digital Agenda for Europe (Chapter 3.1) and DSM Strategy (Chapter 3.2). The latter's mid-term review presents a good opportunity to verify the EU reacts to the digital revolution accordingly to deliver on its overall promise to adopt the future-proof regulatory framework (Chapter 3.3). The final part of the thesis presents partial objectives – an assessment of the state of play of the DSM with its successes or criticisms and formulating recommendations for one of the main areas where the EU needs to act further – the free flow of data, which the author identifies as the key instrument for European integration, as the second breath for the single market's revival and as the cornerstone for creating the DSM's regulatory framework, which will stand the test of the 4th industrial revolution.

The core of this master's thesis lies in Chapter 2.1, using the analytical method of research to compile material sources of the DSM as there is no equivalent to it in jurisprudence so far, and Chapter 2.2, employing the comparative method of research for delineating regulatory foundations of the DSM in contrast to the single market. Their concepts are considerable but by no means identical, therefore, this method is chosen to highlight their differences with respect to their substantive and institutional aspects such as technique of integration, competence, legal basis, institutions and other actors. Another main focus of the master thesis is Chapter 3.3, which provides analysis of the DSM's successful stories, criticisms and further points of interest, within which the author opens a legitimate debate to discuss whether the free movement of data should be given stronger protection and even be upgraded as a fifth freedom.

As the master's thesis deals with an up-to-date and dynamic topic, this fact mirrors in the employed multilingual sources such as conferences, seminars and articles. However, the main source of this work is the relevant EU legislation. In addition to the primary and secondary law

concerning digital issues, non-binding legal acts in a form of communications from the Commission are decisive for this thesis, namely on A Digital Agenda for Europe (COM(2010) 245 final/2), A Digital Single Market for Europe (COM(2015) 192 final) and on the Mid-Term Review on the implementation of the Digital Single Market Strategy (COM(2017) 228 final). In order to join theory with practice, the CJEU case law is referred to throughout the master's thesis. Moreover, many important tools stem from the author's participation on Erasmus programme in Lausanne, where the Jean Monnet Foundation for Europe holds the archives of Jacques Delors, and Luxembourg, including an audience with the CJEU's judge Prof. JUDr. Jiří Malenovský, CSc. For the sake of clarity, the author composes some of hers most important findings into annexes, which serve also as an important source used in support of her arguments and conclusions.

## 1. Theoretical and conceptual framework

Every theoretical digital framework is built on two paramount principles – globalization and liberalism, which have influenced the development of information societies and deployment of technologies around the world, including the EU. Under the influence of those powers, traditional structures are being questioned and often broken, but it does not mean that they are left unfilled. In conjunction with digitalization and technological progress, such destabilizing effects of globalization vacant place for new forms of cooperation, connection and innovation. Together, *“the digitalization and globalization of the economy has subsequently eroded national sovereignty, reshaped conceptions of materiality and place, and facilitated new circulations of culture, capital, commodities, and people”*<sup>3</sup>, which is not deemed as being opposite to the substance of the EU, given its integration character. However, some argue integration by means of regulation prevails over integration through market creation, which may hamper innovation and drive the creation of new business models out of the EU.<sup>4</sup>

In order to understand the EU’s reaction to the digital age, basic concepts should be put into perspective to avoid the distress that might arise from encountering such complex phenomena without a proper understanding. Therefore, the following chapters clarify conceptual framework of the DSM, which became the essence of any piece of legislation introduced within it, namely consisting of digitization and digitalization, digital space and information society.

### 1.1 Digitization and digitalization

Entering the digital age, digitization and digitalization become not only key buzzwords in the European institutions but also one of the – if not *the* – defining characteristics of our time. Both terms were at the beginning associated with shifting activities from paper to computer in the 1970s. The machine gradually changed over from the centre to being one element in a universal network of networks, perhaps a world wide web of connections, referred to as the Internet.<sup>5</sup> They are omnipresent signs of the Fourth Industrial Revolution, which transform technologies, especially

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<sup>3</sup> SASSEN, S. *Globalization and Its Discontents: Essays on the New Mobility of People and Money*. New York: New Press, 1998, p. 288. ISBN 1-56584-518-8.

<sup>4</sup> DITTRICH, P. J. *Balancing ambition and pragmatism for the Digital Single Market*. Berlin: Jacques Delors Institut, 2017, p. 14.

<sup>5</sup> The Internet is a global system of interconnected computer networks that communicate with each other through protocols such as a convention or a standard, wherein electronic communication and data transfer between two endpoints takes place. Available at: <https://en.wikipedia.org/wiki/Internet>

ICTs<sup>67</sup>, from a niche sector for specialists to the core of all innovative economic and social systems, now even capable of non-directed learning and self-creation given the development of genetic algorithms.<sup>8</sup>

Digitalization and digitization are such sort of conceptual terms that are interrelated, however, should not be interchanged, as each offers different analytical significance. In the International Encyclopaedia of Communication, digitization refers to the process of converting analogue information into a universal numerical format. In contrast, digitalization is presented as the way in which social life is organized around digital communication and information and thus, denotes technological progress with social challenges.<sup>9</sup>

Digitization becomes ubiquitous after more and more information across all sectors become digitized. Numerical formats consisting of only two possible values, 1 or 0, are readable for more devices, which cause fewer errors in transferring and decoding in them incorporated information than occur in analogue systems. The decrease of errors allows digitized information to be controlled and transferred more easily, cheaply and accurately between two points. The transfer of digital information does not involve any physical materials; there is only a construct of circuits – configuration of transistors, in which digital information is transferred through copying. The replicable, interactive and distributive affordance of digital information raises perturbing implications for the field of intellectual property. *“The law regulates ‘reproductions’ or ‘copies.’ But every time you use a creative work in a digital context, the technology is making a copy. When you ‘read’ an electronic book, the machine is copying the text of the book from your hard drive,*

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<sup>6</sup> According to the EU, the term ICTs covers *“a wide range of services, applications, technologies, devices and software, i.e. tools such as telephony and the Internet, distance learning, televisions, computers, and the networks and software required to use these technologies, which are revolutionising social, cultural and economic structures by creating new attitudes towards information, knowledge, working life, etc.”* Available at: <http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=uriserv%3A124226j>

<sup>7</sup> The EU use the OECD’s classification Nomenclature generale des Activites economiques dans les Communautes europeennes, which recognizes two main sections ICTs Services and ICTs Manufacturing within the sector. ICTs Services, covered by NACE Rev. 2 Section J, is composed of six separate NACE divisions and includes publishing activities, motion picture and sound recording activities, programming and broadcasting activities, wired, wireless and satellite telecommunications activities, computer programming and consultancy activities, information service activities such as data processing, hosting, web portals, news agencies, information search. ICTs Manufacturing, covered by NACE Rev. 2 Section C, is composed of six separate NACE divisions and includes manufacturing of electronic components, computers, communication equipment, consumer electronics and media. Available at: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Information\\_and\\_communication\\_service\\_statistics\\_-\\_NACE\\_Rev\\_2](http://ec.europa.eu/eurostat/statistics-explained/index.php/Information_and_communication_service_statistics_-_NACE_Rev_2)

<sup>8</sup> Committee on Technology. *Preparing for the future of artificial intelligence*. [online]. [cit. 2018-01-15]. Available at: [https://obamawhitehouse.archives.gov/sites/default/files/whitehouse\\_files/microsites/ostp/NSTC/preparing\\_for\\_the\\_future\\_of\\_ai.pdf](https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf)

<sup>9</sup> CRAIG, R. *The International Encyclopaedia of Communication Theory and Philosophy*. Malden and Oxford: Wiley Blackwell, 2016. Volume I, p. 560-562. ISBN 978-1-118-29073-6.

or from a hard drive on a network, to the memory in your computer. That ‘copy’ triggers copyright law. When you play a CD on your computer, the recording gets copied into memory on its way to your headphones or speakers. No matter what you do, your actions trigger the law of copyright. Every action must then be justified [...].”<sup>10</sup> For instance, in the judgment *VCAST*<sup>11</sup> the CJEU rendered that making available of copies of television programs saved in the cloud must be authorized by the holder of the copyright or related rights, as the retransmission made by VCAST constitutes a communication to a different public from that of the original TV transmission, as such a remote recording service cannot fall within the private copyright exception.<sup>12</sup> On the other side, in the judgment *Svensson and Others*<sup>13</sup> it was held that creating a hyperlink, that is a provision on a website of clickable links, to works freely available on another website is not an infringement of copyright. In this light, digitization balances at the intersection of law – it is the key to exploitation of data and information, which would mean substantial economic growth, however, at the cost of inherent copying, which challenges the monetization of copyrightable content and complicates the enforcement of intellectual property rights. Furthermore, copyright concerns are not the only legal issues implicated in digitization, considering the increasing number of incidents of personal data<sup>14</sup> misuse.<sup>15</sup>

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<sup>10</sup> LESSIG, L. *Remix: Making art and commerce thrive in the hybrid economy*. New York: The Penguin Press, 2008, p. 98-99. ISBN 978-1-594-20172-1.

<sup>11</sup> Judgment of the Court (Third Chamber) of 29 November 2017, *VCAST Limited v RTI SpA*, C-265/16, ECLI:EU:C:2017:913, paragraphs 32-49. The author’s attention drawn to this case by Prof. JUDr. Jiří Malenovský, CSc. within consultation on new developments in this field.

<sup>12</sup> Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). According to which the authorization of the copyright owner or holder of related rights is not necessary in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.

<sup>13</sup> Judgment of the Court (Fourth Chamber) of 13 February 2014, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB*, C-466/12, ECLI:EU:C:2014:76, paragraphs 14-32.

<sup>14</sup> The problem in this case lies primarily in the processing of personal data and other non-specific data, coming from consumer. In part, the issue is addressed by legislation in the area of personal data protection, namely by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88, but the consumer-oriented legal grounding of other categories of non-specific data has not yet been met. Partial solution of end-user data should be brought about by e-Privacy Regulation, which should enter into force together with GDPR, even though it has not been adopted yet, see Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final, 10.1.2017.

<sup>15</sup> Most recently, data privacy issues attracted public attention in the case of Cambridge Analytica, a political data firm, which misappropriated data of Facebook users and used them for “electronic brainwashing” of their data subjects in order to influence upcoming elections. Facebook was aware the misappropriation took place and decided not to come forward. The incident casts a shadow over the USA’s self-regulated digital space and also over the EU’s planned self-regulation measures for online platforms. Available at: <http://www.ceskatelevize.cz/porady/1126672097-otazky-vaclava-moravce/218411030500325/>

Digitalization has come to refer to organizing social life and its various domains around digital communication and information infrastructure. For the purpose of the thesis, the essential characteristic of digitalization represents its tendency to converge different sectors, processes or spheres of social life. This tendency is recognized in a link to four equally essential dimensions – infrastructural, terminal, functional and rhetorical, and market convergence. Infrastructural convergence highlights digitalization’s universal nature, implying that any network can transmit digital information. Terminal convergence stands for merging separate devices into one, which also applies to their functions. By way of example, a smartphone and its functions are the result of numerous devices consolidated into one together with their functions, such as telephone, computer, camera, remote controller, calculator etc. Rhetorical convergence corresponds to the reciprocity of digitalization with freed services of traditional structural arrangements. The market convergence is often associated with computing, telecommunications, media and information sectors, or with blurring the distinctions between infrastructures and services, software and media content.<sup>16</sup>

Discussions often invoke communication and information as the organizing principles of digitalization. That is why the role of ICTs is often being underlined in the DSM’s development. Given its universality, digitalization has a unique ability to simulate or reproduce any medium. Such generalized digital medium can consolidate diverse forms of communication and leads to a reconsideration of what *a medium* is.<sup>17</sup> Even though the medium must not have been confused with the media, just as paper does not automatically constitute the press, technological progress, notably development of new business models such as online platforms, media convergence and diffusion of the Internet, blurred the distinction between medium and media with special privileges, as well as duties and responsibilities.<sup>18</sup> The media freedom grants protection to persons or companies categorized as media that goes beyond freedom of expression protection afforded to private individuals or non-media entities. However, the media’s privileged protection is also subject to certain requirements, such as restrictions on the content or setting standards of conduct. Firstly, content consisting of commercial and financial interests, speech relating to private or intimate

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<sup>16</sup> CRAIG, R. *The International Encyclopaedia of Communication Theory and Philosophy*. Malden and Oxford: Wiley Blackwell, 2016. Volume I, p. 560-562. ISBN 978-1-118-29073-6.

<sup>17</sup> JENSEN, K. B. *Definitive and Sensitizing Conceptualizations of Mediatization*. *Communication Theory*, 2013, 23(3), p. 217. DOI 10.1111/comt. 12014.

<sup>18</sup> OSTER, J. *Theory and Doctrine of “Media Freedom” as a Legal Concept*. *Journal of Media Law*, 2013, 5(1), p. 57 – 78. According to Oster, the media is to be defined as “*a natural or legal person gathering and disseminating to a mass audience information and ideas pertaining to matters of public interest on a periodical basis and according to certain standards of conduct gathering the newsgathering and editorial process*”. Article 11(2) of the Charter of Fundamental Rights of the European Union expressly provides that the “*freedom and pluralism of the media shall be respected*”.

matters, and hate speech<sup>19</sup> can be restricted<sup>20</sup>, as speech without public concern enjoys less protection. Secondly, the media should follow certain standards of conduct when gathering, editing and disseminating information, such as acting in good faith and on an accurate factual basis.<sup>21</sup> Considering in such context Facebook, its chief executive officer Mark Zuckerberg has been until recently strictly denying the title of the media company, seeing that such status would mean more technical liability, as the media companies are currently considered more directly responsible for their content than technology platforms. On the other side, in his latest statements connected to above mentioned privacy issues, Zuckerberg blurred the previous detachment by implying that Facebook constitutes a new kind of platform – a place of public discourse, which incorporates both by providing venue for expression, similar to technology platform, which is bound by values of the community, similar to the media company editorial’s practice.

Such shift stems from the fact that the longer online platforms or any other new business model are able to avoid complying with legal obligations, such as the exemption from certain copyright provisions<sup>22</sup>, they maintain a clear competitive advantage against those who follow the rules.<sup>23</sup> However, it needs to be noticed that medium, as well as media, under technological development, which digitization and digitalization represent, changed and started to recall the concept of a public sphere suggested by Jürgen Habermas, described as a virtual public square, wherein groups of people come together as equals to freely engage in discussion, which refers more to *“a virtual or imaginary community, which does not necessarily exist in any identifiable*

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<sup>19</sup> Illegal hate speech is defined as the public incitement to violence or hatred directed to groups or individuals on the basis of certain characteristics, including race, colour, religion, descent and national or ethnic origin in the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58.

<sup>20</sup> Recently, the Supreme Court of Austria has asked the CJEU a preliminary question for clarification on the scope of Article 15(1) of the e-Commerce Directive and the host provider privilege in link to hate speech on Facebook. The judges appear more inclined to apply the CJEU’s judgment of 12 July 2011, *L’Oréal v Ebay*, Case C-324/09, ECLI:EU:C:2011:474, paragraph 7, which found that hosting providers can be ordered to *“take measures which contribute, not only to bringing to an end infringements of those [intellectual property] rights ..., but also to preventing further infringements of that kind”*. This leaves the question what constitutes infringements ‘of that kind’ and whether under this term can be subsumed also hate speech? Also, the issue of pro-active monitoring/content filtering by hosting providers is not only at the centre of the discussion around Article 15 of the e-Commerce Directive, but also of the Article 13 of the proposal for a Directive of the European Parliament and the Council on copyright in the DSM, COM (2016) 593 final, 14.9.2016.

<sup>21</sup> OSTER, J. Lecture on European media law on 13 March 2017 at the Law Faculty of University of Luxembourg in Luxembourg.

<sup>22</sup> See Article 5(3)(c) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22. 6. 2001, p. 10–19.

<sup>23</sup> ŠVANDELÍKOVÁ, Klára. *Rozhovor: prof. Jan Pichrt – Nedodržování pravidel generuje na straně aktérů sdílené ekonomiky neoprávněné výhody.* [online]. [cit. 2018-01-15]. Available at: <https://www.pravniprostor.cz/clanky/ostatni-pravo/rozhovor-prof-jan-pichrt-pravni-prostor-2018>

*space*”<sup>24</sup>. Speaking in legal terms, the description points at concepts of the information society and digital space, also known as cyberspace. The question is whether the EU at all has to react to such challenges, and, if so, how.

## 1.2 Digital space

As more and more industries are becoming digitized, the digital space<sup>25</sup> flung itself open. The term refers to a network of interconnected technology, wherein digital information flows, able to affect the physical world. The *space* needs to be perceived as an electronic landscape where, for instance, an email conversation appears to occur. Even though the digital space cannot be spatially located, it mirrors the current territoriality of an actual computer or locations of participants and servers.<sup>26</sup> In this sense, it is an online counterpart of the physical space, with whom it interacts and blends into on a daily basis, as can be seen on the example of e-commerce, wherein consumer-user joins the digital space to order physical goods, which are consequently delivered to the indicated address.

Digital space undeniably opens a new market – the digital market, which is more transparent, personalized but also more fragmented than the physical one. This goes straight against its naturally borderless character, considering “*the strong tendency of information to flow across borders*”.<sup>27</sup> In spite of having the largest single market in the world, the EU turned out not to be borderless when it comes to the regulation of the digital space. For instance, only four percent of all digital services consumed in the EU are provided cross-border, yet more than fifty percent are delivered by US-based companies and the rest supplied by national online services.<sup>28</sup> When the issue was assessed, the existence of different legal frameworks was identified as one of the biggest barriers to the EU cross-border e-commerce, causing legal uncertainty among businesses and consumers.<sup>29</sup>

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<sup>24</sup> HABERMAS, J. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. The MIT Press, Cambridge, Massachusetts, 1989, p. 176. ISBN 0-262-08180-6.

<sup>25</sup> The term “digital space” is interchangeable with the more common term of cyberspace. However, the author chose to use this particular term because of its relation to the internal market and DSM, whereas cyberspace is significantly linked to EU’s external actions and above all to its security.

<sup>26</sup> LÉVY, P. *Becoming virtual: reality in the Digital Age*. New York: Plenum Trade, 1998, p. 141-142. ISBN 978-030-6457-883.

<sup>27</sup> White Paper on Completing the Internal Market from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310 final, 14.6.1985.

<sup>28</sup> European Commission. *Why we need a Digital Single Market Fact Sheet*. [online]. [cit. 2018-01-15]. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet_en.pdf)

<sup>29</sup> European Ecommerce. *Cross-border e-Commerce Barometer 2016*. [online]. [cit. 2018-01-15]. Available at: <https://www.ecommerce-europe.eu/research/ecommerce-europe-surveys/>



Up to now, a patchwork of national digital markets and rules persists as a remnant from the beginnings of the EU digital policy in the 1980s, when it was necessary to react to the wave of technological progress and globalization swiftly, but it had to be reacted on both the national and the European level.<sup>30</sup> The situation has not changed, since the digital market, unfortunately, demonstrates a traditional inability of political powers of the Member States to respond to real economic and societal challenges, or if so, to approach them with a rather hostile attitude. This results in, on the one hand, a loss of the economic and social potential of the digital economy and, on the other hand, in a destructive impact on conventional market players, where there is no specific regulation to restore the balance.<sup>31</sup> Fortunately, the situation is completely different at the European level. The EU extensively deals with this topic and invests its efforts to unlock its potential to generate growth and employment by providing opportunities for investment and innovation of estimated €415 billion in additional GDP growth per year.<sup>32</sup> However, such quantitative approach based on creating additional products and jobs does not take into account the fact that traditional structures are changing under the influence of digitalization. In contrast to the EU's expectations, the digital market is less characteristic of intensified consumption and more distinguished by qualitatively different transaction space, in which the roles of consumer, producer, and intermediary are changing. The confusion between roles on the market is growing as consumers become co-producers of information they consume, which leaves traditional producers of information such as journalists, doctors, lawyers at risk of being perceived as mere suppliers of unprocessed materials or as redundant intermediaries.<sup>33</sup>

The replacement of consumption by the notion of co-production could be clearly observed on the example of shared economy, wherein services are provided peer-to-peer through an intermediary linking supply and demand sides of the relevant transaction. In terms of the information society, such intermediaries are called platforms of shared economy, or online platforms in short. What distinguishes today's online platforms from all previous intermediaries of shared economy is their unprecedented position in relation to both contractors by completely

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<sup>30</sup> Centre Virtuel de la Connaissance sur l'Europe (CVCE). Transcription of the interview with Jacques Delors conducted by the on 16 December 2009 at the Paris. [online]. [cit. 2018-01-15]. Available at: [https://www.cvce.eu/content/publication/2011/6/15/1bd9164d-a2bd-49a2-95ec-fe21d220f961/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2011/6/15/1bd9164d-a2bd-49a2-95ec-fe21d220f961/publishable_en.pdf)

<sup>31</sup> POLČÁK, R. Fenomén internetových platform II. *Právní rádce*, 2017(11), p. 38-43.

<sup>32</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe – Analysis and Evidence, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 6.5.2015.

<sup>33</sup> LÉVY, P. *Becoming virtual: reality in the Digital Age*. New York: Plenum Trade, 1998, p. 79. ISBN 978-030-6457-883.

controlling the transaction, such as sales, service provision, etc. Both supplier and consumer are in a complex legal relationship with the platform. However, the platform's main commitment within such relationship is not direct mediation of any transaction, but to ensure the functioning of their digital identities, through which seeks to conclude contracts for various principle transactions.<sup>34</sup>

In response to digitalization of various social transactions, similarly, law is forced to “digitalized” as well. However, it does not demand fundamental changes in legal systems' values or in legal questions' essence, but it is only about adapting the form of legal regulation to conditions in the digital space. Thus, the nature of law does not change within digital space, since the substantial modification undergoes primarily the form of regulation.<sup>35</sup> Yet, on the success of finding future proof regulatory framework for digital age may hinge the future and social relevance of law itself.

### 1.3 Information society

Discussions about digitalization often invoke information as the organizing principle of many domains of social life and thus, in reaction to the technological development was established the concept of “*a society where a significant degree of activity focuses on the creation, distribution, use and reuse of information [...]*”<sup>36</sup>, later known as information society.

Concerning its legal aspects, a distinction can be drawn between quantitative and qualitative aspects of the information society. The quantitative definition is based on building its infrastructure, which enables processing information and is usually an object of attention of economics or informatics. From the qualitative point of view, the information society is determined by information's content and its quality, which is usually covered by law, philosophy or sociology. Altogether, an ideal of the information society constitutes a society, wherein its members make full use of the information infrastructure and through which communicate real information without technical difficulties.<sup>37</sup> Social and technical forces constitute each other

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<sup>34</sup> POLČÁK, R. Virtualizace sdílené ekonomiky a fenomén internetových platforem. *Právní rádce*, 2017(10), p. 42-45.

<sup>35</sup> POLČÁK, R. Virtualizace sdílené ekonomiky a fenomén internetových platforem. *Právní rádce*, 2017(10), p. 42-45.

<sup>36</sup> European Union. *Glossary of summaries – Information society*. [online]. [cit. 2018-01-19]. Available at: [http://eur-lex.europa.eu/summary/glossary/information\\_society.html](http://eur-lex.europa.eu/summary/glossary/information_society.html)

<sup>37</sup> POLČÁK, R. *Internet a proměny práva*. Auditorium s.r.o. Praha 2012. p. 277 – 288. ISBN 978-80-87284-22-3.

within its concept to that point that *“technology is society, and society cannot be understood or represented without its technological tools”*<sup>38</sup>.

Lacking further legal definitions, it is necessary to look at its closely related concept of information society services, whose foundations laid down the e-Commerce Directive<sup>39</sup> except for their definition, which constitutes Article 1(b) of Directive 2015/1535<sup>40</sup> amending Directive 98/34/EC<sup>41</sup>; this definition covers *“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of a service”*<sup>42</sup> and according to Recital 18 of the e-Commerce Directive *“span a wide range of economic activities which take place online [...]”*. The definition applies to shopping, newspapers, finances, entertainment, marketing or internet intermediary services. Hence, information society services are not limited to mere buying and selling of goods and services online, the Internet has also become a powerful tool for businesses and consumer to obtain information. The anchorage of information society services in the European legal framework averted a very severe interference to the free movement of information society services and enabled their deployment.<sup>43</sup>

However, not all changes had positive impact on legal certainty of the information society. With the rise of online platforms, such Google, Apple, Facebook or Amazon (“GAFAs”), and other information society services, a dispute between the e-Commerce Directive and Copyright Directive<sup>44</sup> escalated over what is to be understood under communication to the public in Article 3(1) of the latter directive. The concept has been many times subject to the CJEU’s case law, see

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<sup>38</sup> CASTELLS, M. *The Rise of the Network Society*. Malden, MA: Wiley-Blackwell, 2010, p. 5. ISBN 978-1-405-19686-4

<sup>39</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-16.

<sup>40</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1, 17.9.2015, p. 1-15.

<sup>41</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37.

<sup>42</sup> For the purposes of this definition, “at a distance” means that parties are not simultaneously present; “by electronic means” covers services sent and received by electronic means for data processing or entirely transmitted and received by wire, radio, optical and electromagnetic means; “at the individual request” represents service provided through the transmission of data on request.

<sup>43</sup> See notification obligation of the Member States to communicate any to the Commission any draft technical regulation regarding information society services in Article 5(1) of Directive 2015/1535 or country of origin principle, stated in Article 3 of the e-Commerce Directive, stipulating that information society services are subject to the law of the Member State, in which the service provider is established. In turn, the Member State in which the service is received cannot restrict incoming services (except for strictly limited circumstances).

<sup>44</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167, p. 10-19.

judgments *SGAE*<sup>45</sup>, *ITV Broadcasting and Others*<sup>46</sup> and others.<sup>47</sup> However, the dispute has not been solved during the last decade and culminated in the battle for the so-called second copyright package, namely Article 13 of the proposal for a Directive on copyright in the DSM<sup>48</sup>, which would *de facto* break through the e-Commerce Directive and its harmonized rules on establishing limitations to liability of intermediary service providers, who provide access to the Internet and the transmission and hosting of information, and procedures for removing illegal content. Similarly, the judgment *Asociación Profesional Elite Taxi*<sup>49</sup> casted shadow over the clarification of the status of online platforms. Until recently, online platforms relied on a pro-platform interpretation of the Commission's communication A European agenda for the collaborative economy<sup>50</sup> implying that all online platforms fall under information society services, which the CJEU recently overcame by defining UBER as a service in the field of transport.

As can be clearly observed, the concept of information society has been constantly evolving under the influence of technological development and also regulatory approaches, passing through different phases and titles. Therefore, in order to avoid a Babylonian confusion of terms later in the thesis, when will be this topic discussed further, it is essential to set forth this yet known but certainly not final destination of the information society – data society.

In the digital space, every single act can be recorded and processed into usable data, the raw material of which information and knowledge is produced. Any recordable act creates

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<sup>45</sup> Judgment of the Court (Third Chamber) of 7 December 2006, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, ECLI:EU:C:2006:764, paragraph 36 and notably the term “public” in paragraph 37.

<sup>46</sup> Judgment of the Court (Fourth Chamber) of 7 March 2013, *ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd*, C-607/11, ECLI:EU:C:2013:147, paragraph 20 and notably the term “communication” in paragraphs 21-30 and “communication to the public” in paragraph 39.

<sup>47</sup> See the term “public” explained within the judgement of the Court (Third Chamber) of 15 March 2012, *Società Consortile Fonografici (SCF) v Marco Del Corso*, C-135/10, ECLI:EU:C:2012:140, paragraph 84; judgement of the Court (Third Chamber) of 15 March 2012, *Phonographic Performance (Ireland) Limited v Ireland, Attorney General*, C-162-10, ECLI:EU:C:2012:141, paragraph 33. The concept of a “communication to the public” referred to in the judgment of the Court (Fourth Chamber) of 13 February 2014, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB*, C-466/12, ECLI:EU:C:2014:76, paragraph 24. “A profit-making nature” of the communication in the judgment of the Court (Grand Chamber) of 4 October 2011, *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA, QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, paragraphs 204-206.

<sup>48</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market, COM(2016) 593 final, 14.9.2016.

<sup>49</sup> Judgment of the Court (Grand Chamber) of 20 December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, C-434/15, ECLI:EU:C:2017:981.

<sup>50</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy, COM(2016) 356 final, 2.6.2016.

information or, in the information society, wealth. Information grows into an input and output of data economy, becoming the main commodity on the digital market, obtained with the help of technologies. Such products and services became the most valuable if they can shift the production of added value to the consumer. Any consumer while acting in digital space produces information with digital value simultaneously. Not only the consumer becomes a co-producer of the information he consumes, replacing the notion of consumption with the coproduction as mentioned above, but he or she also serves as an agent of digital market visibility for those who exploit consumers' actions in the digital space.<sup>51</sup> With regard to their importance for emerging technology, such as Big Data, Internet of Things, Machine to Machine, Artificial Intelligence or Blockchain, the EU has realized that the future evolution of the information society is based on data and that data society can only become a reality in the digital space without barriers – the DSM, wherein the free movement of data is ensured.

#### **1.4 Digital single market**

The European society witnessed a new way of thinking of technologies, namely ICTs, in terms of creating new spaces such as the digital space, participating on the creation, distribution, use and reuse of information within the information society, and encountering technological progress at a fast pace like digitalization. Those phenomena are considered to be the driving force behind the EU's reaction to the digital age – the Digital Single Market (“DSM”).

The identification of the DSM's cornerstones provides valuable context not only to the DSM itself but also to the EU's most advanced digital policies, namely Digital Agenda for Europe (“DAE”) in 2010 and Digital Single Market Strategy (“DSM Strategy”) in 2015, multi-annual scope policies focused on key interdependent actions, which fully conceptualize and target exclusively the digital space, navigating the EU to the digital age.

In order to stem the digital tide, the DSM was identified as one of the most promising and challenging areas, in which the free movement of goods, services, persons and capital is guaranteed and where individuals and businesses can effortlessly access and exercise online activities relying on fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.<sup>52</sup> Reflecting the fact that the EU is first of all an economic union, the DSM focuses on the economy and converts its benefits into social advantages, as opposed to

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<sup>51</sup> LÉVY, Pierre. *Becoming virtual: reality in the Digital Age*. New York: Plenum Trade, 1998, p. 80. ISBN 978-030-6457-883

<sup>52</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6.5.2015.

the concept of information society, which equally underlines both social and economic aspects. Furthermore, such definition reveals certain likeness with the single market, on which is based the DSM's legal justification, however, there are also conceptual differences, as shows following parts of this thesis.

In general, digital policies addressing the DSM are formulated around issues in which current legislation and business practices are failing to keep up with the innovative nature of technological development. As the phenomenon of the DSM is *ubiquitous*, transcending legislation, economy, public sector and society, digital policies deliver in horizontal manner on its top priorities more ambitious telecoms rules, effortless cross-border e-commerce, reinforced data protection, updated audio-visual media framework, non-discriminatory content access, modernised copyright law, reassessed competition policy, free flow of data, and simultaneously makes use of attained data to comprehensively analyse the role of online platforms within. However, the real task will be to ensure cohesion between different sets of rules, in this sense, the question is whether the DSM can be truly *connected*.

Since their the Juncker Commission has detailed, negotiated on and signed off many of its legislative initiatives under the DSM Strategy for the all-encompassing overhaul of Europe's digital landscape in pursuit of creating its legacy, but will the EU be able to reach its objective of future proof regulatory framework ready for the digital age? Keeping a promise to take into account interests of numerous stakeholders, such as telecom operators, right holders, collective management operators, online platforms and forth, and at the same time to lead a consumer-friendly approach, it is clear that bringing down digital barriers and connecting different sectors in order to achieve *digital plus single* market will be a labour of Hercules.

## **1.5 Partial conclusion**

The purpose of this part was to provide the brief theoretical and conceptual outline that supports following comparison and analysis of the DSM as the EU's reaction to the digital age. In theoretical terms, the two paramount principles for any digital initiative are globalization and liberalism, leading towards openness and cooperation, which is not regarded as being opposite to the substance of the EU given its integrative character.

In conceptual terms, the part introduced the three DSM's cornerstones – digitization and digitalization as the attained degree of technological progress, digital space as the new aspirant for deepening the single market, and information society as the online community existing within it. Those phenomena are considered to be the driving force behind the DSM, in the sense, that their concepts are mirrored in any piece of legislation introduced under its umbrella.

From beginning to end of this part, opening questions have been posed serving as a prelude to defining the topic of the thesis and to introducing research questions linked to it, what are the material sources of law in the case of the DSM, with whom be dealt in detail further in the thesis. The part also implied whether the EU at all has to react to challenges brought along by technological development, namely digitization and digitalization, and, if so, how.

Not until recently it was realized that Internet and other digital technologies, which become essential across all sectors of economy and society, depend on information and its tendency to flow across borders. Consequently, issues related to the digital space are in essence of a cross-border nature. Therefore, only EU law, having direct or indirect effect on the laws of its Member States, can efficiently establish a set of rules, which would make cross-border movement of information easy, efficient and secure and weld fragmented digital markets together into one. Moreover, with regard to the alleged potential of digital economy and the lack of understanding leading either to negligence or hostile attitude of the Member States, the EU takes over the reins in pursuit of creating the DSM. In this case, law is forced to react to digital specifics but rather than changing its substance, it modifies the form of regulation to ensure the free movement of data, which is the commodity of the 21<sup>st</sup> century and oil of the economy, technological development and evolution of the information society.

The overhauling question is whether the EU is able to create a future proof regulatory framework for the DSM and, if so, to what extent; respectively, to what extent the Member States will have to confer powers on the EU to ensure its cohesion. Where both terms *digital* and *single* essentially aim for convergence, approximation or even uniformity, it is all the more important to exploit the potential of such integration, which can be raised to the second power. At the same time, it should not be forgotten that on the success of finding the right formula for regulation of the DSM may hinge the future existence and social relevance of law itself.

## 2. Delineating foundations of the digital single market

The previous part introduced three cornerstones – digitization and digitalization as the wave of technological progress, digital space as the new market and information society as the online community existing within it. Those phenomena are considered to be the driving force behind the DSM, which was briefly introduced in the fourth chapter for the sake of completeness, but also behind the European integration process in general, whose state of play could be observed on the example of the DSM.

In this sense, the first chapter of this part is dedicated to the historical delineation of the DSM, in which are highlighted key moments in the evolution of the European Union towards the DSM's cornerstones. Such excursion into past developments shall provide not only historical but also social grounds for the need of regulation in that regard. The essential part of this section is to validate the fact that DSM was created specifically due to the very fast technological developments that pose huge challenges to the overall regulatory framework of the EU. Furthermore, under the spotlight appears notably the evolution of the regulatory framework for the information society, which may be relevant for today's quest to find the right balance between market regulation and innovation. However, the chapter does not claim to present an exhaustive record book of all developments, as it would exceed the scope of this contribution.

The historical delineation ends at the point of establishing the connection between the DSM and the single market, which is essential to verify another assumption of this thesis that the single market legally justifies the DSM. Therefore, the second chapter is dedicated to regulatory foundations of the DSM, which are delineated by drawing from the experience of the single market. In spite of their synergy, the chapter is constituted in a comparative manner of their substantive and institutional aspects. This method is chosen to highlight their similarities and above all their differences, as the assumption continues that those are the cause of tensions between both markets and underperformance of the DSM. However, differences are simultaneously the key to identifying challenges of the DSM, which are distinctive only for this market and which enables to customize the policy and regulatory framework for DSM's needs.

In overall, the delineation of the DSM's foundations provides valuable context to contemporary digital policies *stricto sensu* adopted after the Treaty of Lisbon, which are determined mainly based on differences between the single market and DSM in order to take into account unique character of the latter.



## **2.1 Historical and social foundations: from information, through knowledge, to data society**

The historical and social foundations of the DSM start with the information society creation, pass through the knowledge society, and end with the idea of data society of the future. The evolution of the regulatory framework of the information society with its phases is significant because it outlines the DSM's spine, which is to be followed when exploring this topic. Like the subchapter headings imply, the various stages of the information society can be compared to the one of the single market, as it constitutes an evolution in itself. However, proceeding from Newton's third law of motion, behind reaction there is always an action. The chapter will seek to explain what action led to the EU regulation of the digital space.

This chapter has two objectives. Firstly, it outlines the evolution of the regulatory framework for the information society on the background of the European integration process up to the moment before the first digital policy was adopted, as its analysis is left for the final part of this thesis. Secondly, it focuses on different approaches adopted towards the digital agenda, more or less successful. Therefore, the partial objective of this chapter is to present a compilation of material sources of law of the DSM, which are for the sake of clarity highlighted in bold.

### **2.1.1 With common market towards information society**

From the Treaties of Rome to the Maastricht Treaty, the process of European economic integration moved gradually, going beyond initial degrees of economic integration such as a free trade area or a customs union, towards an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured – the internal market<sup>53</sup> (also known as single market).<sup>54</sup> Established, or according to some “completed”<sup>55</sup>, on 1 January 1993 by the Maastricht Treaty, the internal market descended from a common market set up by the Treaties of Rome on 25 March 1957. Regardless of the different titles, the technical term denotes that to the free movement of goods within the customs union is added the free movement of the factors of production such as labour, capital and enterprise.<sup>56</sup> Hence, it articulates its fundamental feature –

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<sup>53</sup> See Article 26(2), Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

<sup>54</sup> The European Union uses the term single market interchangeably with the internal market (see Single Market Act I – Twelve levers to boost the growth and strengthen confidence (COM/2011/0206 final) and Single Market Act II – Together for new growth (COM/2012/0573 final)), despite the consistent terminology developed in the Treaties. With regard to the topicality of this thesis, notably the fact that the DSM is based on policy documents operating with this term, the author chose to use the single market, where it is possible. In particular, the term internal market is used in connection with competence or the four freedoms.

<sup>55</sup> Given the Monti report and more recent policy documents, such as Single Market Act I and II, the European Union adopted towards this issue a clear position and agreed that the internal market is not completed.

<sup>56</sup> CRAIG, P. P. a G. DE BÚRCA. *EU law: text, cases, and materials*. Sixth edition. New York, NY: Oxford University Press, 2015, p. 608. ISBN 978-0-19-871492-7.

the freedom of movement, which has evolved from a simple declaration in the Treaty of Rome to reality as of the Treaty of Maastricht.

Since its beginning, the idea has been restarted many times in the effort to reboot the supranational approach to the European unity in pursue of its benefits. It is clear that the ideal of Adam Smith, described in *The Wealth of Nations*, as “[without trade restrictions] the obvious and simple system of natural liberty establishes itself of its own accord. Every man [...] is left perfectly free to pursue his own interest in his own way [...]. The sovereign is completely discharged from a duty [for which] no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society”<sup>57</sup>, has not been achieved. However, the formation of numerous policies<sup>58</sup> and the optimization of the competences over decades allowed the European Union to embrace the four freedoms and led nearly to “the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market”<sup>59</sup>. The elimination of the obstacles occurs in conjunction with other instruments used for the creation of the internal market, namely the harmonization of laws and principle of mutual recognition of national standards,<sup>60</sup> which jointly brings the Member States’ legislation closer in line. Their legal aspects are discussed in detail in the following chapter.

For European integration process are also highly important other paramount principles. Besides liberalization, lay at the foundation of the internal market also principles of widening and deepening.<sup>61</sup> Concerning the development of the internal market, widening can mean either accessing to new economic fields or enlargement of the European Union, deepening refers to ensuring the flexibility of the internal market so that resources could be uniformly distributed.

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<sup>57</sup> SMITH, Adam. *The Wealth Of Nations*. Book IV, Chapter IX, p. 687, paragraph 51.

<sup>58</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 377 – 383. ISBN 978-80-7400-488-9. According to the author of the publication, the ambiguous term “policy” can be understood as “a coherent system of measures in a certain area of the societal relations, characterized by mutual interdependence, common method, decision-making procedure and principles”. Policies are considered to be tools used to achieve EU’s objectives. Nowadays, EU policies can be divided into two groups – external and internal, which exist for competition, consumer protection, transport, trans-European networks, social issues, research and technological development and forth.

<sup>59</sup> Judgment of the Court of 5 May 1982, *Gaston Schul Douane Expeditieur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, C-15/81, ECLI:EU:C:1982:135, paragraph 33.

<sup>60</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 223. ISBN 978-80-7400-488-9.

<sup>61</sup> European Union. *Glossary of summaries – Deepening and widening*. [online]. [cit. 2018-01-30]. Available at: [https://eur-lex.europa.eu/summary/glossary/deepening\\_european\\_integration.html?locale=en](https://eur-lex.europa.eu/summary/glossary/deepening_european_integration.html?locale=en)

To begin with, the influence of new technologies and development of the information society were highly debated in the evolution of the European Union. The greatest progress in this regard was achieved by Jacques Delors during his occupancy of the Commission between the years 1985 and 1994, bringing back much-needed credibility after the Eurosclerosis period. As the freedom of movement had not been achieved in reality, which questioned the legitimacy of the Community, Delors focused on two fronts – on the prioritization of the common market, while being conscious to its interrelation with social dialogue and technological development, and on the reformation of the Treaty to allow Community institutions to engage in more issues.

New technologies became one of his top priorities, as the lack of references towards technological development caused lagging behind the USA and Japan in competitiveness. In those times, which had not been reigned yet by the Internet or World Wide Web, the term *new technologies* portrayed innovation in research, affecting all people and processes across all industries, without being limited to ICTs. Delors recognized their strategic importance and prioritized new technologies to the level of steel, telecommunication or automation industries.<sup>62</sup>

The low performance and lack of collective action at the supranational level were addressed in the **White Paper on Completing the Internal Market** together with a series of solutions for the elimination of all barriers to the free movement. The composition of the document was based on a classification of three types of barriers obstructing the functioning of the common market – physical, technical and fiscal. The physical barriers, such as border controls or quantitative restrictions, represent the most visible examples of a breach of the freedom of movement and the failing common market project. Physical barriers result in technical obstacles, such as different product standards and legislative systems in overall, and also in fiscal ones, such as tax harmonization. Furthermore, the document includes several references to the development of new technologies in context with the creation of new cross-border services, for instance, audio-visual, distribution, information and data processing services. The Delors Commission based the economic revival on linking the internal market with technological development. However, unlocking its potential was possible only within an unobstructed market, which takes us back to the significance of the elimination of barriers.<sup>63</sup>

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<sup>62</sup> Commission of the European Communities. *Speech by Jacques Delors, the President of the Commission of the European Communities on 25 February 1985 in Flanders Technology Gent*. [online]. [cit. 2018-01-30]. Available at: [http://europa.eu/rapid/press-release\\_SPEECH-85-1\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-85-1_en.htm)

<sup>63</sup> White Paper from the Commission to the European Council on Completing the Internal Market to the European Council, COM(85) 310 final, 14.6.1985.

The credit of the White Paper was that it not only started a discussion on the internal market but that it also expedited the technological development and provoked the reformation of the Community. As a result, the **Single European Act** (“SEA”), entering into force on July 1, 1987, eliminated the vague character by setting a clear deadline for the attainment of the internal market on December 30, 1992.<sup>64</sup>

In order to facilitate positive integration and establishment of the internal market, the SEA introduced a legislative reform, since legislative mechanism required unanimity, as is recognized today in Article 115 Treaty on the Functioning of the European Union (“TFEU”).<sup>65</sup> Therefore, the SEA introduced two major legislative improvements for the internal market – current Article 26 and 114 TFEU. Art. 26(1) TFEU provides that the EU shall adopt measures with the aim of establishing or ensuring the functioning of the internal market. This went together with the acceleration of the harmonization process through the rule of a qualified majority vote in current Article 114 TFEU, whereas the previously only available legal basis under Art. 115 TFEU demanded unanimity in the Council.

Qualified by today’s Article 27 TFEU, the Commission, when drawing up its proposals, shall take into account differences between the Member States either by leaving a margin of discretion in the legal act applicable to all Member States, or by the form of temporary derogations causing the least possible disturbance to the internal market. Such transitional periods were applied in the DSM’s telecommunications<sup>66</sup> and other areas, where increased competitiveness and breaking down barriers create macroeconomic and social tensions within weaker economies.

As the SEA stated, the Community obtained an explicit competence in research and technological development, which justified actions taken in the field of technologies. The framework program had to be implemented through specific programs developed within each activity. At this point, the information society was limited to bringing about research efforts and inciting the mobility of researchers across borders, who would have the chance to innovate and transpose innovations to the economy.<sup>67</sup> Social aspects of the information society and impacts of technology into daily lives of Europeans were limited because of the fear of replacement employees with technologies.

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<sup>64</sup> See Article 13, Single European Act, 1987 OJ L 169/1, Volume 30, 20.6.1987 (amending Treaty Establishing the European Economic Community, 25.3.1957, 298 U.N.T.S. 11).

<sup>65</sup> CRAIG, P. P. a G. DE BÚRCA. *EU law: text, cases, and materials*. Sixth edition. New York, NY: Oxford University Press, 2015, p. 614-615. ISBN 978-0-19-871492-7.

<sup>66</sup> SYLLOVÁ, PÍTROVÁ, PALDUSOVÁ a kolektiv. *Lisabonská smlouva: komentář*. Praha: C.H. Beck, 2010, p. 267. Beckova edice komentované zákony. ISBN 978-80-7400339-4.

<sup>67</sup> Following the SEA, it took another decade to launch negotiations on the e-Commerce Directive and Directive 98/34, which laid down foundations for information society services, as mentioned before. See footnotes No. 37-41.

In institutional terms, it was clear that the mission of the Commission in research and technological development is not to replace national policies, given the principle of subsidiarity, but rather aims to complement them. The main actor is the Council, represented by the Member States, adopting overall priorities of the multi-annual framework, along with the European Parliament based on proposals of the Commission. Such decision-making process considerably slowed down the implementation process.

Given the considerable pressure on technical facts involved in any technological development, increasing the danger of conflict of legal and technical rules, the passage of these measures had to be secured through new approach to harmonization. Traditional techniques demanding detailed technical specification were bound to fail given the diversity of national regimes and the pace of innovation.<sup>68</sup> Under the **New Approach of Technical Harmonization and Standardization**<sup>69</sup>, legislative harmonization was meant to formulate health and safety requirements of products for national rules and was concentrated only on those measures which were still lawful under the scrutiny test under Article 36 TFEU and mandatory requirements of Cassis de Dijon<sup>70</sup> principle of mutual recognition. Since then, directives could be drafted more easily as they were less detailed, and their volume drew nearer to national technical legislation with obviation of the unanimity through Article 114 TFEU. In this manner, the single market has evolved on a combination of harmonization of laws and mutual recognition, which in the 90s started to apply also to other freedoms and became very popular among the Member States, as it limited the need for legislative harmonization.<sup>71</sup>

Based on the specific policy framework introduced in the SEA, the Delors Commission presented throughout its mandate **framework programs** for activities in the field of research and technological development, taking part in the creation of the information society. Such activities were highly dependent on the negotiation and interaction between the Member States at the Council, as it decided on financing and orientation of policies on the Commission's proposal. In

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<sup>68</sup> CRAIG, P. P. and G. DE BÚRCA. *EU law: text, cases, and materials*. Sixth edition. New York, NY: Oxford University Press, 2015, p. 620. ISBN 978-0-19-871492-7.

<sup>69</sup> Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards. OJ C 136, 4.6.1985, p. 1–9.

<sup>70</sup> Judgment of the Court of 20 February 1979, *Rewe-Zentral*, C-120/78, ECLI:EU:C:1979:42.

<sup>71</sup> STEHLÍK, HAMULÁK, a PETR. *Praktikum práva Evropské unie: vnitřní trh : teoretické základy, judikatura, praktické příklady*. Praha: Leges, 2011, p. 17. ISBN 978-80-87576-09-0.

contrast to the monetary union and its sovereignty issues, national interests manifested in this field mostly in budget negotiations.<sup>72</sup>

Despite its delayed approval due to budgetary negotiations, the **Second Framework Program**, valid between 1987 and 1991, was considered as successful in overcoming the disparity between the potential of the internal market and modern research.<sup>73</sup> Even though it already contained an explicit reference to the information society, citizens had not become full-grown users overnight and experienced technology mainly through employment.<sup>74</sup>

The **Third Framework Program**, stretching from 1990 to 1994, had not included the information society among its explicit objectives, instead the program focused on enabling ICTs. This shift was justified by the fact that ICTs placed the user at the centre and thus, positioned the framework program into a user-oriented strategy. Citizens became users, rightful members of the information society, and they should be able to benefit from it. Besides opportunities, which were brought by technologies in the field of health, transport and so, limited access disturbing economic and social cohesion was recognized as a major concern.<sup>75</sup>

The year of 1992 was marked by the deadline for the attainment of the internal market. Nevertheless, the main focus was on the economic and monetary union, as the European Union accomplished another level within the European integration process. Due to Delors' efforts, the internal market had been also officially launched with the **Treaty of Maastricht** ("TEU"), entering into force on 1 November 1993. By that time, approximately 90% of the proposals contained in the White Paper had been implemented. Among other things, controls on goods and persons at borders were abolished and significant shift marked the area of freedom to provide services and freedom of establishment or capital. On the other side, the liberalization of transport services or telecommunications was not realized. In addition, the EU had to face the lack of transposition of directives adopted by the Member States. It became clear new advances will continue to emerge in the light of technological developments and European integration process, towards which the Member States will show a rather hostile attitude or over-regulate them contrary to the notion of a

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<sup>72</sup> Single European Act, Title VI – Research and Technological Development, OJ L 169, Volume 30, 20.6.1987.

<sup>73</sup> Commission of the European Communities. Evaluation of the Second Framework Programme for Research and Technological Development, SEC (92) 675 final, 22.4.1992.

<sup>74</sup> Council Decision of 28 September 1987 concerning the framework programme for Community activities in the field of research and technological development (1987 to 1991). OJ L 302, 24.10.1987, p. 1–23.

<sup>75</sup> Council Decision of 23 April 1990 concerning the framework Programme of Community activities in the field of research and technological development (1990 to 1994), OJ L 171, 4.7.1990, p. 30–30.

market without internal borders.<sup>76</sup> Therefore, by excluding the deadline for the attainment, it was nonchalantly gestured that the internal market is an ongoing task, given the persisting barriers of physical, technical, fiscal and also social nature. Along these lines, the Treaty put another block on the concept of the information society by adding social dimension to the internal market.<sup>77</sup>

Moreover, drawing on the example of the Third Framework Program, the Treaty introduced trans-European networks in the areas of transport, telecommunications and energy infrastructures.<sup>78</sup> The impact of transnational telecommunications brought a territorial dimension to the development of new technologies and thus, thanks to their interconnecting impact on society, they were able to address informational or digital barriers, such as limited access of peripheral regions. In addition, the Maastricht Treaty for the first time recognized separate policies for research and technological development activities on the national and supranational level provided that they are mutually consistent and remain coordinated.<sup>79</sup>

### 2.1.2 With internal market towards knowledge society

As off the Treaty of Maastricht, which created the European Union and established the internal market, the next reforms concentrated on the democratization of the decision-making process. The **Treaty of Amsterdam**, entering into force on May 1, 1999, marked a new stage in the process of creating an ever-closer union, wherein decisions are taken as closely and as openly as possible in regard to citizens. In this way, the EU launched the co-decision making procedure of the Parliament and the Council.<sup>80</sup>

In its final **White Paper on Growth, Competitiveness and Employment** the Delors Commission brought again the information society to mind by highlighting its ability to create new forms of economic and social organization.<sup>81</sup> As foundation for the proper functioning of the information society, was designated a *common information area*, referring to what later became the DSM. This space is determined by the need to ensure the free movement of information without barriers and fragmentation and thus, depends on infrastructure which is no longer subject to geographical constraints as well as on the promotion of innovation.

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<sup>76</sup> STEHLÍK, HAMUĽÁK, a PETR. *Praktikum práva Evropské unie: vnitřní trh : teoretické základy, judikatura, praktické příklady*. Praha: Leges, 2011, p. 19. Student (Leges). ISBN 978-80-87576-09-0

<sup>77</sup> Treaty on European Union (Treaty of Maastricht), OJ C 191, 29.7.1992.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, see Article 3 TEU.

<sup>80</sup> Treaty of Amsterdam, Article 1(4). O J C 340, 10.11.1997.

<sup>81</sup> White Paper on Growth, Competitiveness and Employment, The challenges of the challenges and ways forward into the 21<sup>st</sup> century, COM (93) 700 final, 5.12.1993.

15 years later, Delors explained in an interview his motivations behind the White Paper: “So my idea was that, with things breaking down because of the new wave of technological progress, especially in information technology, and with globalisation, it was time to react.”<sup>82</sup> As the cause of the evolution, or action creating reaction, Delors explicitly marked technological development and new technologies, notably the ICTs. The White Paper was simultaneously considered to be an embryo for the Lisbon Strategy.

The White Paper was presented to the European Council, which then requested a report on its priorities, notably on development and interoperability of networks for facilitating the dissemination of information, trans-European basic services and ICT applications. In response, a group of leading figures representing the industry, operators and users led by Michael Bangemann, the Commissioner for the Internal market and Industrial Affairs, presented the **Bangemann report on Europe and the Global Information Society**.<sup>83</sup> With technology perpetrating daily lives of citizens, the report acknowledged that the information society had begun to recede from a strictly sectoral view of research and technological development, and was overlapping with other policies. Technological progress and the evolution of the internal market rendered obsolete previous policies and thus, the report called for the interaction of the whole policy triangle, citizens included. All citizens should have been able to reach for benefits, which would prevent the separation of the information society into have and have-nots access to technology.

The **European Council at Corfu** on June 24 and 25, 1994, took note of the Bangemann report and concluded that it is up to the private sector to respond to this challenge, however, the Community and its Members should back up the development by creating a clear and stable regulatory framework, notably concerning access to markets, compatibility between networks, intellectual property rights, data protection and copyright. The European Council maintained pressure to establish the necessary framework without further hesitation. To be exact, the Council together with the Parliament should not delay adopting measures covered by existing proposals in these areas. Similarly, the Commission should establish a program covering the remaining measures needed.<sup>84</sup>

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<sup>82</sup> CVCE.eu by University of Luxembourg. *Interview de Jacques Delors*. [online]. [cit. 2018-01-30]. Available at: [https://www.cvce.eu/content/publication/2011/6/15/1bd9164d-a2bd-49a2-95ec-fe21d220f961/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2011/6/15/1bd9164d-a2bd-49a2-95ec-fe21d220f961/publishable_en.pdf)

<sup>83</sup> European Commission. *Bangemann report on Europe and the Global Information Society*. [online]. [cit. 2018-02-8]. Available at: [https://cordis.europa.eu/news/rcn/2730\\_en.html](https://cordis.europa.eu/news/rcn/2730_en.html)

<sup>84</sup> European Council. *Conclusions of Corfu European Council on 24 and 25 June 1994*. [online]. [cit. 2018-02-8]. Available at: [http://www.europarl.europa.eu/summits/cor1\\_en.htm#infosoc](http://www.europarl.europa.eu/summits/cor1_en.htm#infosoc)



The information society still remained in topics such as research and technological development, i.e. at the level of framework programs. Certain shift was clearly apparent in the **Fourth Framework Programme** between 1994 and 1998. As technologies became more common, the information society was leaving the field of research and focused instead on building the information infrastructure, notably telecommunications. By removing constraints of time and distance, information and communication infrastructure was able to connect citizens at any time or in any place and thus, arranged the relationship between the citizen-user and the information society.<sup>85</sup> At the same time, it was necessary to ensure the protection of such individuals with regard to the processing of their personal data and, on the other side, to enable the free movement of data through the infrastructure.

However, at this point of the evolution towards the DSM, the Commission did not favour strict regulation, as the single market was absent in the network industries, data flow and electronic commerce, which were left up to the market players. The **Data Protection Directive**<sup>86</sup> was, therefore, a breakthrough measure, protecting the right to privacy with respect to the processing of personal data and, at the same time, their free flow between the Member States. Followed by the advent of liberalization and elimination of remaining monopolies in 1990s, the EU then led a formalistic regulation focused on overcoming the dividing line between liberalized and reserved services, which could be preserved under monopoly. After the removal of last remaining monopoly rights,<sup>87</sup> telecommunications single market has been established and the previously mentioned **e-Commerce Directive** soon followed. Such advancement forged the connection between the information society and the internal market, which added a new dimension to the latter and to European integration process in general.

With dissemination of the Internet and World Wide Web<sup>88</sup>, the information society was more and more referenced in policies by putting the European citizen in their centre. In contrast to previous efforts in developing information infrastructure, which had been under the spotlight of the Fourth Framework Programme, the information society was perceived later more as a society

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<sup>85</sup> Decision No 1110/94/EC of the European Parliament and of the Council of 26 April 1994 concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration (1994 to 1998), OJ L 126, 18.5.1994, p. 1–33.

<sup>86</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.

<sup>87</sup> Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74/13, 13.3.1996.

<sup>88</sup> CERN. *The birth of web*. [online]. [cit. 2018-02-8]. Available at: <https://home.cern/topics/birth-web>

of people able to cope with the fast changing information technology and who are skilled in making effective use of IT in obtaining its goal.<sup>89</sup> Therefore, the redirection did not stop at information infrastructure but continued to embrace the social dimension of the information society, acknowledged in the **Fifth Framework Programme** from 1998 to 2002, which prioritized a user-friendly information society where technology supports all domains of daily life. It is here, where the phenomenon of digitalization came to the forefront, which is today still under way.

At the turn of the Millennium, the information society agenda acknowledging its social implications was set in motion by the **Lisbon Strategy for Growth and Jobs**<sup>90</sup> and its follow-up action plans, such as eEurope 2002<sup>91</sup>, eEurope 2005<sup>92</sup> and i2010<sup>93</sup>. Focused primarily on the objective to deliver information society for all, the strategy dealt with digital barriers. Most of them were connected to the digital divide, defined as a lack of access, usage, and skills in the field of technology. The strategy used for the first time a term *knowledge-based society*, which was later explained in the **Sixth Framework Programme**, as a next phase in the evolution of the information society.<sup>94</sup> The concept of knowledge-based society is based on the assumption that processed information take a form of knowledge, which is a powerful engine for competitiveness. In order to ensure the free movement of knowledge, informational barriers had to be eliminated. Therefore, the program was focused on supporting the means of processing information, such as developing hardware, software or digital skills of citizens. These efforts were enabled by the

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<sup>89</sup> Decision No 182/1999/EC of the European Parliament and of the Council of 22 December 1998 concerning the fifth framework programme of the European Community for research, technological development and demonstration activities (1998 to 2002), OJ L 336, 19.12.2001, p. 1–93.

<sup>90</sup> European Council. *Conclusions of Lisbon European Council 23 and 24 March 2000*. [online]. [cit. 2018-02-8]. Available at: [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)

<sup>91</sup> Communication from the Commission to the Council and the European Parliament, eEurope 2002: Impact and Priorities communication to the Spring European Council in Stockholm, 23 and 24 March 2001, COM (2001) 0140 final.

<sup>92</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, eEurope 2005: An information society for all - An Action Plan to be presented in view of the Sevilla European Council, 21 and 22 June 2002, COM (2002) 0263 final.

<sup>93</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, i2010 eGovernment Action Plan - Accelerating eGovernment in Europe for the Benefit of All, COM (2006) 0173 final.

<sup>94</sup> Decision No 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), OJ L 232, 29/8/2002, p. 1.

**Seventh Framework Programme**, valid from 2007 to 2013, which right away dropped any reference to the information society and focused on building the Europe of knowledge.<sup>95</sup>

Despite the dynamic development of the internal market, its foundations in the primary law remained stable. With the entry into force of the **Treaty of Lisbon** on 1 December 2009, the three major priorities – monetary union, enlargement and institutional reforms – have been achieved and there was no reason to turn away from the internal market, as it retained the position as the objective, set down among others in Art. 3(3) TEU.<sup>96</sup> However, the placement of the internal market's key provisions indicates that at the time of negotiations over the Lisbon Treaty, the internal market was understood to be completed, and thus side lined.<sup>97</sup>

By the time of the Treaty of Lisbon, there were especially two issues related to the internal market with the utmost importance for the digital space. Firstly, any discrimination based on nationality in relation to the freedom of movement is prohibited,<sup>98</sup> which founded a basis for ending unjustified geo-blocking.<sup>99</sup> The second issue, which is also relevant for e-commerce, refers to the freedom to perform services within the internal market.<sup>100</sup>

Moreover, the Treaty introduced a new delineation of competences divided into three categories – exclusive, shared and supporting. The exclusive competences under Article 3(1) TFEU cover areas wherein only the EU may legislate and include among others the establishing of the competition rules necessary for the functioning of the internal market, common commercial policy or concluding international agreements in certain situations. Shared competences, provided under Article 4(2) TFEU, are those where both the EU and the Member States may legislate and adopt legally binding acts and applies in areas, such as internal market, social policy, economic, social and territorial cohesion, environment, consumer protection, trans-European networks, or in area of freedom, security and justice. As per the definition of shared competences, competences falling into this category are only shared until the European Union adopts secondary legislation,

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<sup>95</sup> Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013), OJ L 347, 20.12.2013, p. 965–1041.

<sup>96</sup> Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

<sup>97</sup> SYLLOVÁ, PÍTROVÁ, PALDUSOVÁ a kolektiv. *Lisabonská smlouva: komentář*. Praha: C.H. Beck, 2010, s. 264–265. Beckova edice komentované zákony. ISBN 978-80-7400339-4.

<sup>98</sup> See Article 45, Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47. Despite the fact that this specific provision refers to the abolition of any discrimination based on nationality between workers, the right of establishment is also established within the TFEU, which is not in this case subject to different treatment resting on the nationality or place of residence.

<sup>99</sup> That is a territorial restriction in form of a refusal to sell or automatic re-routing based on geographic location of the consumer determined by means of IP addresses, registration of country of credit card or postal address.

<sup>100</sup> See Article 56, Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

at which point the Member States must ensure compliance at the national level and must put their national powers to sleep. However, the national level is not primarily involved only in the implementation of the directives but also in deciding the future of the EU within the Council and the Parliament. Lastly, among the areas designated for the supporting competences, set down in Article 6 TFEU, wherein the EU shall support, coordinate or supplement the actions of the Member States, are listed protection and improvement of human health, industry, culture, tourism or education, vocational training, youth and sport.

With regard to research and technological development, according to Article 4(3) TFEU, the EU may carry out activities, notably programs, in particular to define and implement them. Yet, it shall not prevent the Member States from exercising their competences and should refrain from developing a common policy, as it is allowed in the case of development cooperation and humanitarian aid.<sup>101</sup> In this way, the research and technological development remained unchanged compared to previous legal frameworks, that is without possibility to be harmonized.

Digital technology being an essential part of everyday life of European citizens have long been a reality and strategic point of interest. As could be seen, digital policy had long aspired to be recognized at the European level in similar manner as social policy and others, which are today listed in the TFEU. Time of inaccessible, complicated and unhandy technologies has passed without any significant progress being made since the Delors Commission. In the light of importance of technology, we have to ask why there is no explicit mentioning relating to the digital area established within the Lisbon Treaty? Translated into the language of legislation – if the EU does not move forward, then it will not merely stagnate but actually go backward.<sup>102</sup>

### **2.1.3 Single market and digital single market**

In the upcoming years, the digital debate slowly fused with the revival of the single market. There were three options how the EU could address the issue of its underperformance – work longer, work harder, or work smarter. Opting for the third option, the single market was restarted with a communication on the **Europe 2020** – A strategy for smart, sustainable and inclusive growth wherein the Commission introduced its vision of a stronger, deeper, extended single market, which should be attained by 2020.<sup>103</sup>

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<sup>101</sup> Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

<sup>102</sup> White Paper on Growth, Competitiveness and Employment, The challenges of the challenges and ways forward into the 21<sup>st</sup> century, COM (93) 700 final, 5.12.1993.

<sup>103</sup> Communication from the Commission, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3.3.2010.

As one of its flagship initiatives was presented **A Digital Agenda for Europe** (“DAE”), adopted in 2010, with its objective to take full advantage of the social and economic potential of ICTs, especially the Internet, which was identified as an essential medium of all activities from doing business to providing entertainment. In comparison to previous efforts in this regard, the DAE fully conceptualized the digital space in Europe and in this sense continued in the legacy of Delors’ information area, except for introducing among its objectives a new title for the concept – *Digital Single Market*, focused on opening up access to content, building digital confidence and reinforcing the single market for telecommunications services.

Actually, the DAE’s greatest contribution to the digital future of Europe was an identification of the seven most significant digital barriers to exploitation of ICTs – fragmented digital markets, lack of interoperability, rising cybercrime and risk of low trust in networks, lack of investments in networks, insufficient research and innovation efforts, lack of digital literacy and skills, missed opportunities in addressing societal challenges. Even though the existence of digital barriers was not disputed, it was not until then when they were identified in such complex manner, which made clear the need for equally complex response.

In total, the DAE presented eight pillars consisting of more than one hundred actions. Aside from its objective of attaining a vibrant DSM, there were other pillars dedicated to interoperability and standards, trust and security, fast and ultrafast Internet access, research and innovation, enhancing digital literacy, skills and inclusion, ICT enabling benefits for society, and last but not least international aspects of the Digital Agenda.<sup>104</sup>

Concrete actions within the pillars varied from legislative to non-legislative measures across all sectors of economy and society with a twofold purpose – to enable ICTs, that is to create fast, reliable and connected digital networks, and to adopt ICTs, that is to enhance online participation of businesses and population. Given the fact that the Treaties do not contain any special legal bases notably for ICTs, the EU take relevant actions to achieve the DAE’s objectives within the framework of established sectoral and horizontal policies, such as the free movement of goods, people, services and capital, competition policy, the approximation of laws, educational, vocational training, youth and sport, culture, trans-European networks, industrial policy, research and technological development and trade policy. These are all key elements for establishing a digital Europe.<sup>105</sup>

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<sup>104</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

<sup>105</sup> European Parliament. *Digital Agenda for Europe* [online]. [cit. 2018-02-13]. Available at: [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.4.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.4.3.html)

Simultaneously, for the occasion of the approaching 20<sup>th</sup> anniversary of the single market, Mario Monti issued a report on the state and development of the internal market entitled **A New Strategy for the Single Market** upon a request of Mr. Barroso, the former President of the European Commission. The report identified three issues – an erosion of the political and social support across Europe causing integration and market fatigue, an uneven policy attention in regard of the expansion to new sectors to embrace a fast-changing economy, and finally, the internal market’s perception as yesterday’s business, which is in need of regular maintenance but not of active promotion.<sup>106</sup>

In the report, Mario Monti used digital technologies as an example to proof that the single market must adapt, notably its regulatory and social conditions, in order to undertake new technologies and disperse benefits of a digital economy. The capacity of industry in Europe to innovate is reduced by a number of obstacles in digital sphere. Therefore, the single market should not be perceived as an end but rather an instrument in the European integration process, which needs to be restarted by tackling those new frontiers. In Monti’s conclusion, “*many of these obstacles point to a simple cause: a lack of a Digital single market*”<sup>107</sup>.

Proceeding from the Delors’ conclusions, Monti confirmed the DSM to be a tool for restarting the single market, namely by challenging digital frontiers. It is worth noted that the DSM was positioned under the single market due to economic potential of digital technologies, which can be indirectly translated to social benefits as well. The previous justification of measures taken towards the digital space was provided mainly by research and technological development policy, however, it ceased to be sufficient as technologies could not be always approached as innovations in terms of research, and more importantly as technologies receded from the strictly sectoral view into the daily lives. In this context, the EU has presented its most advanced policy effort yet.

Issued on May 6, 2015, more than 30 years after Delors’ commitment to ensure freedom of movement, the Juncker Commission’s **Digital Single Market Strategy for Europe** for the first time provides a definition of the DSM, as „*one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and*

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<sup>106</sup> MONTI, Mario. Report to the President of the European Commission: A new Strategy of the Single Market – At the service of Europe’s economy and society, 9.5.2010.

<sup>107</sup> Ibid. Chapter 2. Building a stronger single market, subchapter 2.3. Shaping Europe’s digital single market.

*personal data protection, irrespective of their nationality or place of residence.*<sup>108</sup> The DSM's definition immediately resonates with the one of the single market. There are obvious similarities in their construction based on the four freedoms or in the abolition of discrimination. On the other side, their differences can be also easily detected. In the spotlight of the DSM are online activities taking place in the digital space and privacy going hand in hand with increasing trust and security with respect to processing of personal data. Therefore, the author chose to compose the following part on a comparison of the single market and the DSM to explain the nature of their relationship and regulatory foundations of the latter.

Going beyond the definition, the DSM Strategy refers to other differences – digital barriers to the free movement of information, which pinpoint the clear distinction between the single market and the DSM, as follows: *“fragmentation and barriers that do not exist in the physical Single Market are holding the EU back”*.<sup>109</sup> According to the DAE, the concept of the DSM was developed to eliminate the most pressing digital obstacle – fragmented digital markets. The former Commissioner for the Digital Economy and Society Günther H. Oettinger said: *“Europe cannot be at the forefront of the digital revolution with a patchwork of 28 different rules for telecommunications services, copyright, IT security and data protection. We need a European market”*<sup>110</sup>. The persisting state of the European digital space, divided into national online markets, goes straight against the meaning of the term *single* in the title of the DSM and thus, sentences the DSM to be an evident paradox in case the DSM Strategy fails.

The fragmentation of digital markets is only one obstacle among many, which impede free movement of information and, thus, also impact the free movement of commercial and cultural content and services within the DSM. The thesis provides their detail outline in Annex III – Classification of obstacles impeding the DSM and explains their nature together with the EU's regulatory reaction in detail in the third part.

As the EU has progressively evolved into what aspires to be an ever closer union among the peoples of Europe, the DSM started to be perceived as a deepening of the single market and, thus, emphasizes the approximation of diverse national laws to create as connected European

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<sup>108</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market for Europe, COM(2015) 192 final, 6.5.2015.

<sup>109</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe – Analysis and Evidence, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 6.5.2015.

<sup>110</sup> European Commission. *Press release: Digital Single Market Strategy: European Commission agrees areas for action plan* [online]. [cit. 2018-02-13]. Available at: [http://europa.eu/rapid/press-release\\_IP-15-4653\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4653_en.htm)

framework as it is needed for the DSM to be achieved. Considering that most of the decision-making in relation to the DSM is realized within shared competence leaning on the legal bases for the internal market.<sup>111</sup> According to the EU there is no need for explicit digital competence, however, such line of reasoning deserves to be elaborate on.

## **2.2 Substantive and institutional foundations: drawing from the regulatory experience of the single market**

As concluded in the previous chapter, the need of the DSM creation was recognized in response to the technological progress, passing from the oversight of the research and technological development to the protection umbrella of the single market. Those assumptions were verified by delineating its historical and social foundations, which revealed that developments in the single market translate themselves into the digital space.

As this chapter seeks to explain the regulatory foundations of the DSM but also the nature of the relationship between the DSM and the single market, the author chose to compose the text around a comparison of the regulatory frameworks of both markets concerning their substantive and institutional aspects. Firstly, focusing on substantive law applicable to the DSM and single market, a closer look on their techniques of integration, competences and legal bases is provided. Secondly, regarding institutional aspects, the role of institutions and other actors influencing the shape of legislative and other accompanying measures is explained. This method is also chosen for its ability to underline similarities and differences of the single market and the DSM, as the author assumes that even though the DSM is built on the single market, their concepts differ.

However, differences are simultaneously the key to identifying challenges of the DSM, which may be different from the ones of the single market. The author assumes the challenges are considerable but by no means identical, as the DSM only began to be created, whereas the single market and its “offline obstacles” have started to be addressed half a century ago.

### **2.2.1 Technique of integration**

Undeniably, the attainment of both markets is not foreseen in the near future, given the pace of innovation and new strategies focused on the elimination of remaining barriers. However, there are mechanisms aimed at pushing towards these grand objectives, which can be observed in both the single market and the DSM. In order to create one from many, respectively two markets

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<sup>111</sup> European Parliament. *The ubiquitous digital single market* [online]. [cit. 2018-02-8]. Available at: [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.7.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.7.html)



with one in the digital and one in the physical space, the keyword for the EU's integration is regulation.

Market regulation is an idealized system, in which the EU and the Member States control the forces of supply and demand, such as who is allowed to enter the market and/or what prices may be charged.<sup>112</sup> It is often put incorrectly in contrast to market creation, wherein economic integration is encouraged through regulation only where necessary according to the concept of liberalism and thus, is often associated with liberalization or self-regulation.<sup>113</sup> Yet, market regulation and market creation do not necessarily stand on the opposite spectrum of the scale. For instance, self-regulation can work either as a substitute or as a complement to regulation in case of certain form of co-ordination delegating certain areas to selected entities. In addition, it is necessary to realize that if subjects to self-regulation or co-regulation come to terms, they must necessarily accept and follow the applicable rules, often in the form of EU legal act, that affects the field. It is therefore questionable whether self-regulation is not only one of many forms of regulation.<sup>114</sup>

Within the **single market**, the EU used to approach digital space with traditional, formalistic, autonomous and mono-disciplinary regulation, as it used concepts and legal definitions to create categories in which they were placed and to which legal consequences were attributed. Such *formalistic paradigm* led to a regulatory separation and fragmentation of the digital space into sector-specific regulation of electronic communications, satellite broadcasting and cable retransmission services, research and forth. As an example can serve legal separations into black-and-white categories in substance – liberalized and reserved services in telecommunications; networks and content; or within content separation between various type of services, such as electronic communication services, information society services and audiovisual media services – or in institutional terms – powers of the EU and powers of the Member State.<sup>115</sup>

To attain its regulatory objectives, the system formed by the Treaties distinguishes between positive and negative techniques of integration. Within the single market, the EU operates in negative and deregulatory way ensuring the elimination of protectionist measures hindering the

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<sup>112</sup> Wikipedia. *Regulated market*. [online]. [cit. 2018-02-8]. Available at: [https://en.wikipedia.org/wiki/Regulated\\_market](https://en.wikipedia.org/wiki/Regulated_market)

<sup>113</sup> DITTRICH, P. J. *Balancing ambition and pragmatism for the Digital Single Market*. Berlin: Jacques Delors Institute, 2017, p. 14.

<sup>114</sup> UTTING, P. *Rethinking Business Regulation: From Self-Regulation to Social Control*. [online]. [cit. 2018-02-8]. Available at: <https://www.files.ethz.ch/isn/102693/15.pdf>

<sup>115</sup> CRAIG, P. P. a G. DE BÚRCA. ed. *The evolution of EU law*. 2nd ed. New York: Oxford University Press, 2011, p. 744. ISBN 978-0-19-959296-8

cross-border trade. However, many of such barriers were not overcome only by negating illegitimate obstacles through judicial interpretation. Therefore, the negative approach is reinforced where necessary by positive integration measures to diminish certain adverse effects of negative integration.<sup>116</sup> In this manner, the single market has evolved on their combination, namely the principle of mutual recognition of national standards linked to negative integration and harmonization of laws representing positive integration,<sup>117</sup> wherein the negative integration was preferred over the positive one.<sup>118</sup>

The principle of mutual recognition means reciprocal application of the country of origin principle, that is the manufacturer of goods or service provider in the course of trade in another country basically follows the conditions in his country of establishment. Into the countries of import or destination thus have access also products and services meeting the standards of the country of origin. The principle of mutual recognition applies, for instance, in the field of the quality standard of goods, qualifications and diplomas for the performance of economic activities, incorporation standards for the establishment of legal persons, but also in the recognition and enforcement of judgments in civil and commercial matters or in competition matters.<sup>119</sup> As the principle is on own-account of the Member States and limits the need for legislative harmonization, it became crucial instrument for the creation of the single market, that is for the elimination of physical, technical, fiscal and social obstacles to the free movement of goods, persons, services and capital.

Oppositely, the harmonization means alignment in the sense of a one-way process, wherein national laws are aligned with EU law. It is a normative application of the law, in which Member States are given through secondary act of EU law, usually in the form of a directive, the result to be achieved by their national legislation. Leading to the approximation of laws, the harmonization is most accomplished on the legal basis of Article 114. It is important to point out that harmonization in this sense differs from legal integration, which is also an instrument of positive integration, however, it governs matters in the form of directly applicable regulations, decisions or international treaties, and renders the conflicting national rules inapplicable.<sup>120</sup>

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<sup>116</sup> CRAIG, P. P. a G. DE BÚRCA. *EU law: text, cases, and materials*. Sixth edition. New York, NY: Oxford University Press, 2015, p. 626. ISBN 978-0-19-871492-7

<sup>117</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 223. ISBN 978-80-7400-488-9

<sup>118</sup> Ibid. p. 226.

<sup>119</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 224 – 226. ISBN 978-80-7400-488-9

<sup>120</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 227. ISBN 978-80-7400-488-9.

In terms of the **DSM** regulation, the EU has moved from self-regulation to regulation, as opposed to its biggest competitors,<sup>121</sup> and within it has been – and still is – in the process of moving from formalistic legal paradigm to another. It became evident that the formalistic paradigm, which suited the single market in initial tasks of its building, hampered the proper evolution of the digital space, as the law was tied to the definition of a specific technological model which diverse and fast evolving technologies rendered obsolete within the snap of a finger. The paradigm, towards which the EU is moving, is more innovative, integrative and inter-disciplinary. Based on economic insights and other disciplines, it assesses specific situations in a wider sectoral setting, until a conclusion can be made and consequences attached. The *integrative paradigm* fits complex and horizontal policies such as the DSM, where many objectives intersect and where the initial tasks of opening a new market and ensuring an access are exceeded. It is characterized by integration in substance as well as in institutional terms, not by mere separation into sector-specific regulation.<sup>122</sup> Therefore, the DSM is based on reverse regulatory approach in comparison to the single market in an attempt to overcome fragmentation into sector-specific regulation by integration.

The importance of the shift from formalistic to integrative paradigm could be most clearly observed on the example of electronic communications. After the formalistic paradigm based on distinguishing between liberalized and reserved services in telecommunications was surmounted,<sup>123</sup> it became clear EU would have to find a new answer to the question why regulate in order to be justified. The most effective answer adopted so far is enshrined in the regulatory framework for electronic communications enacted in 2002.<sup>124</sup> The framework justifies regulation on integrative paradigm and economic needs, which means that regulation ensures that taken

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<sup>121</sup> Aside from the United States, self-regulation as a technique of integration governs also Japan's digital market. Most recently, their cryptocurrency industry announced a self-regulation body. Available at: <https://www.reuters.com/article/uk-crypto-currencies-japan/japans-cryptocurrency-industry-to-launch-self-regulating-body-sources-idUSKCN1G006H>

<sup>122</sup> CRAIG, P. P. a G. DE BÚRCA. ed. *The evolution of EU law*. 2nd ed. New York: Oxford University Press, 2011, p. 744. ISBN 978-0-19-959296-8

<sup>123</sup> Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L74/13, 13.3.1996.

<sup>124</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108/7, 24.4.2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108/21, 24.4.2002; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/51, 24.4.2002; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); to which should be added Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249/21, 17.9.2002 (all together "the 2002 framework").

measures produces the desired effects defined by policy and intervene in case of market failures to address that risk. It is no longer built on definitions, such as telecommunications organizations, telecommunications network or telecommunications service as its predecessors, rather it relies on two principles – economic analysis, similar to one used in competition law, and technological neutrality. The latter is often overlooked, yet essential to the advances in electronic communications law. The term vaguely denotes not only the principle of non-discrimination, that is to say “*it neither imposes nor discriminates in favour of the use of a particular type of technology*”<sup>125</sup>, but also evidences *a contrario* that the law is not tied to technological categories or concepts of a specific technological model. The most forward-looking definition implies even more economic underpinning by avoiding all influence on technological choices and leaving them to the market forces.<sup>126</sup> Within the framework, definitions of electronic communications networks and electronic communications services continue to exist but they have been enlarged to cover all imaginable types of networks and services.<sup>127</sup> However, the evolution of electronic communications law in the past decade inclines to show that when sector-specific regulation is put to an end in certain areas, it appears elsewhere.<sup>128</sup> Remnants of the formalistic paradigm can still be found in electronic communications regulation. Taking into consideration the strict separation between networks and content regulation, the latter is explicitly left outside the 2002 framework’s scope. In its place, it is covered by the Audiovisual Media Services Directive<sup>129</sup> and the e-Commerce Directive, which result in another separating system, wherein services fall in one of the following categories – electronic communications services, information society services or audiovisual media services. Considering the fast pace of innovation and efforts invested in developing a killer application<sup>130</sup>, such system is not enough integrated to prevent hampering the

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<sup>125</sup> See recital 18, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/51, 24.4.2002.

<sup>126</sup> CRAIG, P. P. a G. DE BÚRCA. ed. *The evolution of EU law*. 2nd ed. New York: Oxford University Press, 2011, p. 744 – 753. ISBN 978-0-19-959296-8

<sup>127</sup> This was outcome of convergence between the telecommunications, media and ICT sector based on Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM (97) 623 final, 3.12.1997.

<sup>128</sup> For example, in reaction to the 2002 framework regulation of mobile operators has increased with interventions on mobile termination and international roaming. Especially, regulatory authorities seek new regulatory opportunities in order to preserve sector-specific regulation, which justifies their existence.

<sup>129</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (“Audiovisual Media Services Directive”), OJ L 95/1, 15.4.2010.

<sup>130</sup> “*A killer app is a new good or service that establishes an entirely new category and, by being first dominates it, returning several hundred percent on the initial investment. The personal computer, electronic funds transfer, and the first word processing program are all examples of killer apps.*” DOWNES, Larry a Chunka MUI. *Unleashing the killer app: digital strategies for market dominance*. Boston, Mass.: Harvard Business School Press, 1998, p. 4. ISBN 978-0-87584-801-3.

digital economy by forcing businesses to navigate around the definitions in order to choose the preferred regulatory regime instead of merely guaranteeing that they are in line with policy objectives. Sector-specific regulation will not accordingly disappear any time soon, yet the best illustration of so far of the integrative paradigm is currently under way.

The integrative paradigm is only one of numerous principles shaping the DSM's regulatory framework, which were not acknowledged back in the time of establishing the single market, such as the efforts to simplify EU law in general. Simplifications not only have effects on regulation *pro futuro* but changes are also made to existing law in numerous forms. For instance, the integrative paradigm is recognized in the principle of codifications, reducing volume and enhancing complexity of legislation. Furthermore, the EU declared its tendency to replace directives with regulations to ensure legal integration, notably where there is no need for further discretion when implementing the proposed EU rules. Aside from the simplification, there are other principles dedicated to the reduction of the regulatory burden, such as laws being modified to keep the up-to-date or automatically removed after a given period, when find unnecessary or irrelevant. Legally binding laws can be also replaced with lighter alternatives on the basis of self-regulation or co-regulation. Such simplifications or reductions principles, which help to adapt existing legislation without compromising on policy objectives, are coordinated by the Regulatory Fitness and Performance ("REFIT") program. Introducing obligatory impact assessments and consultations through REFIT platform with various stakeholders and Member States, the DSM is in contrast to the single market being built in cooperation with individuals, businesses, NGOs, national authorities and other stakeholders.<sup>131</sup>

Similarly to the single market, negative and positive integration play also an important role in the attainment of the DSM but in an opposite ratio. While negative integration instruments played first fiddle in building the single market, positive integration prevail in the DSM as the need to harmonize laws or unified rules is directly connected to the inherent borderless character of the digital space, which is demonstrated in Annex II – Table of DSM Strategy files. As can be seen, most of the legislative initiatives under the DSM Strategy counts with a hard law approach in various digital policy areas, from the protection of personal data to copyright. Therefore, positive measures primarily focus on building a proper legal framework, whereas negative integration instruments are limited to the removal of barriers to the free movement.

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<sup>131</sup> European Commission. *Refit – making EU law simpler and less costly*. [online]. [cit. 2018-02-08]. Available at: [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en)

It is unimaginable that such ratio – the dominance of positive measures over negative measures with regard to the declared tendency to favour regulations over directives – would be agreeable for the Member States while establishing the single market. However, the situation is different in the case of the DSM as national authorities in general agree that a proper regulatory framework is necessary but are not very present as they lack interest, knowledge or resources, with the possible exception of fiscal issues. In this sense, the question is whether the EU has all necessary attributes to become *single* in the digital sense without over-regulating itself.

Easing the EU's regulatory burden and joining in the Member States, the country of origin principle is consistently extending to the digital space, most importantly facilitating the cross-border provision of services within the EU, as their providers only need to comply with the rules of a Member State of establishment, rather than a set of national laws.<sup>132</sup> Moreover, it allows the free flow of information, which is also supported by another principle crucial to the DSM – one stop shop mechanism, brought along by the General Data Protection Regulation.<sup>133</sup> The principle ensures consistency of interpretation of the new rules in the way that one data protection authority will be responsible for the supervision of cross-border processing operations. In contrast to the country of origin principle, which is usually linked to minimum harmonization where the Member States are free to apply stricter rules, the one stop shop mechanism demands legally uniform rules. With the tendency to favour regulations over directives, the one stop shop mechanism can be expected to extend its application within the DSM.

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<sup>132</sup> See Article 3 of the e-Commerce Directive, establishing that the country of origin principle shall prevail for information society services. Recital 22 provides further reasoning: *“Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.”* Within the DSM Strategy, the principle is one of the new elements in a legislative proposal amending the previous Audiovisual Media Service Directive 2010/13/EU, adopted by the European Commission on 25 May 2016, or in a proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain transmission of broadcasting organisations and retransmissions of television and radio programmes, adopted by the European Commission on 14 September 2016.

<sup>133</sup> See Recital 127 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (“General Data Protection Regulation”), OJ L 119, 4.5.2016, p. 1–88.

Another key regulatory instrument is the use of performance-based norms, which can be observed also on the example of the General Data Protection Regulation<sup>134</sup> or cybersecurity<sup>135</sup>, which goes hand in hand. The performance-based legal rules establish a general obligation and, at the same time, a right for a controller to create specific rules that appropriate *technical and organizational measures* should be taken and enforced within the limits of their legal and technical possibilities. Generally, this approach can be applied in any situation in the digital space, where individuals are under technical or legal control of an entity, such as information society services providers. It is based on the assumption that such entities in control know best how to achieve the desired regulatory effect and thus, can select appropriate tools. At the same time, it is incomparably simpler and efficient for the EU to define a general rule and let concerned entities create and implement specific form.<sup>136</sup>

### 2.2.2 Competence

Alongside the principles of proportionality, transparency and subsidiarity, sits the principle of conferral, according to which EU needs to have competence to act, including in the digital space. However, there is no explicit digital competence in that regard in the Treaties and thus, it leaves space for elaborated argumentation of the EU institutions with the upper hand of the CJEU, which plays an important role in monitoring the delineation of competences. Therefore, the lack of provisions raises the questions of whether the EU has “digital competence” and if the answer is in the affirmative, under which category it falls.

Taking into consideration that EU law is able to create and develop accompanying single market policies,<sup>137</sup> the EU developed justification of building the DSM by tying it to the single market and its legal context but, at the same time, using a term *ubiquitous* DSM. Such delineation creates in connection with the adjective an evident paradox, leading to the question – whether the DSM is circumscribed to the single market, as the EU declares<sup>138</sup>, or if it transcends beyond such narrow delineation. Therefore, the author of this thesis further follows the idea that the DSM translates itself also to other areas and competences than the single market. Suitable areas are

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<sup>134</sup> See Recital 78 of the General Data Protection Regulation.

<sup>135</sup> See Article 14 of the Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1–30.

<sup>136</sup> POLČÁK, R. Fenomén internetových platforem. *Právní rádce*, 2017(11), p. 38-43.

<sup>137</sup> TOMÁŠEK, TÝČ, MALENOVSKÝ, et al. *Právo Evropské unie*. 2. aktualizované vydání. Praha: Leges, 2017, p. 290. Student (Leges). ISBN 978-80-7502-184-7.

<sup>138</sup> The derivation of the DSM from the single market is apparent from many documents from Monti’s Report to the European Union’s website stating legal basis, as follows Article 4(2)(a), 26, 27, 114, 115 TFEU. Available at: [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.7.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.7.html)

enumerated under relevant competences in order to be compared with the ones that are used for building the DSM in practice, delineated in Annex II – Table of DSM Strategy files. Because of that following subchapters do not continue to divide the text into two separate blocks dedicated to the single market and the DSM, as they may be in many aspects identical. Nevertheless, the comparative character of this chapter persists as differences are pinpointed instantly or at the end of a relevant section.

The system formed by the Treaties recognizes competences assigned to exhaustive or non-exhaustive lists of areas. The concept of an area is essentially built on a collection of Treaty provisions – legal bases – enabling the EU institutions to adopt legal acts on the various aspects of a certain substantive matter, usually encompassed in sectoral or horizontal policy. Competences in the exhaustive list of areas provided in Article 3(1) TFEU are permanently assigned to the EU. Most areas, however, fall under the non-exhaustive list of shared competence in Article 4(2) TFEU and are inseparably tied to the presence of legal basis in Treaty conferring on the EU a competence that is neither an exclusive nor supporting competence in the sense of Article 6 TFEU. That is because all other areas of EU policy automatically fall under the category of shared competence in case they do not belong to either exclusive or supporting competences, as stipulated in Article 4(1) TFEU. Thus, it defines an existence of various competences that are shared between the EU and the Member States, even though they are not explicitly stated in the Treaty, provided there has to be a special provision further in Treaties.

Taking into consideration the general rule of Article 4(1) TFEU and that there is no special provision further in Treaties but on the other side regarding the existence of numerous proposals building the DSM, and that the EU law, in connection with the single market, is capable of removing physical, technical and fiscal obstacles to the free movement,<sup>139</sup> the competence for the DSM *de facto* exists but is most frequently subordinated to **shared competence** assigned to the internal market based on Article 4(2)(a) TFEU.

As was mentioned in the previous part with regard to the exercise of shared competence in general, the EU has the right of pre-emption, that is a right to choose to start exercising shared competence. To the extent that it does so, the Member States cannot continue to exercise their power in that specific respect and vice versa they again exercise their competence to the extent

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<sup>139</sup> TOMÁŠEK, TÝČ, MALENOVSKÝ, et al. *Právo Evropské unie*. 2. aktualizované vydání. Praha: Leges, 2017, p. 290. Student (Leges). ISBN 978-80-7502-184-7.



that the EU has decided to cease exercising its competence.<sup>140</sup> The parts must always create a whole – “*every competence exercised in a shared area is either exercised by the European Union or exercised by the Member States*”.<sup>141</sup> This applies to all areas, wherein shared competence applies, and constitutes an important difference in contrast to exclusive competence, where the Member States do not have such power in the absence of EU legislation.

Particular mention should be made of the convenient multifaceted nature of the single market, which allows to develop attached policies, such as the DSM. “*Internal market legislation is always also about something else, and that something else may, in fact, be the main reason why the internal market measure was adopted. The multifaceted nature of internal market legislation is one of the inherent characteristic of the legislation and not a perverse ploy of European actors to extend the range of their competences.*”<sup>142</sup> Such characteristic corresponds to the nature of the DSM built on the information society and technology, which receded from the strictly sectoral view of research and technological development into the core of all economic and social systems, as was shown in the previous chapter. However, does it necessarily mean that the DSM with its horizontal nature covering all sectors would not transcend even the multifaceted nature of the internal market?<sup>143</sup>

When examining legal context and delineation of competences in the DSM in particular, it is not possible according to the assumption of the author to remain within strict limits of shared competence for the area of the single market, as the EU institutions indicate,<sup>144</sup> without exploring possibilities for the attainment of the DSM under other areas or even categories of competences. Even though the vast majority of the DSM legally binding acts not dealing with competition policy falls under general single market policy because of its economic nature, namely Article 114 TFEU or exceptionally on specific legal bases of one of the four freedoms, it is not the only option for

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<sup>140</sup> Opinion of AG Szpunar, *Germany v Council*, C-600/14, ECLI:EU:C:2017:296, paragraph 71.

<sup>141</sup> Opinion of the Court 2/15 (Full Court), *EU-Singapore FTA*, C-2/15, ECLI:EU:C:2017:376, paragraph 61.

<sup>142</sup> DE WIITE, Bruno. *Non-Market Values in Internal Market Legislation*. In: Niamh Nic Shuibhne (ed.), *Regulating the Internal Market*, Cheltenham, Edward Elgar, 2006, p. 61-86. ISBN 1-84542-033-0.

<sup>143</sup> JUNCKER, Jean-Paul: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. In: Political Guidelines for the next European Commission presented in opening statement in the European Parliament Plenary Session in Strasbourg on 15 July 2014. “*Enhancing the use of digital technologies and online services should become a horizontal policy, covering all sectors of the economy and of the public sector*”. This view shares also the European Parliament: “*Calls on the Commission to develop a digital transformation plan without delay, including the modernisation of legislation and the use of relevant instruments for investment in R&D and infrastructure, to support the digitalisation of industry in all sectors*” in point 97 of the Report on Towards a Digital Single Market Act (2015/2147(INI)) on 21 December 2015.

<sup>144</sup> See website page of the European Parliament – The ubiquitous digital single market indicating legal basis for the DSM, as follows: “*Articles 4(2)(a), 26, 27, 114 and 115 TFEU.*” Available at: [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.7.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.7.html)

the EU to adopt legal acts in terms of the DSM with regard to its horizontal nature. From the historical foundations of the DSM can be deduced that the EU may take relevant actions within shared competence for social policy, consumer protection (Article 169 TFEU), transport, research and technological development (Article 179-190 TFEU) or trans-European networks (Article 170-172 TFEU), when appropriate. However, from the information vested in Annex II, it can be observed that those areas are not frequently relied on<sup>145</sup> either because the functionally driven and relatively unconfined Article 114 TFEU<sup>146</sup> suits the economic objectives of the DSM's legislation better or because harmonization is not expected in certain areas at all, such as research and technological development, which contradicts the preferred technique of integration used within the DSM.

For the same reason, the DSM does not often rely on areas under Article 6 TFEU, notably industrial policy (Article 173 TFEU), education, vocational training, youth and sport (Article 165 and 166 TFEU), or culture (Article 167 TFEU), wherein the EU has only **supporting competence**. That means the EU can only support, coordinate or supplement actions of the Member States and legally binding EU acts in these areas cannot imply the harmonization of national laws. Nevertheless, legal acts based on different legal basis has to be consistent with other EU policies. For instance, the proposal for a directive on copyright in the DSM facilitates education, improves dissemination of European culture and positively impacts cultural diversity.<sup>147</sup>

Some of the areas on the **exclusive competence** list are typically internal market policy areas and thus, can be also potentially significant for the DSM, such as the establishing of the competition rules necessary for the functioning of the internal market (Articles 101-109 TFEU), common commercial policy (Articles 206 and 207 TFEU) or concluding international agreements within external relations (Article 216-219 TFEU). In this sense, three situations in which the EU enjoys exclusive competence are explicitly mentioned – firstly, when their conclusion is required by a legislative act of the EU, secondly, when their conclusion is necessary to enable the EU to

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<sup>145</sup> With an exception of the recently adopted WiFi4EU, ie Regulation (EU) 2017/1953 of the European Parliament and of the Council of 25 October 2017 amending Regulations (EU) No 1316/2013 and (EU) No 283/2014 as regards the promotion of internet connectivity in local communities, OJ L 286/1, 1.11.2017, p. 1-8.

<sup>146</sup> Fixing the limits of Article 114 TFEU has become preoccupation of the CJEU, which started with the *Tobacco Advertising* judgment, referring to the judgment of 5 October 2000, *Germany v. Parliament and Council*, C-376/98, ECLI:EU:C:2000:544, in which the Court of Justice for the first time concluded that the EU legislature had stepped beyond the limits of the competence to harmonize national laws, as granted by the Treaty.

<sup>147</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market, COM(2016) 593 final, 14.9.2016.

exercise its internal competence, or lastly, in so far as their conclusion may affect common rules or alter their scope, as provided in Article 3(2) TFEU.

Even though much of the EU's competence continues to be exercised internally within the EU, certain aspects of their distribution have implications for external action, which in practice pose a problem in terms of their distinction, notably where the EU enjoys exclusive or shared competence. Therefore, when such external actions are taken, the agreed distribution of competences must be respected. The ECJ explained the distribution of exclusive and shared competences many times. In *Opinion 1/76*<sup>148</sup> the Court ruled that whenever has been created powers for the Community within its internal system to attain a specific objective, the Community is competent to enter into necessary international commitments despite the absence of an explicit provision in that regard. Later, in *Open Skies* cases<sup>149</sup>, regarding the conclusion of international air transport agreements, the Court noted that the Community's competence to conclude international agreements may result by implication from the treaty in the absence of explicit competence in that connection. However, the Member States are no longer competent to enter into obligations towards third countries only where the Community lays down common rules and is alone entitled to assume such obligations, that is where the international commitments fall within the scope of the common rules. Therefore, it cannot lead to the exclusivity of Community powers in the field of external air transport as EC competence had become exclusive only to a limited extent as a result of the adoption of the internal regulations.

The battle for competences has been recently fought also in connection with the DSM and copyright law. In 2012, the Council authorized the Commission to take part in negotiations of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled within the framework of the World Intellectual Property Organization. Taking the view that the EU alone should ratify the Marrakesh Treaty, the

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<sup>148</sup> Opinion 1/76 of the Court of 26 April 1977, ECLI:EU:C:1977:63.

<sup>149</sup> Judgment of the Court of 5 November 2002, *Commission of the European Communities v Kingdom of Denmark*, C-467/98, ECLI:EU:C:2002:625; Judgment of the Court of 5 November 2002, *Commission of the European Communities v Kingdom of Sweden*, C-468/98, ECLI:EU:C:2002:626; Judgment of the Court of 5 November 2002, *Commission of the European Communities v Republic of Finland*, C-469/98, ECLI:EU:C:2002:627; Judgment of the Court of 5 November 2002, *Commission of the European v Kingdom of Belgium*, C-471/98, ECLI:EU:C:2002:628; Judgment of the Court of 5 November 2002, *Commission of the European Communities v Grand Duchy of Luxemburg*, C-472/98, ECLI:EU:C:2002:629; Judgment of the Court of 5 November 2002, *Commission of the European Communities v Republic of Austria*, C-475/98, ECLI:EU:C:2002:630; Judgment of the Court of 5 November 2002, *Commission of the European Communities v Federal Republic of Germany*, C-476/98, ECLI:EU:C:2002:631; Judgment of the Court of 5 November 2002, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-466/98, ECLI:EU:C:2002:624, with the respect to the UK, the situation is slightly different, since no truly open skies agreement had yet been concluded, the infringement action is directed towards the bilateral agreement, which contained provisions contrary to the right of establishment.

Commission presented a proposal for a decision on its conclusion, which was not adopted by the Council. Therefore, the Commission sought the Opinion of the CJEU. In the procedure Czech, French, Italian, Hungarian, Romanian, Finnish and United Kingdom Governments argued that the EU does not have exclusive competence for ratification. The Court in the process examined whether the Marrakesh Treaty is connected with the common commercial policy under Article 207 TFEU, as stated the Commission's proposal, which was supposed to cover the exchange of accessible format copies with third countries. The Court concluded its *Opinion 3/15*<sup>150</sup> that even though the Marrakesh Treaty does not rely on the common commercial policy under Article 3(1)(e) TFEU, as its non-profit objective to improve the position of beneficiary persons prevail over commercial purposes,<sup>151</sup> the Marrakesh Treaty falls within the exclusive competence of the EU and may be concluded by the EU acting on its own, since the Marrakesh Treaty may affect the Directive 2001/29/EC on copyright<sup>152</sup> or alter its scope as stated in Article 3(2) TFEU. The Marrakesh Treaty goes further than the Directive on copyright as it introduces an obligation (not merely an option) to introduce an exception or limitation for the of persons with a disability<sup>153</sup>, which will have to be implemented within the area harmonized by the Directive and the Member States will also be required to introduce it.

Clearly, the Member States do not have a direct interest in delineating of competences within the exclusive category, since in all circumstances their powers are equal to zero. However, it is also in their interest to have knowledge of the exact choice of competence as they can take more active part in the decision-making procedure and not rely on the CJEU. Even though it is defending another exclusive competence of the EU, it would be for the sake of defending their own national powers.

In conclusion of this subchapter, the differences between the single market and the DSM start with their legal context set within the TFEU. Whereas the single market is a principle area of shared competence, the TFEU does not provide for specific digital competence and thus, the DSM issues are dealt with based on competences for different areas covered by its horizontal nature. In theory the DSM may fall under numerous areas, however, their use in practice mirrors their ability to lay down legally binding rules, which is the preferred technique of integration of the DSM. According to analysis in Annex II, the DSM measures are most frequently subordinated to shared

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<sup>150</sup> Opinion 3/15 of the Court (Grand Chamber) of 14 February 2017, ECLI:EU:C:2017:114.

<sup>151</sup> Ibid, paragraphs 70 and 91.

<sup>152</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167, p. 10.

<sup>153</sup> Opinion 3/15 of the Court (Grand Chamber) of 14 February 2017, ECLI:EU:C:2017:114, paragraph 127.

competence, particularly (but not exclusively) assigned to the internal market, notably to the Article 114 TFEU. The DSM transcends also to other areas of shared competence, such as trans-European networks or research and technological development and is also close to areas of supporting competence. Moreover, the battle for competence in the case of the Marrakesh Treaty showed the exclusive nature of the EU competence for external action in relation to the DSM stemming from the Treaties. It is, therefore, possible to conclude that by circumscribing the DSM to the single market the EU simplifies the legal context of the DSM, which delineates mainly from the substantive matter of its objective, as can be observed in Annex II.

### 2.2.3 Legal basis

When competences enabling the EU to legislate were outlined in regard to the DSM, another question follows – under which legal bases may be used? On the account of the foregoing, the DSM’s applicable areas of competence are, in fact, composed of numerous legal bases given its horizontal character, from which the Commission has to choose with regard to their object in order to initiate and justify any measures taken within the DSM. It is the specific article which confers the power to legislate on the EU.

Taking into consideration the analysis entrusted in Annex II, it is undisputed that most of the DSM legally binding acts fall under single market policy, notably Article 114 TFEU. Therefore, this chapter explains the importance of legal bases of the single market for the DSM and goes further beyond by exploring the existence of certain legal basis, which would support the idea of the DSM as an implicit area of shared competence and not as mere derivation of the internal market and forth. For ease of reference, the vast majority of legal bases, whose affiliation to certain area is undisputable, were already mentioned in the previous chapter in link to corresponding competences.

In terms of legal bases, **Article 114 TFEU** is considered to be a general basis distinguishable from special harmonization bases. Their application follows the basic rule – *lex generalis* applies save where the Treaties provide special legal basis.<sup>154</sup> Article 114 TFEU enables to “adopt the measure for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”<sup>155</sup>. Despite the broad formulation, the material scope of the

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<sup>154</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 228. ISBN 978-80-7400-488-9.

<sup>155</sup> Article 114(1), Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

article does not entrust the EU with a general power to regulate the internal market. According to the judgment *Germany v Parliament and Council*<sup>156</sup>, the referred measure must improve the conditions for the establishment and functioning of the internal market and contribute to the elimination of obstacles to the free movement of goods, persons, services and capital. The baseline of achieving the freedom of movement is common for both the single market and the DSM. In the case of the DSM, however, the free movement has to be put into the context of digital space, wherein every single act can be recorded and processed into data, becoming the main commodity on the digital market.<sup>157</sup>

In the light of the advances in technology and their immense deployment over recent years, the free of movement of data appears necessary for the establishment and functioning of the DSM. This is where Article 114 TFEU intersects with another legal basis **Article 16 TFEU** dedicated to the protection of personal data, drawing on the example of Article 8 of the Charter of Fundamental Rights of the European Union<sup>158</sup>. Their relation can be best observed on the example of the Proposal for a e-Privacy Regulation presented under the umbrella of the DSM Strategy. Since an electronic communication involving a natural person qualifies as personal data<sup>159</sup> it is based on Article 16 TFEU, however, as the initiative also concerns the component of protecting communications of legal persons and aims at achieving the internal market for electronic communications, namely guarantees the free movement of electronic communications non-personal data, equipment and services in the EU, it is also based on Article 114 TFEU.

Such distinction drawn between Article 16 and 114 TFEU underlines the former's nature of a provision having general application. Therefore, it is possible to contemplate about Article 16 TFEU as a specific legal basis, which would (in contrast to Article 114 TFEU) support the idea of the DSM as an implicit area of shared competence under Article 4(1) TFEU, used for achieving two basic objectives – protection of individuals with regard to the processing of personal data and free movement of such data.<sup>160</sup> In practice, this construction was used in the case of the General

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<sup>156</sup> Judgment of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, C-376/98, ECLI:EU:C:2000:544, paragraphs 82-84, 86, 95.

<sup>157</sup> European Policy Center. *The Economic Impact of a European Digital Single Market*. [online]. [cit. 2018-02-13]. Available at: [http://www.epc.eu/dsm/2/Study\\_by\\_Copenhagen.pdf](http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf)

<sup>158</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

<sup>159</sup> Article 4(1) of the General data Protection Regulation defined personal data, as follows: „*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*”.

<sup>160</sup> SYLLOVÁ, PÍTROVÁ, PALDUSOVÁ a kolektiv. *Lisabonská smlouva: komentář*. Praha: C.H. Beck, 2010, p. 237. Beckova edice komentované zákony. ISBN 978-80-7400339-4.

Data Protection Regulation, which is exclusively based on Article 16 TFEU. However, with regard to its strictly delineated scope, which does not suffice for the purposes of the DSM of more general provision due to its horizontal nature, and the fact that the General Data Protection Regulation generally covers the whole area, it does not go further than providing an already exhausted example of “digital competence”.

Conversely, Article 114 TFEU corresponds to the above-mentioned need for more general legal basis. By returning once again to Annex II, it is evident that the vast majority of the DSM Strategy legal acts relies on its grounds, from copyright to roaming. This is caused by the phase of the DSM, which is yet to be established, as national borders, known from the internal market, translate themselves into the digital space. Aside from barriers, which already exist in terms of electronic frontiers leading to a digital divide, what is known as a lack of access, usage, and skills in the field of technology, it creates new digital barriers. Those are mainly represented by a geo-blocking, territorial restriction in form of a refusal to sell or automatic re-routing certain content, either copyrighted or not, based on consumer’s geographic location, which is generated by private parties. This is one of the basic differences between the DSM and single market, as in the former, obstacles were imposed by the Member States to protect domestic businesses.

This is reflected in the form of measures taken on the legal basis of Article 114 TFEU, shifting from directives addressed to the Member States to regulations addressed to private parties, as those create obstacles in the DSM. It is necessary to differ between harmonization, in the sense of bringing national laws closer to each other by a directive, and unification or legal integration understood as a complete replacement of previously existing national law by a uniform EU legal act by a regulation. Within the last 30 years of the evolution of the single market, preferences were given to harmonization by way of a directive, which respects the specificities of relevant national law, as well as its legal traditions, and is inherently more in line with the principle of subsidiarity applicable within the EU shared competence. On the other side, directive can be also intrusive and disruptive in certain situations and may conflict with the principle of proportionality. Despite regulation being the most far-reaching instrument of EU law, it can display a lower degree of invasiveness, working around intrusion or disruption of national legislations, which may be caused by a directive. Therefore, regulation based on Article 114 TFEU may be the right instrument for the need of the DSM to create a truly *single* market in the digital space and overcome its fragmentation in the narrow sense, that is into the patchwork of national laws, as it is entirely binding, leaving no room for the Member States for choice of form or methods in comparison to a

directive.<sup>161</sup> Moreover, regulation with its direct applicability may also address other obstacles, which creates fragmentation in the broad sense, often posed by private parties.

The prevalence of regulations over directives corresponds with the REFIT program destined for all areas in general. Yet, the Commission specifically suggests for the digital economy such approach already back in 2012. Based on a communication on Better Governance for the Single Market, this area needs further market integration through proposing regulations instead of directives, if there is no need for further discretion when implementing EU rules in 2012.<sup>162</sup> However, the wording of digital strategies is still not consistent with proposed measures or further preparations.<sup>163</sup> Whereas the Commission mostly referred on paper to harmonization, rather than unification, the ratio between proposed regulations and directives clearly prevail in favour of regulation according to Annex II. It is not even necessary to take into consideration maximum or full harmonization directives, as their actual effects are similar to regulations, to prove the point.

When enacting harmonization, the European Union decides between two alternatives – minimum or maximum harmonization measure. Until recently, minimum harmonization counted for a general legislative approach, since it leaves a possibility for the Member States to maintain national legislation and pursue their own policies, provided that it achieves minimum standard, which is a “floor”, and does not infringe the freedom of movement, which constitute a “ceiling”. This is the case, for instance, of the proposal for Audiovisual Media Services Directive, which takes national circumstances into account. However, recent legislative initiatives show a tendency to shift from minimum to maximum harmonization that covers the entire area without any chance of deviation. As an example of an exhaustive “*setting both the floor and the ceiling*”<sup>164</sup> maximum harmonization in the DSM can serve consumer protection with its proposal for a Common European Sales Law or cybersecurity with its Network and Information Service Directive. The disadvantage of a maximum harmonization measure lies in its ability to respond quickly to

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<sup>161</sup> Article 288, Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

<sup>162</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better Governance for the Single Market, COM(2012) 259 final, 8.6.2012.

<sup>163</sup> See the example of a proposal of a Common European Sales Law (“CESL”). Whereas the wording of the DSM Strategy mentions harmonization of the rules governing online sales in the EU, there is an explicit reference to a regulation at the same time as to total harmonization in the Inception Impact Assessment, stated as follows: “*will create uniform rules for digital products avoiding legal fragmentation*” and simultaneously “*a fully harmonized targeted set of mandatory rules*”. Available at: [http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_008\\_contract\\_rules\\_for\\_digital\\_purchases\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases_en.pdf)

<sup>164</sup> CRAIG, P. P. a G. DE BÚRCA. *EU law: text, cases, and materials. Sixth edition.* New York, NY: Oxford University Press, 2015, p. 626. ISBN 978-0-19-871492-7.



technological developments, as harmonized rules can be revised only in the framework of EU legislative procedures, which can be lengthy.<sup>165</sup>

Moreover, measures referred to in Article 114 are as a rule adopted based on an ordinary legislative procedure applying qualified majority voting, which after the Treaty of Lisbon applies in most of the areas of shared competences. This is reflected in a decrease of legal basis disputes, as the choice of legal basis became almost a “purely formal” matter without procedural differences and thus, the CJEU will not annul the contested measure, even if it finds that measures have been based on an incorrect legal basis.<sup>166</sup> Therefore, the integration of the ordinary legislative procedure disencumbered the EU legislating institutions from navigating around categories of competences and legal bases in order to choose the preferred decision-making process instead of pursuing policy objectives.

This is not the case of the flexibility clause of **Article 352 TFEU**, introducing an optional instrument which neither harmonizes, nor unifies domestic laws, but creates a parallel regime with the special legislative procedure, wherein the Parliament gives consent and the Council acts unanimously. Therefore, the Commission rather invokes the legal basis of internal market harmonization, than going to great lengths for reaching unanimity under Article 352 TFEU. Nevertheless, when the Treaties have not provided the necessary powers, the flexibility clause offers its basis to adopt a necessary measure within the framework of the policies defined in the Treaties. This may be relevant for certain proposals within the DSM, which are for the ease of qualified majority based on Article 114 TFEU, even though they “*leaves unchanged the different national laws already in existence [and therefore] cannot be regarded as aiming to approximate the laws of the Member States*”<sup>167</sup>, such as the Proposal for a Regulation establishing the BEREC<sup>168</sup>, which should ensure “only” a more effective regulatory institutional framework as part of the creation of the right conditions for the DSM. However, in the light of the CJEU’s case *United Kingdom v Parliament and Council*<sup>169</sup>, Article 114 TFEU can also provide for the

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<sup>165</sup> SVOBODA, P. *Úvod do evropského práva*. 5. vyd. V Praze: C.H. Beck, 2013, p. 232. ISBN 978-80-7400-488-9.

<sup>166</sup> See for example Judgment of the Court of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, C-491/01, ECLI:EU:C:2002:741, wherein the Court did not annul the measure, even though it was based on wrong article, because the same legislative procedure applied.

<sup>167</sup> Judgment of the Court (Grand Chamber) of 2 May 2006, *European Parliament v Council of the European Union*, C-436/03, ECLI:EU:C:2006:277, paragraph 44.

<sup>168</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Body of European Regulators for Electronic Communications, COM(2016) 591 final, 14.9.2016.

<sup>169</sup> Judgment of the Court (Grand Chamber) of 2 May 2006, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-217/04, ECLI:EU:C:2006:279, paragraphs 42-45 and 61.

establishment of an EU body, such as ENISA or BEREC, responsible for contributing to the implementation of a process of harmonization and preventing the creation of obstacles to the smooth functioning of the internal market in an area in which technology is implemented which is not only complex but also developing rapidly.

Moreover, the Treaty of Lisbon's extension of Article 352 TFEU and its formulation from *within the internal market*, which encompassed the four freedoms, competition and other related matters, to *within the framework of the policies defined in the Treaties* overcame Article 114 TFEU in terms of its general scope of application. It is not clear, what is precisely covered by such formulation, however, it is not possible to interpret this connection restrictively in a manner that no substantive or competence extension, which has objectives and boundaries within the Treaties, is possible.<sup>170</sup> Hence, it poses the question with regard to the principle of subsidiarity, whether the establishment of the free movement of non-personal data should not be based on Article 352 TFEU, as it does not contribute to the elimination of obstacles to the free movement of goods, persons, services and capital and in new proposals, notably the Proposal for e-Privacy or Proposal for a Regulation on the free flow of non-personal data, constantly distinguish between data, goods and services.

In this sense, it would be also possible to think about Article 352 TFEU as the legal basis, which supports the idea of the DSM as an implicit area of shared competence under Article 4(1) TFEU. Moreover, drawing from the measures that have been previously brought along through the flexibility clause, such as intellectual property, energy policy, civil protection and others, which are now mentioned in the TFEU,<sup>171</sup> making use of Article 352 TFEU could lead to the establishment of the explicit "digital competence".

For the sake of completeness, there are also specific legal bases for harmonization aside from Article 114 TFEU, such as taxation issues, including forms of indirect taxation (Article 113 TFEU), the free movement of people, including workers (Article 114(2) TFEU), directives directly affecting the establishment or functioning of the internal market (Article 115 TFEU), freedom of movement for workers (Article 46 TFEU), business law (Article 50(2)(g) TFEU), creation of

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<sup>170</sup> SYLLOVÁ, PÍTROVÁ, PALDUSOVÁ a kolektiv. Lisabonská smlouva: komentář. Praha: C.H. Beck, 2010, p. 993. Beckova edice komentované zákony. ISBN 978-80-7400339-4.

<sup>171</sup> Ibid.

European intellectual property rights (Article 118 TFEU) or agricultural policy (Article 43 TFEU), which can be used for building the DSM as well.<sup>172</sup>

In conclusion of this subchapter, the single market and the DSM have in common the same baseline of achieving the freedom of movement. Hence, the DSM may rely on Article 114 TFEU to an extent that the measure improves conditions for the establishment and functioning of the internal market and contributes to the elimination of obstacles to the free movement of goods, persons, services and capital. In the case of the DSM, however, such freedom has to be perceived within the context of the digital space, which inherently adds new dimension to it in the form of data but at the same time poses new obstacles set by private parties. Those are one of the basic differences between the DSM and single market, as in the former, obstacles were imposed by the Member States to protect national businesses. Therefore, efforts to eliminate the fragmentation in narrow and broad sense may explain the tendency to adopt regulations instead of directives within the DSM. Given the horizontal nature of the DSM, it is not possible to limit applicable legal bases only to the single market, even though Article 114 TFEU is chosen most often according to Annex II – Table of DSM Strategy files. For the choice of legal basis is decisive the ability to adopt legally binding acts, which are preferred within the DSM in contrast to the single market, in combination with legislative procedure. On the other side, such measures do not respond quickly to technological developments, as harmonized or uniform rules can be revised again only within EU legislative procedures, which can be lengthy with regard to the huge number variety of the institutions and other actors involved.

#### **2.2.4 Institutions and other actors**

As a result of the DSM's complexity, in the sense of the variety of products and services that are interconnected and the vast number of private and public institutions and actors at both supranational and national level; the smooth functioning of the DSM risks being undermined by a heterogeneous implementation of legal acts.<sup>173</sup> The DSM is based on the same pattern of the decision-making process and same subjects as the single market, notably on the ordinary legislative procedure under Article 114 TFEU, with two exceptions – more EU regulatory authorities and far more influential digital stakeholders are involved in the DSM. What the single

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<sup>172</sup> See for example Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1, 17.9.2015, p. 1-15.

<sup>173</sup> Judgment of the Court (Grand Chamber) of 2 May 2006, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-217/04, ECLI:EU:C:2006:279, paragraph 63.

market experienced only with telecommunications companies, the DSM is familiar on a large scale. Big tech companies like GAFA and other interest groups gain momentum in order to tip the regulator's scale in their favour, as the rules put forward concern them directly. Therefore, the relation between various players involved in the DSM is further explored, as it may be of an argumentative nature, which would lay emphasis on the need for a more streamlined process.<sup>174</sup>

#### 2.2.4.1 EU institutions and bodies

Starting with the supranational level, wherein the most important role is played by the DSM's legislating institutions, namely the Commission, Parliament and Council. The latter not to be confused with the European Council, as both councils are represented by the Member States. However, the European Council is not one of the EU's legislating institutions but outlines the EU's overall political course and priorities by adopting conclusions during its meetings.<sup>175</sup> As indicated in the previous chapter, among the crucial meetings with regard to the digital agenda belong, for instance, Corfu Council in 1994. Even though the European Council recognize the importance of the digital space, it defines priorities only in broad sense, leaving the detailed work on the Commission.

Conversely, the **Council of the European Union** ("Council") is a crucial EU decision-maker, negotiating and adopting EU laws, in most cases together with the European Parliament as the co-legislators through the ordinary legislative procedure, which is used for internal market regulation. In terms of digital agenda, its Transport, telecommunications and energy Council configuration plays an important role in achieving the completion of the DSM. In particular, it is responsible for negotiations on the legislative packages, such as telecommunications (Electronic Communication Code and BEREC regulation, Wifi4EU), data (regulation on the free flow of data), privacy (regulation on privacy in electronic communications), cybersecurity (ENISA regulation), certain aspects of e-commerce (regulation on parcel delivery) and e-government.<sup>176</sup> Since the adoption of the DSM Strategy, digital priorities are regularly featured within the Council presidencies.<sup>177</sup> The pressure on digital issues was especially strong during the Estonian "digital

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<sup>174</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market for Europe, COM(2015) 192 final, 6.5.2015.

<sup>175</sup> The European Council. *About*. [online]. [cit. 2018-02-28]. Available at: <http://www.consilium.europa.eu/en/european-council/>

<sup>176</sup> Council of the European Union. *Policy debate on implementing the DSM Strategy – follow-up to European Council and Tallinn Digital Summit*. [online]. [cit. 2018-02-28]. Available at: <http://data.consilium.europa.eu/doc/document/ST-13303-2017-INIT/en/pdf>

<sup>177</sup> The Council of the European Union. *About*. [online]. [cit. 2018-02-28]. Available at: <http://www.consilium.europa.eu/en/council-eu/>

presidency” between July and December 2017, promoting the digital dimension of all policy areas of the EU. However, the trend of promoting the digital agenda within the Council is not something new, as it was on the presiding Member States’ program continuously since 2010 with the appearance of the Digital Agenda for Europe in 2010. Even the current “not-quite-wired presidency”<sup>178</sup> of Bulgaria included the digital economy among its priorities with a focus on education.<sup>179</sup> The Council’s awareness of the digital space is of utmost importance in order to stem the interest in the national governments of the Member States.

The **European Parliament** (“Parliament”) has also played an important role in getting the single market back on stage. Aside from its law-making function in the co-decision procedure<sup>180</sup>, the Parliament has adopted number of non-legislative resolutions relating to the DSM on a competitive digital single market – e-Government as a spearhead<sup>181</sup>, on Digital Freedom Strategy in EU Foreign Policy<sup>182</sup> and further resolution on completing the DSM, focusing on fully exploiting its potential, addressing the skill gap, building trust, security and consumer confidence, creating a favourable business environment, creating an attractive and legal supply of digital content, and building mobility services and international dimension.<sup>183</sup> The latter resolution outlined course for policy towards a new digital agenda which was subsequently followed by the Commission in the DSM Strategy in 2015. In this sense, the Parliament pushes the Commission forward to the digital age and monitors the implementation. Concurrently, the Parliament’s Committee on Internal Market and Consumer Protection guards interests of the consumer-user, notably in the field of privacy, to ensure the same level of protection also online. Other committees can also provide their opinions pursuant the procedure, especially the Committee on Legal Affairs, Committee on Civil Liberties, Justice and Home Affairs, Committee on Industry, Research and Energy or Committee on Culture and Education. However, with regard to their number, the European Parliament can be susceptible to disintegrated discussions.

Even though the role of the **European Commission** (“Commission”) was thoroughly discussed previously, notably through mapping its activities from the Delors tenure of the Commission to the Juncker’s present mandate, its part in the ordinary legislative procedure

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<sup>178</sup> European Commission. *Digital scoreboard of Bulgaria 2016*. [online]. [cit. 2018-02-28]. Available at: <https://ec.europa.eu/digital-single-market/en/scoreboard/bulgaria>

<sup>179</sup> Bulgarian Presidency of the Council of the European Union. *Priorities – Digital economy*. [online]. [cit. 2018-02-28]. Available at: <https://eu2018bg.bg/en/54>

<sup>180</sup> An overview of the IMCO related legislation in the field of DSM can be found here:

[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/542204/IPOL\\_ATA\(2015\)542204\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/542204/IPOL_ATA(2015)542204_EN.pdf)

<sup>181</sup> European Parliament resolution of 20 April 2012 on a competitive digital single market – eGovernment as a spearhead (2011/2178(INI)).

<sup>182</sup> European Parliament resolution of 11 December 2012 on a Digital Freedom Strategy in EU Foreign Policy (2012/2094(INI)).

<sup>183</sup> European Parliament resolution of 4 July 2013 on completing the digital single market (2013/2655(RSP)).

remains to be outlined. The Commission acts from the position of initiator of policies and proposals. Commissioners, Directorate-Generals, Directorates and their units as one carries out digital policy initiatives, notably legislative proposals, whose final shape is then in hands of the Parliament and Council. Once adopted, the Commission guards their implementation both at the supranational and national levels. Apart from building the legislative framework for the DSM, the Commission opened a dialogue with stakeholders in order to enforce measures of the digital agenda. In institutional terms, digital efforts were under the DSM split into two portfolios between Andrus Ansip, the Vice-President of the Commission in charge of the DSM, and Mariya Gabriel, the Commissioner for the Digital Economy and Society proposed by the Bulgarian Government and taking the baton from her predecessor Günther Oettinger. While reorganizing preparations of the “DG CONNECT 2.0” to be fit for DSM are in progress,<sup>184</sup> the Commissioner focuses herself on fake news or digital skills and leaves high-stake issues, such as 5G deployment in telecommunications, on the Vice President.<sup>185</sup>

**Other European bodies, agencies, offices and advisory groups** should not be forgotten given the fact that their importance grown together with their number since the White Paper on Governance in Europe<sup>186</sup>. Defined as supranational regulatory bodies of the internal market but also of the DSM, the most important are the Body of European Regulators for Electronic Communications (“BEREC”), the European Data Protection Board (“EDPB”), the European Regulators Group for Audiovisual Media Services (“ERGA”), the European Union Agency for Network and Information Security (“ENISA”) or the Radio Spectrum Policy Group (“RDPG”). Booming the growth of European regulatory agencies since 2001, they form a part of the Commission’s response to the criticism of the lack of transparency of the comitology system. The formation of regulatory agencies in the first place enhances the implementation of the EU’s policy and law, including on matters relating to the DSM. Simultaneously, agencies achieve better communication with digital stakeholders, their involvement in policy shaping, effective consultations and potentially faster regulation. For instance, apart from publishing guidelines on the interpretation, the EDPB will also have a mandate to issue binding decisions on disputes.<sup>187</sup>

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<sup>184</sup> European Commission. *DG CONNECT 2.0 – making DG CONNECT fit for DSM*. [online]. [cit. 2018-03-5]. Available at: <https://ec.europa.eu/digital-single-market/en/blog/dg-connect-20-making-dg-connect-fit-dsm>

<sup>185</sup> Politico. *Europe’s Digital Single Market hits Bulgarian rocks*. [online]. [cit. 2018-03-5]. Available at: <https://www.politico.eu/article/mariya-gabriel-digital-single-market-on-the-rocks/>

<sup>186</sup> White paper on European Governance, COM(2001) 428 final, OJ C 287, 12.10.2001, p.1-29.

<sup>187</sup> European Commission. *What is the Europea Data Protection Board?* [online]. [cit. 2018-03-5]. Available at: [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/enforcement-and-sanctions/enforcement/what-european-data-protection-board-edpb\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/enforcement-and-sanctions/enforcement/what-european-data-protection-board-edpb_en)

Another example constitutes the BEREC, which is an independent body established as part of the Telecom Reform package in 2009 ensuring a consistent implementation of the regulatory framework in telecoms sector. Whereas today it is composed by the National Regulatory Authorities (“NRAs”), the proposal for a regulation on BEREC<sup>188</sup> plans to turn it into agency with broader mandate to be fit for strengthen DSM and new tasks, such as the growing need for increased connectivity. In this sense, EU regulatory agencies can be understood as mitigating actors who seek to find regulatory responses suitable for the whole EU, which strengthen the institutional framework face to the complexity of the DSM.

When analysing the internal cohesion within the EU institutions, the **Court of Justice of the European Union** (“CJEU”) occupies a role of a referee *in concreto*. The importance of its position can be illustrated on infringement procedures with Member States, as well as preliminary rulings in domains like intellectual property or privacy. Its flagship judgment *Google Spain and Google*<sup>189</sup> on the right to be forgotten, wherein a European citizen may ask search engines to eliminate damaging search engine results, created a pathway for its inclusion within the General Data Protection Regulation’s data subject rights. Moreover, it pointed at another digital interest group – platforms, as the connection between the citizens and the DSM. The judgment is unique as it challenges the private stakeholders to put privacy of users first.

The CJEU’s decisions have far-reaching consequences for the DSM, where everything is related to everything.<sup>190</sup> The connectedness of the DSM and its issues can be observed on the judgment *McFadden*<sup>191</sup> in which intersect e-commerce, copyright but also data protection. Firstly, the questions 1 to 3 for preliminary ruling seek to establish whether a professional person, such as Mr. McFadden, who operates a free, public Wi-Fi network as an adjunct to his principal economic activity can enjoy the limitation of the liability of intermediary service providers of the E-Commerce Directive, notably its Article 12. In this case, Sony Music is the owner of rights to a work that, in its view, was illegally withdrawn due to the existence and operation of Mc Fadden’s public Wi-Fi network. Secondly, if the case falls within the scope of the e-Commerce Directive,

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<sup>188</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Body of European Regulators for Electronic Communications, COM/2016/0591 final, 14.9.2016.

<sup>189</sup> Judgment of the Court (Grand Chamber) of 13 May 2014, *Google Spain SL, Google Inc. v Agencia Espanola de Protección de Datos (AEPD), Mario Costeja González*, C-131/12, ECLI:EU:C:2014:317.

<sup>190</sup> MARTINICOVÁ, Eva. *Jednotný digitální trh, kde vše souvisí se vším. Může evropské právo plně uchopit pojem “digitální” a “propojený”*. Revue pro právo a technologie, Ústav práva a technologií Právnické fakulty Masarykovy university, 2016, no. 14, p. 85–102.

<sup>191</sup> Judgment of the Court (Third Chamber) of 15 September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:689.

the questions 4 to 9 demand to interpret the scope of the limitation laid down in that provision.<sup>192</sup> The CJEU held that a free Wi-Fi provider is not liable for third-party copyright infringements, however, it may be required to protect its network by a password to terminate infringements. Such injunction is according to the CJEU an instrument for ensuring a balance between, on the one hand, the intellectual property rights of right holders and, on the other hands, the freedom to conduct business of access providers and the freedom of information of the network users.<sup>193</sup> In the context of the DSM, applying this decision could mean the end of free Internet access via public Wi-Fi networks without password and user identification, as other alternatives are not realistic<sup>194</sup>, which is in contrast to the Commission's objective to accelerate public access to Wi-Fi for EU citizens.<sup>195</sup>

In this sense, the opinion of Advocate General Szpunar, from which the CJEU in part departed, understood better the connected nature of the DSM in practice and proposed more suitable translation of this feature into the legal context. He did not oppose in general the granting of a court injunction; however, its issuing is precluded in situations where the addressee is able to comply with it only by terminating the Internet connection, password-protecting the Internet connection, or examining all communications transmitted through it in order to ascertain whether certain copyright-protected work is transmitted again.<sup>196</sup>

Furthermore, Advocate General pointed out that imposing an obligation to password-protect a Wi-Fi network entails a need to identify users and to retain their data, which would fall within the scope of the regulations governing the activities of telecom operators and other Internet service providers, which seems to be disproportionate burden with regard to the adjunct nature of the access to Wi-Fi network in question.<sup>197</sup> In this context, it is necessary to recall the CJEU's judgment *Digital Rights Ireland and Seitlinger and Others*<sup>198</sup> on the invalidity of Directive

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<sup>192</sup> Opinion of the AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraphs 32 and 33.

<sup>193</sup> Judgment of the Court (Third Chamber) of 15 September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:689, paragraphs 99 and 100.

<sup>194</sup> KORBEL, František. O odpovědnosti poskytovatelů služeb často rozhodují drobné nuance. *Právní prostor*. [online]. [cit. 2018-03-21]. Available at: <https://www.pravniprostor.cz/clanky/pravo-it/o-odpovednosti-poskytovatelu-sluzeb-casto-rozhduji-drobne-nuance-rika-frantisek-korbel>

<sup>195</sup> Regulation (EU) 2017/1953 of the European Parliament and of the Council of 25 October 2017 amending Regulations (EU) No 1316/2013 and (EU) No 283/2014 as regards the promotion of internet connectivity in local communities, OJ L 286/1, 1.11.2017, p. 1-8.

<sup>196</sup> Opinion of the AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraph 151.

<sup>197</sup> *Ibid*, paragraphs 140 and 142.

<sup>198</sup> Judgment of the Court (Grand Chamber) of the 8 April 2014, *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General, intervener: Irish Human Rights Commission, and Kärntner Landesregierung (C-594/12), Michael Seitlinger, Christof Tschohl and others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.



2006/24/EC providing for retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications network services. In Czech law, this obligation was laid down in Section 97(3) of Act No. 127/2005 Coll., on the Electronic Communications Act, which was also subject to the decision of the Constitutional Court of the Czech Republic with a similar result for the provision in question.<sup>199</sup>

Moreover, the CJEU judgment did not take in consideration its consequence in the form of further obligations for private businesses under the General Data Protection Regulation. The operator of a Wi-Fi would need to store the IP addresses identifying users of the Wi-Fi.<sup>200</sup> The risk of becoming a data controller would be for most of professional persons of this type unaffordable with regard to uncertainty and, moreover, against the Commission's principles of data minimization and transparency.<sup>201</sup>

Nevertheless, such obligation to identify and register users for the sake of Internet security cannot be interpreted as a general obligation to monitor information leading to conferring an active, preventative role on intermediary service providers, which would be inconsistent with their particular status under the e-Commerce Directive, namely its Article 15.<sup>202</sup> In light of this judgment, questions arise demanding how the continuous technological development will be assessed. Notably, in cases of new innovations, such as shared economy, as services are provided peer-to-peer through intermediary, or even machine-to-machine ("M2M"), the question is who will be liable in situations where parties are not so easily identifiable.

Undeniably, the CJEU and other EU institutions will continue to be exposed to very complex issues that have a direct impact on technological development and thus, on all sectors and areas of human activity. With regard to the technological development and innovation are applicable clear rules of the e-Commerce Directive, however, those are influenced by the interpretation of the CJEU *in concreto*, which are often source of legal uncertainty about their future application. This issue is also part of the ongoing legislative process within the EU, the end result of which is difficult to predict. It will be interesting to see what happens in the event of a

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<sup>199</sup> Pl.ÚS 24/10 ze dne 22. 3. 201194/2011 Sb., N 52/60 SbNU 625, Shromažďování a využívání provozních a lokalizačních údajů o telekomunikačním provozu.

<sup>200</sup> Opinion of the AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraph 141.

<sup>201</sup> See Article 5 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("General Data Protection Regulation"), OJ L 119, 4.5.2016, p. 1–88.

<sup>202</sup> Opinion of AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraphs 143 and 144.

recurrence of conflict between the e-Commerce Directive, General Data Protection Regulation and other sectoral regulatory frameworks that are more or less part of the strategy to DSM.<sup>203</sup> However, one thing is clear at this point, technology indisputably offer great potential for innovation and, thus, “*any measures that could hinder the development of that activity should therefore be very carefully examined with reference to their potential benefits.*”<sup>204</sup> As could be observed on the judgment above, the CJEU does not fully acknowledge the interconnection between all parts forming the DSM, perhaps except for e-Commerce and copyright issues, and thinks within the formalistic paradigm governed by sectors.

#### 2.2.4.2 National institutions and bodies

In spite of the declared tendency of information to flow across borders, the national level is not omitted due to the EU’s multi-governance design. Pursuant the principle of conferral, the **Member States** define the scope of competences conferred to the EU either through the TFEU, where competences are listed within its Articles 2 to 6, or by every legal act, where the role of the EU is in detail inscribed in relation to a particular subject matter. The act itself – the conferral of competences – is an indirect involvement of the Member States in the digital policies. However, there is no such thing as specific digital competence. As concluded in the previous chapter, the information society became the essence of digital policies, earlier addressed within the research and technological development, today most often justified as part of the internal market. Such derived competence may lack specific empowerment to address digital policy issues, namely fragmentation of national digital markets, or to create a future proof legislative framework to protect the digital space, as well as consumers. Current scope forces the Commission to operate in the shadows of established competences in order to justify its digital initiatives, which may face-to-face to a direct involvement of the Member States prove to be insufficient at advancing the DSM from different points of view.

Direct involvement of the Member States manifests not only in implementation phase as sometimes reproached, but it starts with their representation at the European level, namely at the Council in the phase of adoption of legal acts. National interests are reflected in priorities within

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<sup>203</sup> MARTINICOVÁ, Eva. *Jednotný digitální trh, kde vše souvisí se vším. Může evropské právo plně uchopit pojem “digitální” a “propojený”*. Revue pro právo a technologie, Ústav práva a technologií Právnické fakulty Masarykovy university, 2016, no. 14, p. 85 – 102.

<sup>204</sup> Opinion of AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraphs 147-149.

the rotating presidencies, where Member States can push their own topics, and in qualified majority voting within the legislative procedure, where besides yes, no or abstentions Member States can issue also their own statements on the subject.<sup>205</sup> At the occasion of voting on the General Data Protection Regulation in 2016, the Czech Republic seized the opportunity to express their concerns regarding several issues, namely insufficient adaption period, extensive upper limits of the administrative sanctions or its regrets towards reluctant use of the risk-based approach, which could function as possible counterweight to disproportionate administrative burdens on controllers and processors.<sup>206</sup> Voting and statements, like this one in the example, in the Council generally mirror positions of national governments, whereas national parliaments can provide their opinion at an early stage of the legislative procedure through subsidiarity control mechanism acting as “watchdogs” of the principle of subsidiarity.<sup>207</sup>

Member States are also in charge of implementation. National institutions, notably governments and parliaments, implement legislation into national framework when necessary, inform citizens and businesses about their rights and obligations, as well as enable legislation to function in local conditions in accordance to its objectives. The intensity of involvement depends on the form of legal act. For instance, going back to the example of the General Data Protection Regulation and Czech Republic, the Ministry of Interior in cooperation with the Office for Personal Data Protection, the Czech Data Protection Authority (“DPA”), were entrusted with preparatory works on new legislation, which will replace the current Act No. 101/2000 Coll., on the Personal Data Protection. The new act should provide further details left by the General Data Protection Regulation to the discretion of each Member State and help data subjects, controllers and others with general orientation. However, the draft is not likely to be adopted on time, which may limit its enforceability.<sup>208</sup> Member States, which fail to implement legislation, can be subjected to an infringement procedure before the CJEU. The Czech Republic already faced referral to the CJEU and potential penalties in the past, for instance, in connection to the DSM it was because of EU telecoms rules only partial implementation in 2011.<sup>209</sup>

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<sup>205</sup> Council of the European Union. *Voting system* [online]. [cit. 2018-03-21]. Available at: <http://www.consilium.europa.eu/en/council-eu/voting-system/>

<sup>206</sup> Council of the European Union. *Voting result* [online]. [cit. 2018-03-21]. Available at: <http://data.consilium.europa.eu/doc/document/ST-7920-2016-INIT/en/pdf>

<sup>207</sup> Treaty on the Functioning of the European Union (consolidated text), Protocol I and II, 2008 OJ C 115/47.

<sup>208</sup> Úřad vlády České republiky. *Aplikace ODok – Návrh zákona o zpracování osobních údajů*. [online]. [cit. 2018-03-21]. Available at: <https://apps.odok.cz/veklep-detail?pid=KORNAQCDZPW5>

<sup>209</sup> European Commission. *Press release – Digital Agenda: Commission presses 16 Member States to implement new EU telecom rules* [online]. [cit. 2018-03-21]. Available at: [http://europa.eu/rapid/press-release\\_IP-11-1429\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-1429_en.htm?locale=en)

Regarding the digital state of play in the **Czech Republic** in general, according to the Europe's Digital Progress Report ("EDPR") 2017<sup>210</sup>, combining the quantitative evidence from Digital Economy and Society Index ("DESI") with country-specific policy insights, the Czech Republic ranks 18<sup>th</sup> in comparison to other Member States based on five chapters, which catapults the country to the medium performing cluster of countries. Since last year, progress was made in digital public services, stable performance was registered in human capital and worse results were marked in the other dimensions. The country's strength is in integration of digital technologies by businesses as majority of Czech SMEs embrace e-commerce. It is in good terms with 4G coverage, but overall performance in the connectivity is stagnating. The Czech Republic should face challenges regarding the use of Internet services, in particular for e-government, entertainment and social purposes.<sup>211</sup>

Making an excursion to the Czech digital agenda organization – in response to ongoing discussions on the need of a comprehensive understanding of the digital agenda at the national level and its coordination, the Czech government led by Bohuslav Sobotka established the position of a **Digital Agenda Coordinator** in 2016. Due to the interdepartmental nature of the agenda, the coordination role was embedded in the Office of the Government of the Czech Republic with a direct link to the Prime Minister. This guaranteed a horizontal approach to coordination activity. The Coordinator facilitated intensive cooperation of relevant actors across state administration, ensured the interdependence of their activities and promoted regular dialogue with social and economic partners. Into the scope of the Coordinator's activity fell also promotion of the digital economy, building public awareness and debate on the importance and impact of digitalization on society. At the EU level, the Coordinator was in contact with the Commission and developed relations with other Member States to promote common positions on Commission proposals and exchange experience in developing national measures.<sup>212</sup>

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<sup>210</sup> EDPR is constructed around five chapters and subchapters – connectivity (fixed broadband, mobile broadband, broadband speed and prices), human capital (Internet use, basic and advanced digital skills), use of Internet (citizens' use of content, communication and online transactions), integration of digital technology (business digitization and e-commerce), digital public services (e-government).

<sup>211</sup> European Commission. *EDPR and DESI Scoreboard 2017 – Czech Republic*. [online]. [cit. 2018-03-21]. Available at: <https://ec.europa.eu/digital-single-market/en/scoreboard/czech-republic>

<sup>212</sup> Office of the Government of the Czech Republic. *Updated Action Plan on the Development of Digital Market*. [online]. [cit. 2018-03-21]. Available at: <http://digiczech.eu/wp-content/uploads/2016/06/Aktualizovaný-Akční%3%AD-plán-pro-rozvoj-digitln%C3%ADho-trhu.pdf>

The EU regarded the appointment of the Coordinator as an important step on a pathway to unified digital activities, which signalled that the digital agenda is a national priority.<sup>213</sup> As highlighted was seen the updated Action Plan on the Development of Digital Market of 2017, namely the initiative Society 4.0,<sup>214</sup> which stands for the Czech information society.<sup>215</sup> The initiative functioned as an umbrella for the various sectoral strategies with pillars, namely connectivity and mobility, education and labour, e-government, cybersecurity, industry, supporting policies of the DSM and digital-friendly legislative environment. Within the latter, the Coordinator together with the Office of the Government prepared a working version of the Principles for the creation of digital-friendly legislation. The aim was to create framework guidelines for ministries so that the digital aspects of legislation are already taken into account when drafting. Those principles composed of digital by default principle promoting the modern state administration, only once principle regarding reusability of data, GDPR principle, governance accessibility for all principle, technological neutrality, user-friendliness of the services introduced to citizens, openness and transparency of the state administration, and forth.<sup>216</sup>

After the 2017 Czech legislative elections, the leader of the resultant government Andrej Babiš changed the structure by cancelling position of the Digital Agenda Coordinator. Currently, it is not entirely clear who has the main lead in overall coordination as the national digital agenda is split between several institutions – the Office of the Government is entrusted with its coordination in general, the Ministry of Industry and Trade appointed a Deputy Minister for Internetization and a Coordinator of e-Government, the Ministry of Education, Youth and Sport delegated a Coordinator of e-Learning and so forth. It cannot be expected that Act No. 2/1969 Coll., on establishment of ministries and other central bodies of state administration of the Czech Republic (“Competence Act”), dating back to the year which is considered to be beginning of the

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<sup>213</sup> European Commission. *EDPR and DESI Scoreboard 2017 – Czech Republic* [online]. [cit. 2018-03-21]. Available at: <https://ec.europa.eu/digital-single-market/en/scoreboard/czech-republic>

<sup>214</sup> Ibid.

<sup>215</sup> The Society 4.0 is defined by the Office of the Government of the Czech Republic, as follows: “*The emergence of the so-called "Fourth industrial revolution" will increasingly lead to significant changes not only in manufacturing but also in an intertwined way in the labour market, education and other areas. These changes are associated with the development of the Internet of things, the use of digitization and the Internet in all areas of economic and social life. Therefore, innovation in each of the above sectors must be carried out simultaneously and in a coordinated manner and it is necessary to examine the issue in its social dimension, as "Society 4.0".*” Available at: <http://digidczech.eu/wp-content/uploads/2016/06/Aktualizovaný-Akčn%C3%AD-plán-pro-rozvoj-digitln%C3%ADho-trhu.pdf>

<sup>216</sup> Digital Agenda Coordinator. *Principles for the creation of digital-friendly legislation* [online]. [cit. 2018-03-21]. Available at: <https://www.dropbox.com/s/mcxohsmynu2y67i/Zásady%20pro%20tvorbu%20digitálně%20př%C3%ADvětivé%20legislativy.pdf?dl=0>

Internet,<sup>217</sup> can provide an adequate answer to organizational issues surrounding the digital agenda. In the light of these events, the Czech Republic once again faces the problem of disperse digital coordination, in the sense, that there is no single authority responsible for the coordination of the digital agenda at the national level, which has proved to be less efficient based on the past experience.

**National regulatory bodies** play an important role within implementation, notably in transposition, information and enforcement. NRAs can be compared to their European counterpart BEREC with the exception that such regulatory authority exists within each Member State. NRAs operates within the implementation of digital legislation, notably in terms of ending the roaming charges. NRAs are engaged in transposing and enforcing legislation, notably in monitoring and assessing the compliance. Being middlemen between end-users and businesses, they guard balance, independence and net neutrality. Similarly to the EU, there is no single regulating authority for digital space at the national level, which cause lack of uniformity in the DSM, regarding different capabilities and pace at which different national authorities handle implementation, which affect the DSM's deployment. The Czech Telecommunication Office, Czech regulatory authority, defines itself as "*a central administrative body for the execution of state administration in matters set out in the Act [No. 127/2005 Coll., on Electronic Communications and on Amendment to Certain Related Acts], including market regulation and definition of the conditions for business activities in the areas of electronic communications and postal services.*"<sup>218</sup> Into its scope of competences belong electronic communications, postal services, broadcasting services, information society services and consumer protection.<sup>219</sup>

With regard to stagnating connectivity, the Czech Telecommunication Office recently carried out a test of three criteria<sup>220</sup> in compliance with the Commission Recommendation

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<sup>217</sup> The Advanced Research Projects Agency Network ("ARPANET") was established in 1969 and later became the technical foundation of the Internet.

<sup>218</sup> Czech Telecommunication Office. *About CTU* [online]. [cit. 2018-03-21]. Available at: <https://www.ctu.eu/office>

<sup>219</sup> Czech Telecommunication Office. *Competences of CTU* [online]. [cit. 2018-03-21]. Available at: <https://www.ctu.eu/competences-ctu>

<sup>220</sup> Only the market where the Office demonstrates that three criteria are cumulatively met (I) the existence of significant, rather than temporary, structural, legal or regulatory barriers to entry, (II) a market structure that does not lead to effective competition over a given time horizon, taking into account the state of competition based on infrastructure and other competition that creates barriers to entry; and (III) competition law alone is unable to respond adequately to the market failure, can be considered relevant and appropriate for the ex-ante regulation, if the significant market power is subsequently demonstrated. Available at: <https://www.ctu.cz/sites/default/files/obsah/ctu/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb/obrazky/trh-mobilnich-sluzeb-verzeprovkverejna.pdf>

2014/710/EU<sup>221</sup>, which can be used to identify the relevant market that is not mentioned in the Recommendation, such as redefine the existing wholesale market for the data services. The test showed that all three criteria are cumulatively fulfilled. The Authority found barriers to entry, found that there was no effective competition in the retail and wholesale markets, particularly on the segment of resident customers, and that competition law was not sufficient to eliminate the problems found. The Czech Telecommunication Office therefore concluded that the wholesale market for mobile access services is a market suitable for ex-ante regulation by the Office. After gaining green light from the Office for the Protection of Competition, the Czech Republic is waiting for an opinion from the Commission on whether it can introduce regulation of the domestic mobile market, which is expected to lower prices for mobile services, including mobile data, which are among the most expensive in Europe.<sup>222</sup>

Similarly, in the field of data protection operates DPAs, namely the Office for Personal Data Protection in the Czech Republic, which set an example of strengthened and connected model of regulatory authorities at the national level in relation to EDPB. This scheme adopted by the GDPR shares similar ratio of cooperation with the one proposed by the BEREC regulation.

### 2.2.4.3 Interest groups

The harmonization of legislation affects digital interest groups both at the national and European level, covering the whole range of organized civil society or private actors who carry out activities to influence decision-making linked to a specific digital outcome. They can either play a passive role and comply with adopted obligations or involve themselves actively in the adoption and transposition phases of the legislation. For that purpose, a joint transparency register was set up for the Parliament and Commission in order to encourage interest groups to participate more actively in the dialogue and at the same time avoid undue pressure and illegitimate or privileged access to information or to decision-makers.<sup>223</sup>

The diversity and amount of influence of interest groups is particularly wide and powerful regarding the DSM. The single market was shaped mainly through an involvement of federations

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<sup>221</sup> Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 295, 11.10.2014, p. 79–84.

<sup>222</sup> Czech Telecommunication Office. *Trh mobilních služeb* [online]. [cit. 2018-03-21]. Available at: <https://www.ctu.cz/sites/default/files/obsah/ctu/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb/obrazky/trhmobilnichsluzeb-verzeprovkverejna.pdf>

<sup>223</sup> European Parliament. *Transparency Register* [online]. [cit. 2018-03-21]. Available at: <http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en>

of national associations, trade unions, businesses acting as large employers and many NGOs, especially in link to environmental or consumer issues.<sup>224</sup> The influence of those groups still persists in the DSM, however, the digital space is more significantly marked by big tech companies, taking regulation by surprise, by telecom operators, taking advantage of differences in prices, and by right holders, enjoying the principle of territoriality. Their active involvement in the DSM stems from the fact that “digital interest groups” are often targeted by legislation.

### 2.3 Partial conclusion

The purpose of this part was to delineate the foundations of the DSM with regard to its historical, social, substantive and institutional aspect, which would provide valuable context to the EU’s present digital efforts. In total, this part presented three partial objectives – a compilation of material sources of the DSM, a comparative study between the single market and the DSM and identification of its challenges, which are for the sake of clarity summarized below, as they constitute criteria of the assessment of digital policies in the following part.

The first chapter, which is dedicated to the historical and social delineation of the DSM, provided an answer to the research question – what circumstances led to the regulation of the digital space at the first place? Proceeding from Newton’s third law of motion, behind every reaction there is always an action. In this sense, the pursuit of the DSM is a reaction to the technological progress, as Jacques Delors explained in the interview for the Centre Virtuel de la Connaissance de l’Europe (CVCE) years after his presidency ended. Yet, by recognizing strategic importance and addressing technological development along the way of creating the internal market the Delors Commission formed a legacy, which is followed by his successors even today, as can be seen on the example of current digital policies. Therefore, the Delors’ tenure of the Commission is of the utmost importance for forming the DSM’s *modus operandi* in the future.

The Delors Commission focused on two fronts – a prioritization of the common market with emphasis on the technological development and on a reformation of the primary law to broaden the Community’s competence, complementing each other in the sense of efficiency. New technologies were prioritized for the first time in White Paper on Completing the Internal Market in 1985, to which was linked the idea of an economic revival of the common market. Further progress in this regard was enabled by the SEA, which introduced major legislative improvements such as Article 114 TFEU, but also granted the Community an explicit competence in research and technological development. Throughout its mandate, the Delors Commission used this

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<sup>224</sup> European Council of the European Union. *Interest groups in EU decision-making* [online]. [cit. 2018-03-21]. Available at: <https://www.consilium.europa.eu/en/library-blog/posts/interest-groups-in-eu-decision-making/>



competence to present multiannual framework programs in the field of technology, which played an important part in evolution of the information society, focusing on ICTs, infrastructure, users and most lately on their knowledge. However, with the dissemination of technology into daily lives of citizen-users, the information society receded from strictly sectoral view of research and technological development and started to overlap with other policies, notably the internal market. Proceeding from the Delors' common information area, Mario Monti in his report confirmed the DSM to be a tool for restarting the single market, namely by eliminating digital frontiers, due to the economic potential of digital technologies. Therefore, when exploring historical and social foundations of the DSM, it has to be remembered that its material sources come not only from the evolution of the information, knowledge and data society but also from the one of the common and internal market and, thus, the DSM constitutes a constant evolution in itself. Translated into legal terms – if the EU does not move forward with its initiatives, then it will not merely stagnate but actually go backward.

By analysing the shift from the oversight of the research and technological development to the protection umbrella of the single market, the delineation of the historical and social foundations proved the fact that developments in the single market translate themselves into the digital space. Therefore, the second chapter of this part pursued to explain the nature of the relationship between the DSM and the single market with a focus on the regulatory foundations of the former. The author accomplished the partial objective by presenting a comparative study of their regulatory frameworks concerning substantive and institutional aspects, which is summarized in Annex I – Comparison between Single Market and Digital Single Market and based partly also on findings in Annex II – Table of DSM Strategy files of this thesis. When comparing regulatory frameworks, it was important to realize that the DSM is being built almost 30 years after the single market – whereas the EU prefers regulation as a technique of integration in general, it was not its first choice for the digital economy. Despite the EU has moved from self-regulation to regulation eventually, its regulatory approach has changed over the years, which was demonstrated on the example of electronic communications. In this respect, the EU acknowledges the need to digitalized law, respectively to adapt a form of legal regulation to conditions in the digital space. Thus, as a starting point for building the regulatory framework for the DSM, the EU uses the single market's template and adjusts it to the specifics of the digital space, since the nature of law does not change within it and substantial modification undergoes primarily the form of regulation. Regarding the structure of the comparative study, it was not possible to sustain the clear division seen in the first subchapter, therefore, the author chose to pinpoint differences along the narration, which continued to be focused primarily on the DSM.

In order to summarize the findings concerning the substantive part of the comparison, the key word for the EU's technique of integration is regulation, which applies to both concepts only in different ratio. Whereas in terms of regulation of the single market prevails negative over positive integration with the principle of mutual recognition in lead, the DSM is mainly based on positive integration, notably through harmonization of laws or legal integration. Moreover, the DSM is based on reverse regulatory approach also in terms of moving from formalistic to integrative legal paradigm in an attempt to overcome fragmentation into sector-specific regulation. It became evident that the formalistic paradigm, suitable for initial tasks of building the single market, hampered the proper evolution of the DSM as it tied law to definitions of a particular type of technology. In order to avoid rendering law obsolete because of the fast pace of technological development, another key regulatory instrument for the DSM is the use of performance-based norms, which establish general obligation and let obliged persons to select appropriate tool for its implementation. The differences between the single market and the DSM continue with their legal context set within the Treaties. The TFEU does not provide for specific "digital competence" and thus, the DSM issues must be dealt with within other conferred competences in comparison to the single market, which is a principal area of shared competence. In theory, the DSM may fall under numerous areas given its horizontal nature. According to findings in Annex II, the DSM measures are most frequently subordinated to shared competence, notably to the internal market and its above-mentioned Article 114 TFEU. Despite the EU's tendency to link the DSM exclusively to the internal market, it is important to stress that the DSM transcends also to other areas of shared competence, such as trans-European networks or research and technological development, let alone exclusive competence. Moreover, the battle for competence in the case of Marrakesh Treaty in link to *Open Skies* judgment illustrated the tendency to gradually remove competences from the Member States to the EU by virtue of the fact that the EU is already exercising the power in the domain of the DSM. In this sense, digital competence, or rather competence for the DSM, *de facto* exists. However, whether it is possible to talk about the DSM as an implicit area of shared competence under Article 4(1) TFEU instead of the DSM being a part of the single market depends according to the opinion of the author on the affiliation of a particular legal basis and above all on the overall digital strategy – if the DSM is to be removed from the single market, does it mean that the concept is definitely surmounted? The single market and the DSM have in common the same baseline of achieving the freedom of movement, however, such freedom has to be perceived in the context of the digital space, which inherently adds new dimension to it in the form of information but at the same time poses new obstacles set by private parties. Those two differences proved to be the most important for digital policies and explain many EU actions, for example, the

prevalence of regulations over directives within the DSM. Hence, the DSM may rely on Article 114 TFEU to an extent delineated by the judgment *Germany v Parliament and Council* but it is not possible to limit applicable legal bases only to the single market, as shows Article 16 TFEU. In terms of data, it is legitimate to question whether the free movement of non-personal data, which is currently at the bottom line of several legislative proposals, should not be based on Article 352 TFEU rather than on the four freedoms to be in line with the principle of subsidiarity and the EU's distinction of data from the four freedoms. From the point of view of the regulator, for the choice of legal basis is decisive the ability to adopt legally binding acts, which are preferred within the DSM in contrast to the single market, in combination with legislative procedure. The downside of harmonized or uniform rules is that they do not respond quickly to technological developments, as those measures can be revised again only within EU legislative procedures, which can be lengthy with regard to the huge number variety of institutions and other actors involved.

Regarding institutional aspects of the DSM, the role of institutions and other actors influencing the shape of legislative and other accompanying measures is also explained within the chapter. In general, the DSM's complexity involves a variety of institutions and other actors, which counteracts its effective functioning. Starting at the supranational level, the DSM is based on the same pattern of the decision-making procedure and the same composition of institutions as the single market, notably involved in the ordinary legislative procedure, with two particularities – the DSM is a point of interest of influential digital stakeholders, who are often the subject matter of legislation as they pose obstacles to the free movement, and European regulatory bodies are being more actively involved or even established in order to streamline the governance cycle, notably in the phase of information and enforcement. When contemplating about the future development of the DSM, experts are not homogenous in their view on whether the CJEU or legislating institutions should be in charge. Taking into consideration namely *McFadden* and *Svensson and Others* judgments, which are not ostensibly linked as one the former deals with the interpretation of the communication to the public within the meaning of Copyright Directive and the latter contends with the interpretation of Article 12 of e-Commerce, however, they both interfere with the overall concept of dissemination of information, freedom of expression on the Internet and the very essence of the functioning of the Internet. Furthermore, the two judgments have a major impact on the interpretation of the intermediary liability exemptions set out in Articles 12-15 of e-Commerce. According to the author, the CJEU does not yet fully acknowledge the interconnection between all DSM's domains, except for e-commerce and copyright, and thinks within the formalistic sectoral paradigm. Therefore, the role of the CJEU in the DSM should maintain to be a referee and the task to create simple rules that will stand up for interpretation in long term should be left to the

European legislator and the Member States. At the national level, it is important to remember that the direct involvement manifests not only in implementation phase, but it should start with their representation at the European institutions, namely the Council in the phase of adopting legal acts. On the example of the Czech Republic, the same tendency to streamline the decision-making process could have been seen, however, the fact that circumstances of the coordination of the Czech digital agenda changed significantly just over the period of writing the thesis shows precisely the main problem regarding the national approach – a lack of clear strategy. Despite all criticisms, the EU with its multiannual strategies based on expertise and their actual realization appears to be better equipped for the digital age.

The comparative method was chosen for its ability to underline similarities and differences of the single market and the DSM, as the author assumed that despite the DSM is legally enshrined into the single market in many aspects their concepts differ, which creates tension and results in inefficiency in addressing the DSM issues. In overall, the delineation of the DSM's foundations provided valuable context to the assessment of the state of play of the DSM through its digital policies, which are determined mainly by its unique differences – obstacles and freedoms, as the DSM has yet to overcome the fragmentation into national markets and has to balance existing regulatory framework with innovation.

### 3. The state of play of the digital single market

The previous part delineated the foundations of the Digital Single Market with regard to its historical, social, substantive and institutional aspects. Firstly, historical and social delineation proved the underlying assumption of the thesis that the DSM stems from the single market. Secondly, it was demonstrated through regulatory comparison that the single market's regulatory framework was a point of reference for the DSM, which faces today the challenge to adapt the form of legal regulation to conditions in the digital space while navigating around competences and legal bases, lastly updated over a decade ago.

The delineation of the DSM's foundations provides valuable context to the EU's most advanced digital efforts so far – Digital Agenda for Europe (2010-2020) and Digital Single Market Strategy (2015-2019). With the focus on the latter, this part assesses those *stricto sensu* digital policies to verify whether it acknowledge the differences, notably in freedoms and obstacles identified in Annex III – Classification of obstacles impeding the DSM, between the single market and the DSM and, moreover, to assess whether the DSM Strategy tackles them accordingly to deliver on the overall promise to adopt the future-proof regulatory framework.

The mid-term review of the DSM Strategy adopted in 2017 presents a good opportunity to take stock of Europe's changing “digital reality” and to join the theory with practice. Therefore, the last chapter of this part examines the state of play of the DSM Strategy, starting from its successful initiatives, which are together with others summarized in Annex II – Table of DSM Strategy files, passing through four main criticisms, and closing with recommendations for one of the main areas where the EU needs to act further to ensure a fair, open and secure digital space – the free flow of data. The author on this account adds *de lege ferenda* reflections in order to help reveal and shape a future proof regulatory framework of the DSM, as the free flow of data is an essential instrument for European integration in the digital age.

#### 3.1 Digital agenda for Europe: a vibrant digital single market

A Digital Agenda for Europe in pursuit of taking full advantage of the social and economic potential of ICTs, especially the Internet, set 13 specific objectives to be reached between the years 2011 to 2020 – by 2013 the entire EU to be covered by broadband<sup>225</sup>; by 2015 half of the population to buy online, 20 % of the population to buy online cross-border, 33 % of small and medium

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<sup>225</sup> Broadband coverage is defined as fixed and wireless technologies, such as DSL, VDSL, cable modem, DOCSIS 3, FTTP, WiMAX, HSPA, LTE and satellite. See European Commission. Study on broadband coverage in Europe 2016 [online]. [cit. 2018-03-21]. Available at: <https://ec.europa.eu/digital-single-market/en/news/study-broadband-coverage-europe-2016>

enterprises (“SMEs”) to make online sales or purchases, roaming and national tariffs to approach zero, Internet usage to be increased from 60 % to 75 % and from 41 % to 60 % among disadvantage people, the proportion of the population that has never used the Internet to be halved from 30 % to 15 %, 50 % of citizens to use e-government, key cross-border public services to be available online; by 2010 the entire EU to be covered by broadband, 50 % of the EU to subscribe to broadband above 100 Mbps, public investment in ICT research and technological development to double and energy use of lighting to be reduce by 20 %.<sup>226</sup>

In comparison to the previous efforts in this regard, the DAE fully conceptualized the digital space in Europe. Being the first *stricto sensu* digital initiative, its most important task is to integrate the digital space to the point which would enable the deployment and adoption of ICTs. In this sense, the DAE acknowledged the need to embrace the digital space in general in order to create the right environment for more specific steps to follow in the future. Through adopting broad approach towards the digital space, the DAE aimed to prevent previous failures stemming from *ad hoc* measures, which turned to be inefficient.

In terms of the DAE’s approach towards the digital economy, the EU aims to eliminate barriers impeding the so-called *virtuous cycle of digital economy*. Making available content and services on the digital market, existing within interoperable and borderless Internet environment, increases demand for higher speeds and capacity services, which subsequently leads to investments to faster networks. Their roll-out in turn opens the way for innovative content and borderless services to be presented – and so the cycle continues.<sup>227</sup> This process is illustrated in the outer ring of Figure 1, whereas the inner ring lists the seven digital obstacles, which are briefly described below.

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<sup>226</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

<sup>227</sup> Ibid.

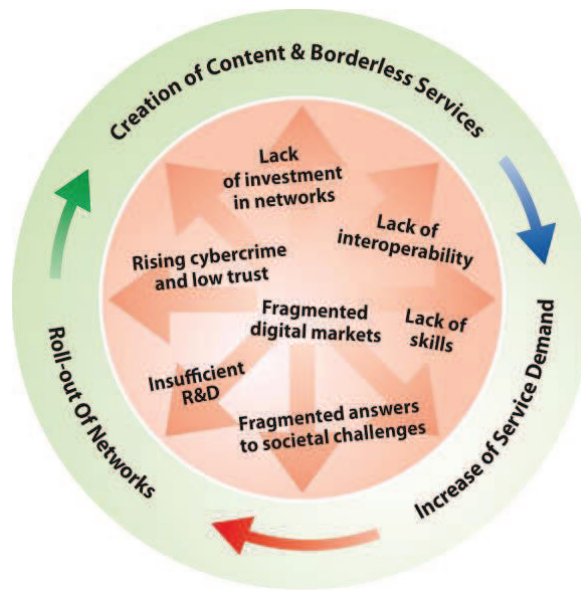


Figure 1: Source<sup>228</sup>

First, the DAE can be attained only when digital services and devices work together based on same standard, which calls for overcoming the lack of interoperability. Second, rising cybercrime and risk of low trust in networks raise new challenges to the protection of rights to personal data and privacy, as demanded by the Charter of Fundamental Rights of the European Union. Third, lack of investment in networks impedes broadband for all through both fixed and wireless technologies should be reversed by right incentives without re-monopolizing networks, as well as improving spectrum allocation. Fourth, insufficient research and technological development efforts hinder the conversion to the competitive market-based innovations. Fifth, lack of digital literacy and skills holding back participation in the digital society and economy. Sixth, answers to societal challenges are fragmented, when it comes to environment, ageing population or health. Finally, at the core of the inner cycle lays the obstacle of fragmented digital markets, which was already mentioned many times.<sup>229</sup>

The DEA organizes its actions around eight pillars in need to systematically tackle these seven problem areas. Aside from its objective of attaining a vibrant DSM, there were other pillars dedicated to interoperability and standards, trust and security, fast and ultrafast Internet access, research and innovation, enhancing digital literacy, skills and inclusion, and ICT enabling benefits

<sup>228</sup> European Commission. A Digital Agenda for Europe [online]. [cit. 2018-02-13]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0245R%2801%29>

<sup>229</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

for society, and last but not least international aspects of the Digital Agenda.<sup>230</sup> It is worth noting that the pillars intertwined, in the sense that increasing population's digital literacy can in theory support trust and security in ICTs.

In terms of the DAE's first pillar – *a vibrant DSM*, the EU abandoned the narrative that the DSM should be built through supporting similarities shared with the single market. Instead of it, the EU started to embrace the unique character of the DSM with side regards to their mutual relation, wherein the single market provides the socioeconomic context. All future initiative should be focused on building the DSM through tackling new frontiers, represented by digital barriers, to enable the free movement of online goods and services.<sup>231</sup> The pillar presented namely four action areas – firstly, open access to content through simplified copyright clearance, management and cross-border licensing, secondly, making online and cross border transactions straightforward, thirdly, building digital confidence through review of the EU data protection regulatory framework, and finally, reinforcing the single market for telecommunications services.<sup>232</sup>

In order to oversee meeting the targets of the DAE, the Commission regularly publishes the digital scoreboard, which evaluates the performance based on specific indicators and publishes update of progress on the full set of policy actions identified in the DAE.<sup>233</sup> The EU was already on track to complete 95 of its 101 actions by 2015.<sup>234</sup> However, their number slowly raised due to the progress in ICT area, reaching the total of 132 actions after their review. For instance, as a result of the DAE was adopted the Framework Directive on collective rights management<sup>235</sup>, Orphan Works Directive<sup>236</sup> and also the General Data Protection Regulation. On the other side, the Commission decided not to review the e-Commerce Directive.

With regard to the overall thirteen objectives of the DAE, data for 2014 also indicated that EU citizens felt confidence in their ICT skills to go and shop more online being able to access the Internet. However, there are still remaining challenges such as engaging small business in selling

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<sup>230</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

<sup>231</sup> European Policy Center. *The Economic Impact of a European Digital Single Market* [online]. [cit. 2018-02-13]. Available at: [http://www.epc.eu/dsm/2/Study\\_by\\_Copenhagen.pdf](http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf)

<sup>232</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2, 26.8.2010.

<sup>233</sup> The digital scoreboard includes data from the Digital Economy and Society Index (“DESI”) and the European Digital Progress Report (“EDPR”).

<sup>234</sup> European Commission. *Overview of the progress on 132 Digital Agenda actions* [online]. [cit. 2018-02-13]. Available at: <https://ec.europa.eu/digital-single-market/en/news/overview-progress-132-digital-agenda-actions>

<sup>235</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

<sup>236</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5–12.



online, achieving high-speed broadband for all (especially in rural areas) and endorsing e-government.<sup>237</sup> The level of the DEA's attainment in individual Member States differ significantly, as was shown in the previous part on the example of the Czech Republic. In this sense, the DSM is truly a *vibrant* space.

### **3.2 Digital single market strategy: a connected digital single market**

More than 30 years after Delors' commitment to ensure freedom of movement, more than 20 years from the launch of the internal market, 10 years after the initiation of ending roaming charges, less than a year after the newly elected president of the European Commission, Jean-Claude Juncker marked on 6 May 2015 a new start for Europe in taking "*ambitious legislative steps towards a connected digital single market*"<sup>238</sup>, the Juncker Commission issued, its long-awaited policy – Digital Single Market Strategy for Europe, a multi-annual scope policy focused on key interdependent legislative and accompanying actions, navigating the EU to the digital age.

The DSM continues in the approach previously suggested by the DAE and focuses on its establishment through tackling digital barriers, which draw the clear line between the single market and the DSM, in order to enable the free movement of online goods and services and, especially, data.<sup>239</sup> With regard to their importance for emerging technology, the EU has realized that the future evolution of the information society is based on data and that data society can only become a reality in the digital space without barriers – the DSM, wherein the free movement of data is ensured.

This approach underpins the EU's "line of attack" towards the digital obstacles. However, digital obstacles are not explicitly stated in the DSM Strategy, as was done in the DEA, but they can be conversely identified through the method of induction from policy initiatives. Therefore, the DSM Strategy's policy initiatives, which will be used for the delineation of the obstacles existing within DSM later in this subchapter, are presented below together with their context.

The DSM Strategy is built on three pillars – access, environment and growth. Whereas the first pillar aims to provide better access for consumers and businesses to online goods and services across Europe, the second and third pillars focus on shaping the right background for digital networks and services to flourish and on exploiting the growth potential of digital transformation.

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<sup>237</sup> European Commission. *Press release: The EU Digital Scoreboard: How did you fare?* [online]. [cit. 2018-02-13]. Available at: [http://europa.eu/rapid/press-release\\_IP-14-609\\_en.htm](http://europa.eu/rapid/press-release_IP-14-609_en.htm)

<sup>238</sup> JUNCKER, J. P. *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*. Political Guidelines for the next European Commission presented in opening statement in the European Parliament Plenary Session in Strasbourg on 15 July 2014.

<sup>239</sup> Ibid.

In total, the DSM Strategy consists of 16 policy initiatives, which require harmonized action on the EU level as it is not possible for the Member States to resolve them efficiently on the national basis due to their scope. The Commission has committed to deliver to the Parliament and to the Council relevant legislative proposals with the deadline of January 2017 concerning issues where existing barriers are already sufficiently evidenced. Matching legislative actions are enumerated for the sake of clarity separately in Annex II – Table of DSM Strategy files. Where further consultation and evidence gathering was needed in order to identify the right direction of action, the Commission engaged stakeholders in discussing the options available.<sup>240</sup>

The first pillar is dedicated to better **access** for consumers and businesses to online goods and services to break down barriers to cross-border online activity. For this reason, it is essential to adopt common *cross-border e-commerce rules that consumer and business can trust*. Current legal situation implies that online traders of goods and services who wish to engage in a cross-border market may potentially need to know about, and comply with, all relevant differing sets of national legislation from contract law to rules on labelling. This state of play creates extra information and compliance costs which are more challenging to amortize for SMEs making up 99% of all enterprises in the European Union.<sup>241</sup> However, having only a common set of rules is not enough. There is also a need for better enforcement of consumer rules for online purchases to safeguard the equilibrium on the market. Another milestone which needs to be met is *affordable, high-quality cross-border parcel delivery services*, since cross-border costs of shipments are often two to five times higher than comparable intra-national prices, either because of sell volumes or weak competitive pressure. The pillar also promotes *preventing unjustified geo-blocking*, i.e. territorial restriction in the form of a refusal to sell or automatic re-routing based on geographic location of the consumer determined using IP addresses, registration country of credit card or postal address. The issue of geo-blocking, similar to national borders in the digital space, is one of the biggest obstacles, which has been lately successfully addressed.<sup>242</sup> Better access also applies to *digital content based on a modern, more European copyright framework*. As the behavioural pattern of consumers and culture changes, accessing digital content became one of the most

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<sup>240</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market for Europe, COM(2015) 192 final, 6.5.2015.

<sup>241</sup> European Commission. *Annual Report on European SMEs* [online]. [cit. 2018-02-13]. Available at: [https://ec.europa.eu/jrc/sites/jrcsh/files/annual\\_report\\_-\\_eu\\_smes\\_2015-16.pdf](https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf)

<sup>242</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, p. 1-15.

popular online activity. In combination with consumers' mobility, it underlines their need to access content from everywhere. However, as regards portability and cross-border access to content from another Member State, consumers are often prevented from using legally acquired content by a territorial dimension of copyright, by territorial restrictions in licensing and by the commercial practices of online service providers. On the other side, rules on the activities of intermediaries concerning copyright-protected content have to be clarified and enforcement of intellectual property rights modernized with cross-border applicability. Last but not least, the access pillar targets *reducing VAT related burdens and obstacles when selling across borders* in manner that it extends the current single electronic registration and payment place of supply mechanism.<sup>243</sup>

The second part of the DSM focuses on shaping the right **environment** for digital networks and services to flourish. Market players often mention a lack of innovation-friendly conditions pulling back start-ups, in comparison to other competitors, notably the United States. This is also reflected in market shares. The digital market today is composed of 54% U.S. based online services, 42% national online services, and 4% representing EU cross-border online services.<sup>244</sup> The DSM Strategy tries to reverse this ratio by *making the telecommunications rules fit for the purpose*, which is the backbone of the DSM. Even though goals set by the DAE in 2010 appeared to be ambitious, they quickly proved to be insufficient, as the capacity of a 30 Mbps service is stretched. Whereas in 2010 there were 5 billion people connected, by 2020 the number of connected devices is estimated to reach 26 billion. The continually increasing number is caused by high-level trends such as reaching even more effective compromise between speed and mobility regarding mobile communication and data evolution, enlarging categories of connected things and enabling interactions between devices.<sup>245</sup> Therefore, the availability of bandwidth and the ability of upgrading networks will be a key precondition for the digital economy and society. Next milestone is dedicated to the creation of *a media framework for the 21st century*, which would be able to respond to the convergence of traditional broadcast services and the Internet. Viewers' possibilities extended from TV sets with added Internet connectivity, through set-top boxes

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<sup>243</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe – Analysis and Evidence, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 6.5.2015.

<sup>244</sup> European Commission. *Why we need a Digital Single Market?* [online]. [cit. 2018-02-13]. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dsm-factsheet_en.pdf)

<sup>245</sup> MATTAS, A. Lecture on electronic communications delivered on 20 March 2017 at the University of Luxembourg in Luxembourg.

delivering OTTs, to audiovisual media services provided via mobile devices.<sup>246</sup> The Audiovisual Media Service Directive is being examined, notably the difference in regulatory treatment between broadcast and on-demand services either towards liberalization of rules for traditional services or stricter rules for non-linear services. *Reinforcing trust and security in digital services and in the handling of personal data* is another milestone to be met to move further towards the DSM. Many people consider that disclosure of personal data is a part of modern life and do not realize their value as an intangible commodity.<sup>247</sup> These feelings stem from constant monetization of personal data and insufficient information about their processing. The General Data Protection Regulation was proposed to step into existing Data Protection Directive shoes, as the latter does not increase individuals' trust in the digital services, nor it protects individuals of all companies offering their services on the European market. The e-Privacy Regulation laying down specific data protection rules for the electronic communication sector should follow. Within *combating illegal content on the Internet*, as far as cybercrime is concerned, the number of attacks, their scope and sophistication will increase. Offences such as interception, child pornography, hate speech, online payment fraud, identity theft, trade secrets theft involve unlawful processing of personal data and privacy violation and, thus, threaten citizens' fundamental rights and hamper potential of engaging in online activities. From the business perspective, cybercrime mean additional costs incurred in respect of post-incident management. Aside from the EU Cybersecurity Strategy<sup>248</sup>, aiming at raising the level of protection and resilience of European networks many actions are being prepared. Liability of intermediaries regulated in the e-Commerce Directive is another issue. Provided conditional exemptions rendered to be sufficient vis-a-vis the recent developments. However, certain cosmetic gestures are planned to address conflicting jurisprudence and fragmented notice-and-action procedures legislation at national level, to fasten the removal of illegal content, to prevent unjustified take-downs affecting freedom of expression and the freedom to conduct a business online and, moreover, to address a lack of transparency on intermediaries' procedures and practices when taking down content. The question is whether to enhance the overall protection or operate at the voluntary level and ask intermediaries to extend their responsibilities

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<sup>246</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe – Analysis and Evidence, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 6.5.2015.

<sup>247</sup> European Commission. *Special Eurobarometer 359 – Attitudes on Data Protection and Electronic Identity in the European Union* [online]. [cit. 2018-02-13]. Available at: [http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs\\_359\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_359_en.pdf)

<sup>248</sup> Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, JOIN(2013) 1 final, 7.2.2013.

in order to improve their due diligence over adopted best practices. Last but not least important initiative is dedicated to *online platforms*, their role in the digital ecosystem and building a fit for purpose regulatory environment for them.

Finally, the third part, committed to the economy and society, is focused on the **growth** potential of the digital transformation process in the sphere of public services, inclusiveness and skills. Citizens and businesses cannot fully benefit from the digital services such as e-government, e-health, e-energy or e-transport, as only 1.7% of EU enterprises make the best of it, whereas 41% do not use them at all.<sup>249</sup> Therefore, it is central regarding *building a data economy*, that is to establish the free movement of data, which is perceived as a catalyst for economic growth, on which depends the development of Big Data, Cloud services, Internet of Things and other innovations. For this reason, the free flow of data initiative undertakes to achieve elimination of technical and legislative barriers, notably those restrictions related to ownership, interoperability, usability and access to data in business-to-business, business-to-consumer, and machine-to-machine situations. Issue connected to cloud services should be dealt with in a European Cloud initiative. *Boosting competitiveness through interoperability and standardization* means ensuring genuinely bidirectional communication across services sectors and industry or communities. The European Interoperability Framework, currently in place, established only basic interoperability principles, which need to be extended. With particular emphasis on standardization, the development of new technologies such as 5G, digitization manufacturing (Industry 4.0) and many more should be made easier. An *inclusive e-society* addresses a lack of essential digital skills and expertise to increase the level of ICT professionalism in Europe, as the demand for digitally skilled employees is growing every year. Member States also feel the need to embrace new technologies. Interactions between public authorities, citizens and businesses are not fluent, reliable or efficient within national borders, let alone in cross-border activities. The Commission planned to present measure, which should facilitate businesses to expand its operations cross-border through interconnecting of business registers and extending once-only principle for reusing once obtained information about citizens and enterprises.<sup>250</sup>

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<sup>249</sup> Commission Staff Working Document, A Digital Single Market Strategy for Europe – Analysis and Evidence, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 6.5.2015.

<sup>250</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market for Europe, COM(2015) 192 final, 6.5.2015.

It follows from what precedes that the DSM is undeniably fragmented which causes its incomplete nature and existing obstacles against free movement. In order to present the digital barriers identified between the lines of the DSM Strategy in organized manner, the author uses the known classification of barriers invented for the purposes of the completing the single market. Since the physical single market supports the digital one such delineation should be possible. Moreover, with regard to the evolution of the single market and the character of the above-enumerated policy initiatives, the author enlarges the types of barriers by one category. Hence, digital barriers are according to their nature subsumed under four types of obstacles to the DSM – physical, technical, fiscal and social, outlined in Annex III of this thesis.

Among physical barriers in the digital space dominates the geo-blocking, because of which users may have encountered similar restricted access to the border controls. As the Vice-President for the Digital Single Market Andrus Ansip stated: *“Let us do away with all those fences and walls that block us online. People must be able to freely go across borders online just as they do offline.”* Such unequal access goes beyond online content and resonates also in e-commerce. Measures denying access are put in place also in domain of cyberspace in order to protect cyberspace with regard to raising cyberattacks. Current state of copyright based on principles from 19<sup>th</sup> century constitute data traffic restrictions as well. Technical barriers most often stem from regulatory gaps or incomplete response but also from a lack of standardization, interoperability or infrastructure. Currently, the DSM is being established mainly with the help of legislation and positive integration, however, an equivalent for the principle of mutual recognition of the single market is in the DSM still missing. This could be the role of ICT standards, which are created as technical specifications on a voluntary basis through cooperation of businesses, consumers and also public authorities. Its success depends heavily on interoperability, which implies the ICTs’ ability to interact with the help of data exchange.<sup>251</sup> Looking at fiscal barriers, the DSM is hindered by a lack of investment and incentives, different VAT regimes causing administrative burdens, expensive parcel delivery system or high roaming charges. Lastly, even though social obstacles had not been listed in the original categorization, this category concerns differences in digital skills or reluctance in using the Internet.<sup>252</sup>

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<sup>251</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market for Europe, COM(2015) 192 final, 6.5.2015.

<sup>252</sup> Ibid.

When the digital objectives and obstacles identified by the DSM Strategy were outlined, notably three conclusions can be made. Firstly, the need to strengthen the promotion of the free movement of data proved to be necessary, as hindering of this freedom lays on the bottom of a number of the above-identified digital obstacles. The question whether its status should be strengthened to the fifth freedom of movement<sup>253</sup> is further developed later in the thesis (3.3.2). Secondly, the DSM enjoys special recognition as one of the priorities of the Juncker Commission. However, the Juncker's perception of the DSM also embraces features from other pillars of the DAE, which explains why certain actions within the DSM Strategy are based also on other legal bases than on the internal market, despite the EU's proclamations linking the DSM exclusively to the internal market. Finally, in comparison to the DAE, which succeeded in differentiating the digital space but has not managed to connect it, the DSM Strategy chooses fewer but more specific and ambitious initiatives which interconnects various sectors-specific regulatory frameworks. In this sense, the DSM is more connected than it has ever been. The only question which was left open to be dealt with at the end is whether it is also coherent or not.

### **3.3 Mid-term review of the digital single market strategy**

After the Commission introduced the DSM Strategy, the Parliament and the Council expressed their support and called on Member States to fully engage in its implementation in order to meet the deadline of 2019. The vast majority of the DSM Strategy files, which are illustrated in detail in Annex II, are midway through the ordinary legislative procedure, being proposed by the Commission from 2015 to 2017 and now negotiated between the Council and the Parliament.

After year and half from the adoption of the DSM Strategy, the Commission presented a communication on the Mid-term Review of the Digital Single Market Strategy<sup>254</sup>, which replied to the question whether the DSM Strategy delivers on its promise. The answer was well summarized by Vice-president Ansip's words: "*the work is far from complete*"<sup>255</sup>, as the co-legislators reached fastest the agreement in three cases – allocation of the 700 MHz band,

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<sup>253</sup> The author acknowledges that the term "fifth freedom" is used also for other priorities in the development of the EU such as the free circulation of judgments reforming litigation in Europe or the possibility to continue flights beyond the US towards third countries, which was included in "open skies" agreements and later subjected to *Open Skies* judgments. Taking into consideration the number of candidates and the silence of law without any review in sight, the author uses the fifth freedom for the free movement of data for the purpose of this thesis.

<sup>254</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mid-Term Review on the implementation of the Digital Single Market Strategy – A Connected Digital Single Market for All, COM(2017) 0228 final, 10.5.2017.

<sup>255</sup> European Commission. *Statement by Vice-President Ansip at the press conference for the mid-term review of the Digital Single Market strategy* [online]. [cit. 2018-02-17]. Available at: [https://ec.europa.eu/commission/commissioners/2014-2019/ansip/announcements/statement-vice-president-ansip-press-conference-mid-term-review-digital-single-market-strategy\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/ansip/announcements/statement-vice-president-ansip-press-conference-mid-term-review-digital-single-market-strategy_en)

portability of online content and wholesale roaming charges, which are more of symbolic than economic value in comparison to other scheduled actions. In reality, the EU struggles to keep the pace with the more ambitious legislative actions proposed under the DSM Strategy.

New hope for the DSM cause was brought along by the Estonian Presidency of the Council. Their efforts resulted in the Tallinn Digital Summit<sup>256</sup> on 27 September 2017, where heads of state or government met to discuss the implications of the digital revolution for the economy, society, security and government. Moreover, the summit endorsed the preparations of the European Council of 19-20 October. So far six agreements on legislative proposals were reached by the co-legislators with three new since the mid-term review, namely Wifi4EU and Marrakesh Treaty on copyright (directive and regulation).

The latest highlights were marked by reaching agreements on geo-blocking<sup>257</sup>, VAT e-commerce<sup>258</sup> and parcel delivery<sup>259</sup>. By June 2018, the co-legislators should also agree on the free flow of non-personal data proposal and the electronic communications code. However, numerous legislative proposals are blocked in internal negotiations, lacking political impetus or industry consensus, as their final shape rests in hands of the Council and the Parliament.<sup>260</sup> Drawing from the example of abolishing roaming charges, the legislative procedure may lag for many years. Given the rapid pace of current online and digital innovation, time is of an essence for the DSM Strategy, as by the time of its implementation into national law a piece of legislation can be easily outdated. With regard to the roadmap for completing the DSM (see Figure 2) and necessary window of time for implementation, it is highly likely the entire DSM Strategy will not be in place by the deadline of 2019.

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<sup>256</sup> Council of the European Union. *Talinn Digital Summit* [online]. [cit. 2018-02-22]. Available at: <https://www.eu2017.ee/political-meetings/tallinn-digital-summit>

<sup>257</sup> European Commission. *EU negotiators agreed to end unjustified geo-blocking* [online]. [cit. 2018-02-22]. Available at: [http://europa.eu/rapid/press-release\\_IP-17-4781\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4781_en.htm)

<sup>258</sup> European Commission. *VAT: Commission welcomes agreement on simpler and more efficient rules for businesses that sell goods online* [online]. [cit. 2018-02-22]. Available at: [http://europa.eu/rapid/press-release\\_IP-17-4404\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4404_en.htm)

<sup>259</sup> European Union. *EU agreed to make parcels more affordable* [online]. [cit. 2018-02-22]. Available at: [http://europa.eu/rapid/press-release\\_IP-17-5203\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5203_en.htm)

<sup>260</sup> Politico. *EU scrapes a pass on Digital Single Market* [online]. [cit. 2018-02-22]. Available at: <https://www.politico.eu/article/digital-single-market-mid-term-report-card-tkkt-percent/>



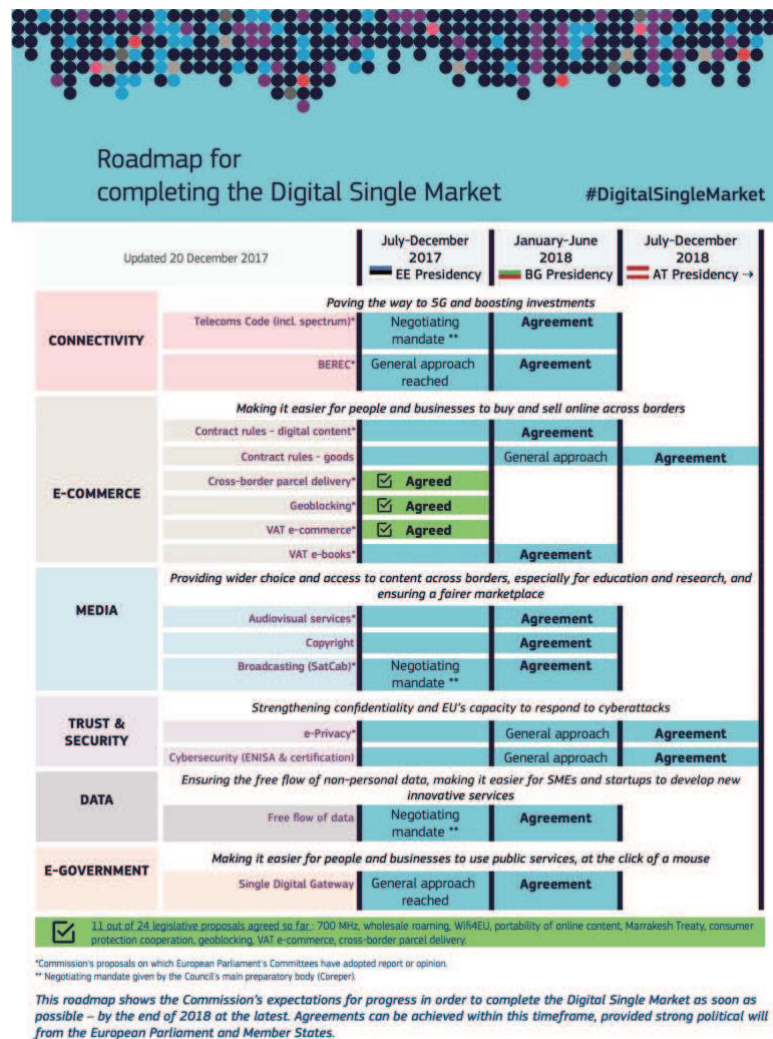


Figure 2: Source<sup>261</sup>

### 3.3.1 Four criticisms of the digital single market strategy

Despite the initial praise for the ambitious steps towards the DSM, the wave of criticism started to grow in volume as the EU turned its attention from policy actions with merely a symbolic value to those with high impact on the future form of economic integration. The DSM Strategy revises all sector-specific regulations connected to the digital space in an attempt to integrate them into consistent regulatory framework creating modernized legal environment fit for the digital age. Economically highly important yet politically controversial, proposals in domains of copyright,

<sup>261</sup> Digital Single Market. *Roadmap for completing the Digital Single Market* [online]. [cit. 2018-02-22]. Available at: <https://twitter.com/DSMeu/status/949207229332426752>

electronic communications and e-commerce face objections notably on four accounts – over-regulation, vested interests, regulatory overlap and a lack of economic liberalization. This subchapter, therefore, examines the cohesion within proposed revisions of sector-specific frameworks under the DSM Strategy in the light of the four criticisms.

### **3.3.1.1 Vested interests on the example of modernized copyright package**

The Commission presented the revision of a legislative framework for EU copyright law, which aspires to modernize the current set of eleven directives governing individual aspects of copyright, including the duration of protection, collective rights management, intellectual property rights enforcement and others. Within the DSM Strategy, the Commission introduced a Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions<sup>262</sup>, tackling the treatment of exclusive television rights by introducing the country of origin principle for the clearance of rights and licensing of TV works, and adopted Directive<sup>263</sup> and Regulation<sup>264</sup> to implement the Marrakesh treaty, which was mentioned in link to the battle for competences in the previous chapter. For the assessment whether the EU regulatory framework is fit for the digital age is key the last legislative piece of the package – a Proposal for a Directive on copyright in the DSM<sup>265</sup>, which was influenced by interest groups.

First concrete example of is the introduction of ancillary copyrights for press publishers (*link tax*) in Article 11 of the draft proposal, for the protection of press publications in the digital space. This is substantiated by the fact that this additional right is essentially only added to the list of already existing mandatory exceptions contained in Article 3(2) of Directive 2001/29, as the Proposal for a Directive on copyright in the DSM does not invalidate the set of copyright directives referred to in Article 1(2) of the draft proposal but forms a protective umbrella for them. The

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<sup>262</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM/2016/0594 final, 14.9.2016.

<sup>263</sup> Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 242, 20.9.2017, p. 6–13.

<sup>264</sup> Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, OJ L 242, 20.9.2017, p. 1–5.

<sup>265</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593, 14.9.2016.

Commission justifies link tax by comparing the situation of press publisher to the one of record companies, which already have a similar right.

This issue needs to be acknowledged within the larger debate on *value gap*, referred to in Article 13 of the draft proposal, dealing with the use of protected content by information society services providers, notably user generated content platforms, storing and giving access to works uploaded by their users. The draft proposal instructs such information service providers to monitor and filter the recorded content and, possibly, to pay for authors or right holders.<sup>266</sup>

Proposed adjustments to the EU copyright package have been introduced under the pressure of interest groups, namely the European publishing industry, having a direct impact on the future development of services and Internet, and also on the concept of hypertext links, even though the Commission itself argues that they are not mentioned to fall within its scope.

Once again, the interpretation of the CJEU will decide whether such formulation counts as an action taken by the European legislature extending the concept of communication to the public to cover the posting of hyperlinks to protected works freely accessible on another website, as suggested by Advocate General Wathelet in *GS Media*<sup>267</sup>. Moreover, the judgement sheds light on the necessity of adjustments to the current system. On the one hand, there is a need to balance rights and obligations and condemn any violation in order to guarantee protection to authors and other right holders, on the other hand, means to intervene against such violations are already in place both at the EU and national level, like in Article 8 of Directive 2001/29.

Taking into consideration the purely protective character of the proposed adjustments, their possible impact on the limitation of liability of information society services providers under e-Commerce Directive and undue regulatory burdens only on providers, the Proposal does not correspond to the overall objective to “modernize” EU copyright law to be fit for the digital age according to the author. Notably, if the proposed adjustments are introduced as provided for by the Commission, it will be much harder for SMEs based on innovative tools, namely for news aggregation or media services, to scale up and challenge larger incumbent players which have the resources to share their advertising revenue with publishing companies from the start. As can be observed, vested interest may impede the cohesion of the DSM.

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<sup>266</sup> MARTINICOVÁ, Eva. *Jednotný digitální trh, kde vše souvisí se vším. Může evropské právo plně uchopit pojem “digitální” a “propojený”*. *Revue pro právo a technologie, Ústav práva a technologií Právnické fakulty Masarykovy university*, 2016, no. 14, p. 85–102.

<sup>267</sup> Opinion AG Wathelet, delivered on 7 April 2016, *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, C-160/15, ECLI:EU:C:2016:221, paragraph 79.

### 3.3.1.2 Lack of economic liberalization on the example of e-commerce

In contrast to the single market, the DSM Strategy hardly contains any liberalization. So far three exceptions have been adopted. Firstly, the e-commerce framework recently welcomed a Regulation on unjustified geo-blocking<sup>268</sup>, a discriminatory practice preventing online customers from accessing and purchasing products and services online based on customers' nationality, place of residence or place of establishment. However, services the principle purpose of which is the provision of access to and use of copyright protected content, or the selling of copyright protected works in an intangible form, such as music streaming, are excluded from the scope of the regulation according to Article 1(5) of the Regulation. Moreover, in practice it is only a minor issue, since the biggest online retailers want to maximize their international sales and do not block or automatically redirect their customers to local sites based on their residence.<sup>269</sup>

The other liberalizing measure is Regulation on cross-border portability of online content services, which is an extremely important step towards the free movement of information and data, which is extended to an online product particular for the digital space, in all probability a content in the form of audio-visual product provided by increasingly crucial online platforms in terms.<sup>270</sup> In comparison to the US market, streaming services such as Netflix or Spotify have to secure rights separately for each Member State, which is costly and time-consuming, resulting in skipping the least lucrative markets. The principle of territoriality prevented customers when travelling to access their online content, for which service lacked rights in that Member State.

Stemming from the Commission's vision to achieve EU copyright rules fit for the digital age, the Regulation ensured equal access to digital content legally acquired or subscribed to in the Member State of residence from abroad when travelling. Article 4 introduced a "mini country of origin principle", which resulted in introducing *fictio iuris* overcoming for the first time in the EU copyright framework the principle of territoriality. Territoriality approach of the current content licensing system should be nevertheless preserved, even if derogated to the limited extent to allow the portability of online content services. The derogation is linked to the temporary presence in

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<sup>268</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, p. 1-15.

<sup>269</sup> Open Up. *How to fix the flaws in the EU's Digital Single Market* [online]. [cit. 2018-03-5]. Available at: <http://www.opennetwork.net/wp-content/uploads/2017/01/OPEN-Open-Up-DSM-final.pdf>

<sup>270</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.6.2017, p. 1-11.

another Member State, that is a *limited period of time* for the purposes like leisure, travel, business and forth.

### 3.3.1.3 Regulatory overlap on the example of reviewed telecom rules

Taking into consideration the strict separation between networks and content regulatory frameworks, the latter is explicitly left outside the 2002 telecoms scope. In its place, it is covered by the Audiovisual Media Services Directive<sup>271</sup> and the e-Commerce Directive, which result in another separating system, wherein services fall in one of the following categories – electronic communications services, information society services or audiovisual media services. Under the DSM Strategy, it is necessary to recall a Proposal for a European Electronic Communications Code<sup>272</sup>, covering all electronic communications services and networks to the extent possible in a single directive. Even though the evergreen separation between networks and content under the DSM Strategy remains, the Directive also tackles the various types of services traditionally falling under content services, as formerly unknown types of market players emerged.

The so-called Over-the-Top players (“OTTs”) are defined broadly as “*anything provided over the public Internet is an OTT service*”<sup>273</sup>, however, regarding the fact that the definition comes from the BEREC it cannot be trusted alone and needs to be add that OTTs are commonly seen as services offering a wide variety of applications and content provided to the user by hardware or software platforms connected to the Internet by means of data transmission. Examples of OTT services vary from voice and video calling (e.g. Skype, FaceTime), text messaging (e.g. iMessage, WhatsApp), audiovisual content delivery (e.g. YouTube, Netflix), social networking (e.g. Facebook) to email (e.g. Gmail) and beyond. When it comes to OTT interpersonal communications services, which compete with traditional mobile telephony or messaging, the draft proposal of European Electronic Communications Code includes OTTs under the definition of electronic communications services. In this sense, certain OTT services will stay under the information society services provided in Article 1 of Directive 2015/1535, whereas most of them will newly fulfil the definition of electronic communications services. For the sake of

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<sup>271</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (“Audiovisual Media Services Directive”), OJ L 95/1, 15.4.2010.

<sup>272</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Code (Recast), COM/2016/0590 final, 12.10.2016.

<sup>273</sup> BEREC. *Report on OTT services*. [online]. [cit. 2018-02-8]. Available at: [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/5751\\_-berec-report-on-ott-services\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/5751_-berec-report-on-ott-services_0.pdf)

completeness, most of OTT services will be included in the scope of the audiovisual media services only when it comes to combat hate speech and disseminating of harmful content to minors.<sup>274</sup>

### 3.3.1.4 Over-regulation on the example of data economy

The Mid-term Review of the DSM Strategy has also outlined main areas of emerging trends, according to which the EU needs to act further in relation to data economy. Thanks to the Internet, the access has opened to a much wider range of information and their amount has grown at an exponential rate ever since. As explained in the first part, in the digital space, every single act can be recorded and processed into usable data. Any recordable act creates information or, in the information society, wealth. Information grows into an input and output of data economy, becoming the main commodity on the digital market and a central element in almost all types of business activities. With regard to the tendency of data to flow across borders, as very few transactions can be made without cross-border movement of data, it is more acute today than few decades ago to preserve their free flow, preferably, without over-regulating itself.

In recent years, the Member States began to acknowledge data but instead of recognizing their potential, such as for cross-border cooperation in criminal matters, they started to impose security-related barriers to their free movement. National governments issued obligations under data localization laws, which are today relatively rare and mostly concern archaic issues, such as an obligation to keep physical copies of company record in the home state or non-commercial measures such as national security. In this context, it is necessary to recall another type of restriction to their free movement – data retention laws. The CJEU's in the judgment *Digital Rights Ireland and Seitlinger and Others*<sup>275</sup> decided on the invalidity of the Data Retention Directive<sup>276</sup> providing for retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications network services. In Czech law, this obligation was laid down in Section 97(3) of Act No. 127/2005 Coll., on the Electronic Communications Act, which was also subject to the decision of the Constitutional Court

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<sup>274</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final, 25.5.2016.

<sup>275</sup> Judgment of the Court (Grand Chamber) of the 8 April 2014, *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General, intervener: Irish Human Rights Commission, and Kärntner Landesregierung (C-594/12), Michael Seitlinger, Christof Tschohl and others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

<sup>276</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54–63.

of the Czech Republic with a similar result for the provision in question.<sup>277</sup> Most recently, on 28 June 2017, the German telecommunications regulator decided to suspend enforcement of certain provisions of the German Telecommunication Act, requiring telecommunication companies to retain certain metadata, based on the CJEU judgment *Tele2 Sverige*<sup>278</sup>, which rendered invalid data retention laws with broad scope because of a violation of the Charter of Fundamental Rights of the European Union. As for the validity of security-related barriers, the free flow of data appeared to be a prerequisite for cooperation of the Member States exchanging information related to potential threats.

Obstacles to the free movement of data stem often from technical barriers such as insufficient infrastructure and speed. It is an obvious truth that data cannot move on its own but needs the support of a network, whether it is cable or wireless. Technical obstacles impeding the free flow of data are results of network capacity limitation as frequencies are a finite resource in combination with net neutrality principle, which may have a deterrent impact on the future investment in network infrastructure.

In the current debate on the regulation of the free flow of data, one of the main concerns is its impact on the fundamental right to privacy, which is safeguarded by the Charter of Fundamental Rights of the European Union vested in Articles 7 and 8, constituting an integral part of the EU primary law. The fast pace of technological development does not allow individuals to attune their own boundaries between what they consider as public and private information and what consider as public and private businesses. Together with the scope of the right, which varies between the Member States and their legal traditions, and with regard to its fitness for future technological development it is difficult for the EU legislator to arrive at consensus on an acceptable level of information processing and risk management. In the EU law, due to its status of the fundamental right, the priority is granted to the right of privacy over free flow of data, whose status in the internal market architecture is subject to many discussions, which is presented in full length in the next subchapter. Such position is motivated by several factors. From the historical point of view, the right to privacy is entrenched in European traditions and its strong resistance against all-controlling entities. More importantly, the EU legislator is not only bound by the Charter of Fundamental Rights of the European Union but also by a number of other rules on privacy as

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<sup>277</sup> Pl.ÚS 24/10 ze dne 22. 3. 201194/2011 Sb., N 52/60 SbNU 625, Shromažďování a využívání provozních a lokalizačních údajů o telekomunikačním provozu.

<sup>278</sup> Judgment of the Court (Grand Chamber) of 21 December 2016, *Tele2 Sverige AB (C-203/15) v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970.

enumerated below. In other words, the free flow of data is a reaction to the right to privacy, as it was defined in opposition to these rights and, therefore, both concepts of data flow and data protection are inherently linked.<sup>279</sup>

In reaction to the above-mentioned barriers that were posed by both private entities and the Member States, the EU legislator started to regulate the free flow of data. In this sense, the concept of free movement of data developed as a response to the need to security-related barriers, technical restrictions due to insufficient infrastructure, conflicting intellectual property rights and the need to protect the right to privacy. Regarding concrete pieces of legislation in this field, contrary to common misperceptions, personal data could move freely within the EU even before the General Data Protection Regulation based on the Data Protection Directive. The Commission in its communication Building a European Data Economy stresses that “*there will be one single pan-European set of rules contrary to 28 national laws today*”.<sup>280</sup> However, it focuses rather on the protection of individuals with regard to the processing of personal data than on the free movement of data, which is viewed as an impediment to the realization of objectives in the Treaties. Moreover, due to its territorial scope, notably in Article 3(2), “lex Google” creates a single level playing field for all obliged persons and establishes the one stop shop mechanism to enhance consistency of enforcement. As was shown in the previous part, the General Data Protection Regulation is articulated through performance-based provisions, which represent efficient legislative instrument. The Regulation is often subjected to criticism because of high administrative costs linked to compliance, which may impede the EU’s journey to become second Silicon Valley.

This will most likely not change after the adoption of e-Privacy Regulation, which is *lex specialis* to the General Data Protection Regulation, complementing it in regard to electronic communications. All matters concerning the processing of personal data not specifically falling under the scope of e-Privacy are covered by the General Data Protection Regulation. Only practice will show gaps in their alignment and possible over-regulation.

In terms of non-personal data, the aim of a Proposal for a Regulation on the free flow of data is to ensure the protection and free movement with regard to non-personal data, in particular

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<sup>279</sup> National Trade of Sweden. *Data flows – a fifth freedom for the internal market?* [online]. [cit. 2018-06-1]. Available at: <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/Data%20flows%20-%20A%20fifth%20freedom%20for%20the%20internal%20market.pdf>

<sup>280</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building a European Data Economy, COM(2017) 9 final, 10.1.2017.



to support the development of a European data-based economy.<sup>281</sup> The draft regulation contains two principles. Firstly, it is the free movement of non-personal data prohibiting any restrictions or similar requirements for data localization, unless such requirements are strictly necessary in the interests of public security. Secondly, the principle of data availability for competent authorities to request and receive access to data for the performance of their official duties. There is also third objective of porting of data, however, the author does not identify a significant link between the principle of free flow of non-personal data within the meaning of the proposal and the issue of data portability. The merger of these two areas into a single legislative act was not a necessary step. In general, the Proposal aspires to increase the innovation and competitiveness of the European data economy, which may bring along the potential for the EU to become the world leader in the free flow of data.

### **3.3.2 Towards the fifth freedom: the free movement of data**

The mid-term review outlined three main areas, in which the EU needs to act further to ensure a fair, open and secure digital space – digital economy, cybersecurity and online platforms. With all being equally important but rather complex issues, the author of the thesis chose for further elaboration only the digital economy, as it encompasses the free flow of data, which according to the author represents the key for European integration, the second breath for the internal market's revival and the cornerstone for creating the regulatory framework, which will stand the test of the digital revolution. The subchapter is, therefore, concluded with *de lege ferenda* reflections in order to help reveal and shape the regulatory framework of the DSM ready for the digital age.

The adoption of the General Data Protection Regulation, preparatory works on the e-Privacy Regulation and latest advances on the Proposal for a Regulation on the free flow of data creates tension between the free movement of data and the fundamental right to privacy with regard to previous developments, which affected the free flow of data, such as the invalidation of the Data Retention Directive, reinforcing the right to be forgotten with *Google Spain and Google* or the annulment of the Commission's Safe Harbour Decision in *Schrems*<sup>282</sup>. This tension turns into the question of the free flow of data's status in the internal market architecture. Therefore, the purpose

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<sup>281</sup> Proposal for a Regulation of the European Parliament and of the Council on a Framework for the free flow of non-personal data in the European Union, COM(2017) 495 final, 13.9.2017.

<sup>282</sup> Judgment of the Court (Grand Chamber) of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14, ECLI:EU:C:2015:650.

of this subchapter is to discuss the role of the free movement of data as an instrument of European integration and whether it deserves stronger protection.

With regard to the importance of innovation, the EU has realized that the future evolution of the information society is based on data and that data society can only become a reality in the digital space without barriers – the DSM, wherein the free movement of data is ensured. The free flow of data within the EU is a basic precondition for the further development of the DSM and, in principle, the fifth freedom of the internal market. Reference here is made to the traditional four freedoms of goods, services, persons and capital constituting the backbone of the internal market. The question is whether the establishment of the fifth freedom as a foundation of the information society is necessary and, if so, whether it is possible. In itself, the free flow of data carries the means to impact fundamental human rights. Despite the EU legislator concludes that both sides need protecting, it is not always easily achieved.

As for the necessity of establishing the free movement of data as the fifth freedom, the answer depends on whether it is already included in the four existing freedoms. In regard to the relationship between the freedoms, it is clear that, as from the Treaties of Rome, they are treated as mutually exclusive. Each of the freedoms has its own conceptual features delimitating one from another. Therefore, it is always necessary to determine what freedom applies, what is its scope and restriction conditions, and what specific regulation applies to that freedom.<sup>283</sup> In certain cases, it is relatively simple – the free movement of goods can hardly overlap with the free movement of persons because things are easily recognizable from persons. In practice, however, possible difficulties can occur as is the case of data. Perceived as the raw material of which information and knowledge is produced, data are not considered to be goods, services, persons or capital. The EU legislator constantly distinguishes between data, goods and services within the secondary legislation. In this sense, personal data are covered by the General Data Protection Regulation, which defines them as “*any information relating to an identified or identifiable natural person*”<sup>284</sup>, whereas non-personal data should be covered by the Proposal on a Regulation on the free flow of non-personal data, which in its current form identifies them in a negative manner as “*other than personal data*”<sup>285</sup>. These measures provide specific rules, which differ from the four freedoms.

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<sup>283</sup> SYLLOVÁ, PÍTRVÁ, PALDUSOVÁ a kolektiv. Lisabonská smlouva: komentář. Praha: C.H. Beck, 2010, p. 266. Beckova edice komentované zákony. ISBN 978-80-7400339-4.

<sup>284</sup> See Article 4(1) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (“General Data Protection Regulation”), OJ L 119, 4.5.2016, p. 1–88.

<sup>285</sup> See Article 2(1) of the Proposal for a Regulation of the European Parliament and of the Council on a Framework for the free flow of non-personal data in the European Union, COM(2017) 495 final, 13.9.2017.

However, an interesting fact has to point out that whereas the General Data Protection Regulation relied on the protection of personal data legal basis of Article 16 TFEU, the Proposal uses the general legal basis of Article 114 TFEU as was the case of the Data Protection Directive, which shows that the connection between the free flow of data and the four freedoms of the internal market is becoming stronger again. Therefore, it is not to be considered that data automatically falls outside the scope of the four freedoms. In the absence of specific provisions, data may be subsumed under different freedoms depending on the situation in question given its amorphous nature.<sup>286</sup> For example, non-personal data may today be assessed as services “*where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*”<sup>287</sup> when, for example, activities built on data of a service provider are in question or, on the other side, as goods, defined as “*products, which can be valued in money and which are capable, as such, of forming the subject of commercial transactions*”<sup>288</sup> when data is sold as itself or, alternatively, even as capital or payment, which may be especially relevant for cryptocurrencies. Although it is difficult to provide an objective definition of data, it can be concluded that rules governing their free flow will be after the adoption of the Proposal in most cases distinct from those on the four freedoms because they fall under those specific provisions or in rare cases because several freedoms may be applicable *in concreto*.

In the internal market context, the free flow of data should be understood in relation to the four freedoms. The similarities between them are evident as they all aim at the functioning of the internal market, eliminating barriers to the free movement and constituting the EU regulatory framework. If an obstacle falls outside the harmonization scope, same principles of non-discrimination, mutual recognition and proportionality apply. In the view of the author, it is clear that the free flow of data constitutes a freedom on its own, yet, there are certain differences distinctive only for the free movement of data. Firstly, it is an ancillary freedom as it is not enshrined in the primary law. In this sense, any secondary law adopted on the free flow of data has to comply with rules of the primary law, namely with the four freedoms of the internal market but also with fundamental rights such as the right to privacy. Secondly, in relation to this point, it is an immature freedom in comparison to the four freedoms, which were introduced in the Treaty of

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<sup>286</sup> KASPAR, Kala. *Free movement of data as the 5th freedom of the European Union*. [online]. [cit. 2018-06-1]. Available at: <https://e-estonia.com/free-movement-of-data-as-the-5th-fundamental-freedom-of-the-european-union/>

<sup>287</sup> See Article 48, Treaty on the Functioning of the European Union (consolidated text), 2008 OJ C 115/47.

<sup>288</sup> Judgment of the Court of 10 December 1968, *Commission of the European Communities v Italian Republic*, Case 7-68, ECLI:EU:C:1968:51.

Rome, long before the emergence of the digital economy. Since then, the four freedoms have been interpreted by the CJEU and detailed by the EU legislator many times, reaching the degree of a general understanding about their content. The free flow of data is becoming more acute just recently as the digitization of the economy is progressing. Therefore, in the author's view, the rules on the free flow of data has not reached such degree of maturity, as they were for the first time adopted only twenty years ago and focuses rather on data protection than on its flow. There is still a struggling with fundamental issues, the main one being the balancing of conflicting interests between data flows and data protection, which is characteristic for the recent judgments of the CJEU on data protection<sup>289</sup> and affects the predictability of the rules on the free flow of data.

While predicting the content of the free movement of data as the fifth freedom would be a task for the EU legislator and the CJEU, it is already possible to identify the purpose of the free flow of data as a freedom *per se*. In the light of a positive approach, the significance of data was already mentioned many times, especially, in connection to data society and economy, which are increasingly dependent on data presenting large possibilities in terms of productivity and efficiency. Almost all transactions today involve the aspect of the movement of data and rely on their free flow. Contrarily, the EU legislator is taking steps towards higher level of data protection, which restrains its flow, but also towards security-related barriers, technical restrictions due to insufficient infrastructure or conflicting intellectual property rights in the light of a negative approach to the necessity of the free movement of data. In many respects, rules on the free movement of data have already been created, however, their protective function prevails. Therefore, the adoption of the Proposal on a Regulation on the free flow of data should be a top priority<sup>290</sup> and simultaneously, should be the first step towards a clear set of rules and judgments in this regard. One of the key regulatory instruments suggested by experts for the future regulations is the use of smart rules, which aim at acquiring basic data documenting regulatory relevant facts from private entities for the purpose of efficient law enforcement.<sup>291</sup> Nevertheless, it is possible to conclude that the contribution of data flows to the functioning and rebooting of the internal market does not correspond to the way it is promoted in the legislation. It is, therefore, legitimate to discuss the opportunity to strengthen the position of this freedom at EU level, which may be simultaneously one of the milestones for achieving the regulatory framework fit for the digital age.

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<sup>289</sup> See for example *Google Spain and Google, Schrems, Digital Rights Ireland and Seitlinger and Others*.

<sup>290</sup> This thesis was written before the adoption of Proposal for a Regulation of the European Parliament and of the Council on a Framework for the free flow of non-personal data in the European Union, COM(2017) 495 final, 13.9.2017.

<sup>291</sup> POLČÁK, R. Fenomén internetových platforem II. *Právní rádce*, 2017(11), p. 38-43.

These contemplations and developments have been the source for calls for the promotion of the free flow of data to a fifth freedom alongside the free movement of goods, services, persons and capital. If those calls are to be allayed, it will be the importance of data for the digital economy in an attempt to alter the current balance of interests, notably between the free flow of data and the right to privacy. The fifth freedom will be a clear message about the EU moving towards becoming a sanctuary region for innovation and new technologies based on data, which are equally protected and at the same time available. The status of the fifth freedom would grant the free flow of data to align the secondary legislation rules for how data processing should work in the EU. Indeed, it is not to say that the free movement of data would be unrestricted, but it would bare an influential signal that the EU is at the digital forefront worldwide and is able to embrace integrative paradigm with its horizontal aspects such as the free flow of data enshrined in the primary law, since no area will be out of its scope with regard to the ubiquity of the digitalization. In this light, the DSM Strategy has to be perceived as a step forward the horizontal free flow of data freedom, as illustrates Figure 3. Naturally, sectoral legislation will not cease to exist anytime soon, however, sectoral rules would always be subordinated to the internal market freedoms.<sup>292</sup>



Figure 3: Source<sup>293</sup>

On the other side, there are several arguments for those appeals not to be allayed regarding their uncertainty, inefficiency and impracticability. Firstly, it cannot be anticipated how the upgrade of the free flow of data to the fifth freedom would translate into the mutually exclusive

<sup>292</sup> KASPAR, Kala. *Free movement of data as the 5th freedom of the European Union*. [online]. [cit. 2018-06-1]. Available at: <https://e-estonia.com/free-movement-of-data-as-the-5th-fundamental-freedom-of-the-european-union/>

<sup>293</sup> European Policy Center. *The Economic Impact of a European Digital Single Market* [online]. [cit. 2018-02-13]. Available at: [http://www.epc.eu/dsm/2/Study\\_by\\_Copenhagen.pdf](http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf)

scopes of the four freedoms, whose maturity has been tested by time and are not ancillary. Secondly, regardless of its status in the EU law architecture, the free flow of data would still have to comply with the protection of privacy as a fundamental right enshrined in the primary law. Lastly, in order to become the fifth freedom, a revision of the Treaties would be necessary, which is not in sight in short medium term. Instead, the less ambitious was how to promote the free flow of data through the Proposal on a Regulation on the free flow of data is sufficient. According to such position, the free movement of data has to be perceived as a mere consequence of the development of the digital space in the course of launching the internal market and thus, it is not necessary to approach it as an objective in the Treaties. This would explain some of the questions, which were posed in the second part of the thesis, such as why there is no specific digital legal basis, nor digital area provided for shared competence. Although between both spaces are significant differences, the DSM is derived most often from legal context of the internal market and, therefore, has to be inherently viewed as its counterpart in the digital space without a necessity to explicitly proclaim conferred powers in this regard due to judgments on *Open Skies* and recently *Marrakesh Treaty*. Yet, this does not mean that the EU legislator should have a free hand over data restrictions in the name of their protection. Instead of promoting the free flow of data, it is important to secure that the EU legislator does not impose unnecessary restrictions, which are not thoroughly motivated by privacy concerns. Therefore, the free flow of data could be secure through its own test of proportionality just as the four freedoms.

It is clear that the free flow of data is a natural freedom in itself, in the sense, it is pre-existent to the law enabled by the technological development and restricted by law. Although the significance of data processing is yet difficult to take into consideration, which seems to be prevalent within the EU, it is a fact that their impact is already immense, which is unlikely to change in the future. It is undisputable that the scale of change brought about by the digital revolution puts to the test the traditional internal market's freedom and creates uncertainties as to their application in concrete situations, which is especially relevant with the emergence of new technologies and markets. Taking into consideration the planned adoption of the Proposal on a Regulation on the free flow of data, the EU legislator is clearly opting for the less ambitious path leaning on the argumentation that the area of stricter level of privacy protection might grow, at least to gain access to the internal market, and that businesses may adapt their technological and commercial solutions to comply with the EU rules. Conversely, it needs to be pointed out that the US, where most of the big tech companies are established, will not adjust its regime of data

protection<sup>294</sup> and as for the second argument, there is a real threat that some players may disappear or those who decide to stay may introduce beta versions especially devised for the EU with circumscribed functions in order to reach on the compliance with stricter privacy rules. In the long term, therefore, the author acknowledges the need of the EU to aspire higher, if it desires to be a global leader in the field of technologies and innovations, revision of the Treaty is necessary. Taking into account the above-mentioned arguments, the author in long term favours the stronger acknowledgement of the free flow of data in a form of creating a special legal basis, as the EU needs clear basis for dealing with digital issues in order to achieve the future-proof regulatory framework, otherwise the DSM Strategy will remain only on paper. This solution would symbolize the transition from the traditional internal market to the new DSM with the future proof regulatory framework ready for the digital age without impeding the general understanding on the content of the four freedoms.

### **3.4 Partial conclusion**

The final part of the thesis was dedicated to the assessment of the state of play of the DSM and its digital flagships – Digital Agenda for Europe and DSM Strategy, multi-annual scope policies focused on key interdependent actions, which navigate the EU to the digital age. As the latter’s mid-term review presented a good opportunity to assess the EU’s reaction to the digital revolution and to join the theory outlined in the previous parts of the thesis with practice. In overall, this part presented partial objectives – an assessment of the state of play of the DSM with its successes or criticisms and formulation of recommendations for one of the main areas where the EU needs to act further – the free flow of data, which is the author of this thesis identified as the key aspect for European integration, as the second breath for the internal market’s revival and as the cornerstone for creating the regulatory framework, which will stand the test of the digital revolution.

In the first chapter, the initial *stricto sensu* Digital Agenda for Europe (2010-2020) fully conceptualizes and targets exclusively the digital space in order to prepare the right environment for more focused initiatives, which are to follow in the future. Not only the DAE gave the DSM its name, the policy was ground-breaking also for abandoning the narrative that the DSM should be built on similarities with the single market and starting to tackle frontiers, which do not exist in the single market. The DAE was centred around the concept of the virtuous cycle of digital

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<sup>294</sup> Despite the new regime – the EU-US Privacy Shield replaces the invalidated Safe Harbour regime, its validity is also questioned, as can be seen from Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision of the WP29 adopted on 13 April 2016.

economy, which identified obstacles existing within the DSM such as fragmented digital markets, lack of investment, interoperability or skills. Therefore, by eliminating digital obstacles the EU succeeded in acknowledging the challenges identified in the previous part, which is the first step on its way towards the DSM. The DAE's evaluation using the digital scoreboard shows strong achievements as the EU was already on track to complete 95 of its 101 actions by 2015, including the General Data Protection Regulation. As off the DAE, the DSM became a truly *vibrant* space with legislative and accompanying efforts.

The second chapter, dedicated to the next digital policy – the DSM Strategy (2015-2019), follows in DAE's footsteps building on its success and learning from its mistakes. Instead of tackling frontiers in quantitative terms and neglecting their cohesion, the DSM Strategy picks its battles and focuses on 16 specific and more ambitious initiatives within three pillars on access, environment and growth, which interconnects various sectoral regulatory frameworks. However, digital obstacles were not explicitly stated in the policy, so the author identified them from specific policy initiatives through the method of induction and subsumed them according to their nature under particular types of obstacles. The result of this process can be found in Annex III – Classification of obstacles impeding the digital single market. It can be concluded that a number of the identified digital obstacles would be eliminated in case of the promotion of the free flow of data, which is also the opinion of the EU legislator. In overall, the DSM Strategy constitutes the EU's most advanced digital effort yet.

The third and the last chapter of this master's thesis confronts digital policies on paper with their impact in practice on the occasion of the mid-term review of the DSM Strategy conducted by the Commission in 2017. Starting with its successful stories, the co-legislators reached agreement on several proposals indicated in Annex II – Table of DSM Strategy files such as cross-border portability of online content services, geo-blocking or wholesale roaming, which are either quick<sup>295</sup> or smaller victories in comparison to those with high impact on the future integration, which were left behind as the consensus is harder to reach on those issues. With regard to the remaining priorities and necessary window of time for implementation, it is highly likely the entire DSM Strategy will not be in place by the deadline of 2019. Aside from its lack of punctuality, the four loudest criticisms are presented in the following subchapter examining the cohesion within proposed revisions of sectoral frameworks – firstly, the criticism of vested interests on the example of modernized copyright package, which reveals purely protective character of the proposed adjustments; secondly, the lack of economic liberalization on the example of e-commerce and only

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<sup>295</sup> In the sense that they are results of negotiations, which were lagging over years and resulted in agreement without a bigger help from the DSM Strategy.



a few exemptions; thirdly, the regulatory overlap on the example of reviewed telecom rules, wherein new technologies may also newly fulfil the definition; and lastly, the over-regulation on the example of data economy, as the free flow of data is a natural freedom in itself, in the sense, it is pre-existent to the law enabled by the technological development and restricted in the name of data protection. Notably, in the light of conflicting intellectual property rights, which may not be aligned with the idea of the DSM, and restrictions on the free flow of data, which on the other side may, it is possible to conclude that not all frameworks given the presented circumstances may be connected in holistic set of rules in the sense of integrative paradigm. However, there are some which are more important than others for the overall objective of achieving the future-proof regulatory framework.

The mid-term review, furthermore, outlined three main areas, in which the EU needs to act more in order to ensure the DSM. Those areas are digital economy, cybersecurity and online platforms, from which the author chose the first one for its relation to the free flow of data as is a basic precondition for the further development of the DSM. The concept of free movement of data developed in reaction to the actions of the Member States and EU legislator in the form of security-related barriers, technical restrictions, conflicting intellectual property rights or the need to protect the right to privacy, which curtail their flow but also their potential contribution to the functioning and rebooting of the internal market. This conflict posed a question concerning the free flow of data's status in the EU law architecture, namely the internal market. Although it is difficult to provide an objective definition of data in general, the free movement of data constitutes a natural freedom of its own in the opinion of the author, which is governed by rules distinct from those on the four freedoms as they fall under specific provisions or in rare cases as several freedoms may be applicable on data. Moreover, the free flow of data has in comparison to the internal market's freedom an ancillary and immature character. Starting with the pragmatic solution, the free flow of data is a mere consequence of the development of the digital space in the course of restarting the internal market, which is expected to be sufficiently promoted within secondary law. At the same time, with regard to obvious difficulties of legislation keeping the fast pace with technological development, the EU needs a vision, which does not even exclude the modification of the Treaties, being only of symbolic value or not. Therefore, in the light of outlined argumentations, the author favours in future terms a stronger acknowledgement of the free flow of data, not necessarily in the form of the fifth freedom but as a special legal basis, which may be simultaneously one of the milestones for achieving the regulatory framework fit for the digital age.

## Conclusion

The past years have been transformative in technology. Ubiquitous computing and the global diffusion of the Internet and new means of communication have caused the world to come closer together, spread information more rapidly and brought innovation and economic growth into daily lives. The European society witnessed a new way of thinking of technologies in terms of creating new spaces like the digital space, participating on the creation, distribution, use and reuse of information within the information society, and encountering technological progress at fast pace like digitalization. The author identified in the first part of the thesis this particular trio of phenomena to be central concepts to the EU's reaction to the digital age – the DSM, wherein technology and law would finally move together.

In response to technological development, law is forced to be “digitalized” as well. The author presented the assumption that the nature of law does not change within digital space, since the substantial modification undergoes primarily the form of legal regulation. Therefore, the overall research question was worded, as follows – whether the EU will be able to reach its objective of future proof regulatory framework ready for the digital age? The objective of the master's thesis was to answer this question through the delineation of historical, social, substantive and institutional foundations of the DSM and based on them through the assessment of the state of play of the DSM. Simultaneously, this master's thesis delivered on partial objectives, which placed the phenomenon in the context of the EU and formulated concrete recommendations to the EU legislator in order to attain the DSM.

In order to achieve the set of objectives, it was necessary to initially identify the DSM's theoretical principles and conceptual cornerstones (Chapters 1.1 – 1.3), as they mirror in any piece of legislation introduced under its umbrella. In theoretical terms, the top two principles are globalization and liberalism, inclining towards openness and cooperation, which are not regarded as being opposite to the substance of the EU given its integrative character. In conceptual terms, the DSM stems from the trio of cornerstones – digitization and digitalization as the achieved degree of technological progress, digital space as the new market and information society as the imaginary community existing within it. The author identified those concepts, phenomena of their own, to be the driving force behind the DSM, which was briefly introduced in the fourth chapter (Chapter 1.4) for the sake of completeness, but also behind the European integration process in general, as the DSM raises hopes of its restart. Thus, the partial objective to identify and to define phenomena constituting the DSM was achieved, which allowed the author to trace their development in time in the following part.

In this sense, the delineation of the DSM's historical and social foundations (Chapter 2.1) illustrated that the trigger for the regulation of the digital space was technological development in combination with globalization, as confirmed in the interview with Jacques Delors. His legacy is not only entrusted in prioritizing the common market and technology as its economic revival, which inspired today's DSM Strategy, but also in the reformation of the primary law, which is represented by today's Article 114 TFEU. Since then, different approaches were adopted towards the digital space, notably within the evolution of the regulatory framework of the information society. Initially, the concept receded from strictly sectoral view of research and technological development, then started to overlap with other areas and ended for the moment with the DSM stemming from the internal market. Therefore, the partial objective to compile material sources of the DSM was achieved not only by exploring the evolution of the information, knowledge and data society but also by the one of the common and internal market and, thus, must be remembered that the DSM constitutes a constant evolution in itself.

The delineation of the historical and social foundations, moreover, proved the existence of the relationship between the DSM and the single market, given the fact that developments in the single market translate themselves into the digital space. In order to determine its exact nature, substantive and institutional foundations (Chapter 2.2) of the DSM and the single market were compared with a focus on their differences. As for the substantive aspects, it was important to realize that the DSM is being built almost 30 years after the single market. Whereas the EU prefers regulation as a technique of integration in general, it was not its first choice for the digital economy, which eventually moved from self-regulation to regulation. Drawing from the example of the single market's regulatory framework, the EU started to adapt its template to conditions of the digital space. Aiming at being *single*, the DSM prefers in comparison to the single market positive over negative integration, notably through harmonization of laws or legal integration. Aiming at being *connected*, the horizontal DSM is moving from formalistic to integrative legal paradigm to overcome fragmentation of sector-specific regulation. Aiming at being *digital*, the DSM employed performance-based norms to avoid avoiding rendering law obsolete because of the fast pace of technological development.

The differences between the internal market and the DSM continued to be detected also in terms of their legal context set within the Treaties – the TFEU does not provide for specific “digital competence”, however, the EU competence for the DSM exists in the light of judgments on *Open Skies* and recently *Marrakesh Treaty* and thus, the DSM issues must be dealt with within other conferred competences in comparison to the single market, which is a principal area of shared competence. Whereas in theory the DSM might fall under numerous areas given its horizontal

nature, they are most frequently subordinated to shared competence, notably to the internal market and its general legal basis Article 114 TFEU. Despite the EU's tendency to link the DSM exclusively to the internal market, it is important to stress that the DSM transcends also to other areas of shared competence, such as trans-European networks or research and technological development. This is mirrored also in the choice of legal basis, for which is decisive legislative procedure and their ability to adopt legally binding acts, preferred within the DSM in contrast to the single market. On the other side, such rules do not respond accordingly to technological developments, as those measures can be revised again only within EU legislative procedures, which is lengthy with regard to the variety of institutions and other actors involved in the DSM.

As for the comparison of institutional aspects, differences between the DSM and the single market are less evident except for two particularities – the DSM is a point of interest of influential digital stakeholders like GAFAs and EU regulatory bodies are being more actively involved or even established in order to streamline the enforcement such as EBDP or ENISA. When contemplating about which EU institution should take upon itself the leading role in the future development of the DSM, taking into consideration namely *VCAST*, *McFadden* and *Svensson and Others* judgments, the author is of the opinion that the CJEU does not fully acknowledge the interconnection between all DSM's domains and thinks within the formalistic sectoral paradigm. Therefore, the role of the CJEU in the DSM should maintain to be a referee and the task to create simple rules that will stand up for interpretation in long term should be left to the EU legislator, or as the case may be to the Member States. At the national level, it is important to remember that the direct involvement in the digital agenda should start with their representation at the European institutions, namely at the Council. The example of the Czech Republic showed the same tendency to streamline the decision-making process. However, the fact that circumstances of the coordination of the Czech digital agenda changed just over the period of writing the thesis shows the main problem regarding the national approach – a lack of clear strategy. Despite all criticisms, the EU with its multi-annual strategies based on expertise and their actual realization appears to be better acquainted with the significance of the DSM.

The author accomplished the partial objective by presenting a comparative study of regulatory frameworks concerning substantive and institutional aspects, which is summarized in Annex I – Comparison between Single Market and Digital Single Market and based partly also on findings covered in Annex II – Table of DSM Strategy files. The findings prove the DSM is legally enshrined in the single market in the vast majority of legislation and, therefore, it can be generally considered as the instrument for its revival, which means that the concept of the single market is not definitely surmounted. On the other side, in many aspects their concepts differ despite having

the common baseline of achieving the free movement, which in the case of the DSM has to be put into the context of the digital space, as it differs most significantly in terms of freedoms and obstacles.

The delineation of the DSM's foundations provided valuable context to the assessment of its state of play through the EU's most advanced digital policies, namely the Digital Agenda for Europe and the DSM Strategy. The assessment was based notably on the criterium of the acknowledgement of identified differences between the DSM and the single, as the author assumed that their disregard in previous initiatives created tension and resulted in an inefficiency in addressing the DSM issues. The initial *stricto sensu* Digital Agenda for Europe (Chapter 3.1) fully conceptualized and targeted exclusively the digital space in order to prepare the right environment for more focused initiatives, which are to follow in the future such as the DSM Strategy. Not only the DAE gave the DSM its name, the policy was ground-breaking also for abandoning the narrative that the DSM should be built on similarities with the single market and starting to tackle frontiers, which do not exist in the single market. The DAE was centred around the concept of the virtuous cycle of digital economy, which identified unique obstacles existing within the DSM from fragmented digital markets, through lack of investment, interoperability to skills. The DAE's evaluation using the digital scoreboard showed strong achievements as the EU was already on track to complete 95 of its 101 actions by 2015, including the General Data Protection Regulation. Therefore, despite the DAE succeeded in acknowledging the differences, notably its obstacles, the number of initiatives diffused its focus and rendered tackling its frontiers inefficient. Moreover, the digital policy is more or less already exhausted, which points to its less ambitious and more pragmatic nature, circumscribing its purpose to be a forerunner. The true DAE's deficiency dwells in terms of promoting the DSM's unique freedoms. Despite the General Data Protection Regulation recognizes the free movement of personal data, it focuses rather on the protection of individuals with regard to data processing.

The DSM Strategy (Chapter 3.2) followed the DAE in its footsteps by building on its successes and by learning from its mistakes. Instead of tackling frontiers in quantitative terms and neglecting their cohesion, the DSM Strategy focuses on 16 specific and more ambitious initiatives within three pillars on access, environment and growth, which interconnects various sectoral regulatory frameworks in line with the integrative paradigm. However, digital obstacles were not explicitly stated in the policy, therefore, the author identified them from specific policy initiatives through the method of induction and subsumed them according to their nature under particular types of obstacles, drawing from the model used by Jacques Delors. The result of this process can be found in Annex III – Classification of obstacles impeding the digital single market. Based on

it, the author concluded that numerous identified digital obstacles would be eliminated hand in hand with the promotion of the free movement of data, which is in conformity with the opinion of the EU legislator. As the DSM Strategy constitutes the EU's most recent and advanced digital effort yet, its mid-term review reflects the DSM's state of play most closely.

For the occasion of the mid-term review of the DSM Strategy (Chapter 3.3), the author assessed the state of play of the DSM by moving from its successful stories, through criticisms to recommendations for the future. As the number of reached agreements on proposals was significantly reduced, notably because of the variety of institutions and actors involved, the author compiled the state of play for all initiatives in Annex II – Table of DSM Strategy files. Given the fact that bigger successes in geo-blocking or wholesale roaming were results of lengthy negotiations, the DSM Strategy achieved only smaller victories in comparison to those with high impact on the future integration, which were left behind as the consensus is harder to reach on those issues. Moreover, with regard to the remaining priorities and necessary window of time for implementation, it is highly likely the entire DSM Strategy will not be in place by 2019. Aside from the lack of punctuality, over the attainment of the DSM is hanging the threat of insufficient cohesion within proposed revisions of sectoral frameworks – firstly, the criticism of vested interests on the example of modernized copyright package, which reveals purely protective character of the proposed adjustments; secondly, the lack of economic liberalization on the example of e-commerce with only few exemptions and uncertainties of their future development in the light of developments mentioned within the first point; thirdly, the regulatory overlap on the example of reviewed electronic communications rules, wherein new technologies may also newly fulfil their definition and may be deprived of their today's exemption; and lastly, the over-regulation on the example of data economy, as the free flow of data is a natural freedom in itself, in the sense, it is pre-existent to the law enabled by the technological progress and essential to fostering innovations, which is restricted in the name of data protection. In the light of the four criticisms, the cohesion of the DSM's rules is put at risk and along with it is also jeopardized the EU's objective of reaching the future proof regulatory framework. At this stage, when many of the essential legal acts are mere proposals, it is not possible to assess whether their most impeding or visionary provisions will remain in place, however, one may expect an acknowledgment of the role of the free flow of data in the functioning of the internal market and the process of the European integration.

While technology is evolving at unprecedented pace, the EU witnessed a sequence of events impacting the free flow of data, from the invalidation of Data Retention Directive, through the reinforcement of the right to be forgotten in *Google Spain and Google* to the annulment of the

Commission's Safe Harbour Decision in *Schrems*. The tension turned into the question of the free flow of data's status in the internal market architecture, which the author of the master's thesis sees as an essential precondition for the EU to be able to reach the future proof regulatory framework, as Cloud computing, Big Data, the Internet of Things and other innovations based on data are already central to the EU's competitiveness. Therefore, the author adds *de lege ferenda* reflections on this account in order to shape and reveal the best way under present circumstances how to strengthen the promotion of the free flow of data, stepping from pragmatic to more ambitious proposals. Starting with the pragmatic solution, which is also in conformity with the DSM being legally enshrined in the internal market, the free flow of data is a mere consequence of the development of the digital space in the course of restarting the internal market, which is expected to be sufficiently promoted within secondary law. The strengthening of its protection could be secured by its own test of proportionality, as was proposed by Advocate General Szpunar in *McFadden*<sup>296</sup>, modelled according to the one of the four freedoms. For the time being the author finds this solution in line with present circumstances under the condition that the EU will simultaneously put more pressure on employing integrative paradigm, standardization, performance based and also smart rules. This conclusion is also in conformity with the author's assumption that the nature of law does not change within digital space, since the substantial modification undergoes primarily the form of legal regulation. However, the author does not exclude to the future more ambitious solutions counting with the modification of the Treaties, which draws from the formula pursued by the Delors Commission, whose efficiency in creating the internal market stemmed from the combination of prioritization of common market through technology and the reformation of primary law. For the occasion of the Treaties' revision, the author favours a stronger acknowledgement of the free flow of data, but not necessarily have to be upgraded to the form of the fifth freedom. In order to maximize the potential of technological development while also preserving other timeless values, it would be sufficient to create an alternative digital legal basis of a more general character, symbolizing the transition from the traditional internal market to the new DSM and enabling streamlined efforts in achieving the future proof regulatory framework, as an essential instrument for European integration on its path towards the digital age.

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<sup>296</sup> Opinion of AG Szpunar, delivered on 16 March 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C-484/14, ECLI:EU:C:2016:170, paragraph 149 – “any measures that could hinder the development of that activity [Wi-Fi] should therefore be very carefully examined with reference to their potential benefits.”

## Annexes

### Annex I - Comparison between single market and digital single market

	Single Market	Digital Single Market
Technique of integration	Regulation with prevailing negative over positive integration, notably through the principle of mutual recognition	Regulation with prevailing positive over negative integration, notably through harmonization of laws or legal integration
Competence	Shared competence stipulated in Article 4 TFEU, exclusive competence regarding the competition policy necessary for the internal market and international agreements envisaged in Article 3 TFEU	No express digital competence established within Treaties. Measures pursued in accordance with shared competence, notably for the internal market but also for trans-European networks, taxation and protection of personal data; exclusive competence regarding the competition policy necessary for the internal market and international agreements envisaged in Article 3 TFEU
Legal basis	Ordinary legislative procedure	Ordinary legislative procedure, if derived from the internal market, trans-European networks, protection of personal data; special legislative procedure in taxation
Role of European institutions and bodies	European Commission – initiator	European Commission – initiator



	European Parliament and Council of the EU – co-legislators	European Parliament and Council of the EU – co-legislators
	European Council – overall direction and principles	European Council – overall direction and principles
	Court of Justice of the EU – referee, established mutual recognition principles	Court of Justice of the EU – referee
		European regulatory bodies – BEREC, EDPB, ERGA, ENISA – information and enforcement
Role of national institutions	National governments and parliaments – active role, considering past barriers had brought income to the Member States	National governments and parliaments – generally not very active, except for taxation
		National regulatory bodies – NRAs, DPAs – information and enforcement
Role of other actors	Businesses, federations of national associations, trades unions, NGOs (environmental or consumer groups), right holders	Digital companies (telecom, online platforms, ISP), right holders or collective management organizations

Source: own composition [last updated 25 April 2018]

## Annex II – Table of DSM Strategy files

Pillars	Policy initiatives	Legal Acts (instrument, legal basis)	Objective	X//T/A (year of proposal)
Increasing access to goods, services and content	Modernize e-commerce	Geo-blocking (regulation, Article 114 TFEU)	Better access to goods and services for consumers in the single market by preventing discrimination by traders artificially segmenting the market based on customers' residence.	A (2016)
		Digital contracts I – supply of digital content (directive, Article 114 TFEU)	Eliminating the key contract law-related barriers hindering cross-border trade.	T (2015)
		Digital contracts II – online sales of goods (directive, Article 114 TFEU)	Eliminating the key barriers contract law-related hindering the online and other distance sales of goods.	X (2015)
		Reduce VAT burden for cross-border e-commerce (directive, 2xregulations, Article 113 TFEU)	Improving VAT environment for e-commerce businesses.	A (2017)
		VAT for electronic publications	Applying lower VAT rates to e-publications.	X (2016)

	(directive, Article 113 TFEU)		
	Cross-border parcel delivery services (regulation, Article 114 TFEU)	Increasing transparency; improving availability, quality and affordability of delivery; enhancing complaint handling.	A (2016)
	Consumer protection cooperation (regulation, Article 114 TFEU)	Better enforce EU consumer law in the digital space.	A (2016)
Cross-border portability of online content services	Cross-border portability of online content services (regulation, Article 114 TFEU)	Broaden access to online content services for travellers within the EU.	A (2015)
Modern copyright framework	Directive on Copyright in the DSM (Article 114 TFEU)	Guarantying the legality of certain types of uses in these fields, including across borders.	X (2016)
	Copyright Regulation (following SatCab review, Article 114 TFEU)	Enhancing wider online access to TV and radio programs by users across the EU.	X (2016)
	Marrakesh Treaty (directive, regulation, Article 114 TFEU)	Facilitating the use and cross-border exchange of certain copyright protected	A (2016)

			content without the authorization of the rightholder for the benefit of persons who are print disabled.	
Shaping the appropriate legal framework for digital networks and services	Spectrum (470-700 MHz)	Decision on the use of the 470-790 MHz band (Article 114 TFEU)	Contributing to the target of 1200 MHz for wireless broadband and promoting development of audiovisual media services.	A (2016)
	Audiovisual Media Services Directive	Audiovisual Media Services Directive (Article 53(1) TFEU in conjunction with Article 62 TFEU)	Ensuring the transition from national markets to a common program production and distribution market.	T (2016)
	Online platforms	B2B Practices in Online Platforms		X
	Wholesale roaming	Wholesale roaming (regulation, Article 114 TFEU)	Ensuring that well-functioning markets deliver access to high-performance wireless broadband infrastructure at affordable prices.	A (2016)
	European Agenda for Collaborative Economy	European agenda for the collaborative economy (communication)	Helping to benefit and address concerns over the uncertainty about rights and obligations of those taking part in	

			the collaborative economy.	
Connectivity	BEREC Regulation (Article 114 TFEU)		Achieving harmonized, consistent and efficient implementation of the regulatory framework with the support of BEREC.	T (2016)
	European Electronic Communication Code (directive, Article 114 TFEU)		Focusing on a consistent single market approach to spectrum, tackling regulatory fragmentation, ensuring a level playing field, including the OTTs.	T (2016)
	WiFi4EU (regulation, Article 172 TFEU)		Promotion of Internet connectivity in local communities.	A (2016)
	Towards a Gigabit Society (communication)		Ensuring the best possible internet connection.	
	Action Plan		Support of the deployment and take-up of 5G networks.	A (2016)

	e-Privacy	e-Privacy (regulation, Article 16 and 114 TFEU)	Increasing trust in and the security of digital services.	X (2017)
	Cybersecurity	Cyber Security Act (ENISA + certification, regulation, Article 114 TFEU)	Increasing capabilities, cooperation of the Member States and awareness of citizens and businesses on cybersecurity issues; avoiding fragmentation of certification schemes.	X (2017)
Reaping the benefits of the data-based economy and society	Digitizing European Industry	Digitizing European Industry Initiative	Investing into further development of digital innovations.	A (2016)
	European Data Economy	Building a European Data Economy (communication)	Fostering the best possible use of the potential of digital data.	
		Free Flow of Data Initiative (regulation, Article 4(2)(a) and 114 TFEU)	Improving the mobility of non-personal data across border and creating more competitive internal market for data storage and other processing services and activities.	X (2017)

		Accessibility and re-use of public and publicly funded data		Q2 2018
	e-government	EU e-government Action Plan 2016-2020 (communication)	Modernizing public administration, achieving the digital internal market, and engaging easier with citizens and businesses.	
		Single digital gateway (regulation, Article 21(2), 48 and 114 TFEU)	Improving the online availability, quality and accessibility of information, assistance services and procedures relevant for citizens and businesses.	X (2017)
	Standardization and interoperability	ICT Standardization priorities (communication)	Fresh approach to standards for 5G, IoT, Cybersecurity, Cloud and Big Data, as a strategic instrument to EU industrial policy.	
		European Interoperability framework (communication)	Improving the quality of European public services and creating an environment where public administrations collaborate digitally.	

	Digital skills	New Skills Agenda for Europe (communication)	Improving the quality and relevance of training and other ways of acquiring skills, skill intelligence.	
		Digital Opportunities scheme	Strengthening ICT specific skills through cross-border traineeships.	
	European Cloud initiative	European Open Science Cloud (declaration)	Building a competitive data and knowledge economy in Europe.	
		High Performance Computing (declaration)	Developing HPC technologies, providing access, achieving excellence in HPC application delivery and use.	
	Digital Health and Care	(consultation)	Providing access to safe and top quality digital services in health and care.	

\* X = legislative proposal, T = trilogue, A = adopted

Source: own composition [last updated 25 April 2018]



### Annex III – Classification of obstacles impeding the digital single market

Physical obstacles	Technical obstacles	Fiscal obstacles	Social obstacles
Geo-blocking	Lack of interoperability and weakness in standard-setting	Lack of cross-border parcel delivery	Lack of essential digital skills and expertise
Lack of cross-border portability of online content	Insufficient infrastructure and speed	Different VAT regimes, causing administrative burdens	Reluctance to use Internet
Cybercrime and lack of trust and security of data subjects, consumers and other users	Lack of online platforms	Lack of investments and incentives	
Conflicting intellectual property rights, namely the principle of territoriality		High roaming charges	

Source: own composition [last updated 25 April 2018]

## List of abbreviations

<b>BEREC</b>	Body of European Regulators for Electronic Communications
<b>Council</b>	Council of the European Union
<b>Commission</b>	Commission of the European Union
<b>CJEU</b>	Court of the European Union
<b>EDPB</b>	European Data Protection Board
<b>EDPR</b>	Europe's Digital Progress Report
<b>ENISA</b>	European Union Agency for Network and Information Security
<b>DAE</b>	Digital agenda for Europe
<b>DESI</b>	Digital Economy and Society Index
<b>DPA</b>	Data Protection Authority
<b>DSM</b>	Digital single market
<b>DSM Strategy</b>	Digital single market Strategy
<b>EU</b>	European Union
<b>GAFA</b>	Google, Apple, Facebook and Amazon
<b>Member States</b>	Member States of the European Union
<b>NRAs</b>	National Regulatory Authorities
<b>OTTs</b>	Over-the-top services
<b>Parliament</b>	European Parliament
<b>REFIT</b>	Regulatory Fitness and Performance Program
<b>SEA</b>	Single European Act
<b>SMEs</b>	Small and medium enterprises
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>Treaties</b>	Treaty on the EU, Treaty on the Functioning of the EU

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## **Abstract / Abstrakt**

### **Abstract:**

The master's thesis "Selected Legal Aspects of the Digital Single Market" delineates the legislative reaction of the European Union ("EU") to technological development for the occasion of the mid-term review of the Digital Single Market Strategy for Europe, the most advanced multi-annual scope digital policy navigating the EU to the digital age, which was issued by the Juncker Commission on 6 May 2015, more than 10 years after the initiation of ending roaming charges, more than 20 years from the launch of the internal market and more than 30 years after Jacques Delors' commitment to ensure the four freedoms.

Since the Juncker Commission has detailed, negotiated on and signed off many of its legislative initiatives under the DSM Strategy for the all-encompassing overhaul of Europe's digital landscape in pursuit of creating its legacy, but will the EU be able to reach its objective of future proof regulatory framework ready for the digital age? The master's thesis answers the overall research question by identifying the DSM's theoretical and conceptual framework, delineating its historical, social, substantive and institutional foundations, and based on them by assessing the state of play of the DSM and formulating recommendations.

Initially, the first part identifies and defines phenomena constituting the theoretical and conceptual framework of the DSM. The second part delineates the DSM's foundations with regard to its historical, social, substantive and institutional aspect. Its first chapter on historical and social foundations explores different approaches adopted towards the digital agenda, which results in a compilation of material sources of law of the DSM, establishing the relationship between the DSM and the single market. The second chapter compares substantive and institutional foundations of both concepts to assess their relationship, notably their differences in terms of obstacles and freedoms, which needs to be addressed by digital policies. The single market's regulatory framework is a point of reference for the DSM, which faces the challenge to adapt the form of legal regulation to conditions in the digital space while navigating around competences and legal bases, lastly updated over a decade ago.

Finally, the third part of the thesis uses the context provided by the delineation of the DSM's foundations to assess the state of play of the DSM through the EU's most advanced digital policies Digital Agenda for Europe and DSM Strategy with their successes, criticisms and recommendations for one of the main areas where the EU needs to act further – the strengthening of the status of the free flow of data in the internal market's architecture, which the author identifies as the key instrument for achieving the future proof regulatory framework of the DSM.



## **Abstrakt:**

Diplomová práce „Vybrané právní aspekty jednotného digitálního trhu“ se zabývá legislativní reakcí Evropské unie („EU“) na technologický vývoj, a to při příležitosti nedávno prováděného přezkumu Strategie pro jednotný digitální trh v polovině jejího období, přičemž se jedná zatím o nejpokročilejší víceletý plán v digitální oblasti navigující EU do digitálního věku, jenž Evropská komise představila 6. května 2015, více než 10 let po otevření diskuze o konci roamingových poplatků, více než 20 let od formálního dokončení vnitřního trhu a více než 30 let po závazku Jacquesa Delorse zajistit jeho čtyři svobody.

Od té doby Evropské komise pod záštitou strategie vyjednala a dotáhla ke zdárnému konci řadu svých legislativních návrhů, jenž si kladou za cíl holisticky zrevidovat klíčové právní oblasti spadající pod jednotný digitální trh a zapsat se tak do historie. Otázkou ovšem je, zda bude EU schopna dosáhnout nadčasového legislativního rámce připraveného na digitální věk? Diplomová práce na tuto výzkumnou otázku odpovídá skrze identifikaci teoretického a koncepčního rámce jednotného digitálního trhu, vymezení jeho historických, sociálních, hmotných a institucionálních základů, které následně slouží jako východisko pro posouzení současného stavu jednotného digitálního trhu a formulaci doporučení pro jeho dosažení.

První část diplomové práce identifikuje a objasňuje fenomény tvořící právě teoretický a koncepční rámec jednotného digitálního trhu. Druhá část posléze v rámci své první kapitoly vymezuje historické okolnosti a společenské události, které vedly k regulaci digitální oblasti, čímž zároveň mapuje prameny jednotného digitálního trhu v materiálním smyslu. Jedním z nich je i jednotný trh, jehož vztah k jednotnému digitálnímu trhu je předmětem zkoumání v druhé kapitole této části. Komparace hmotných a institucionálních aspektů obou konceptů odhaluje, co mají jednotný trh a jednotný digitální trh společného a co je naopak odlišuje. Jejich odlišnosti poté představují klíčové body, na které je třeba se v rámci digitálních politik zaměřit. Regulační rámec jednotného trhu je proto pouze výchozím bodem pro ten digitální, který čelí výzvě přizpůsobit formu právní úpravy podmínkám v digitálním prostředí, a to za využití kompetencí a právních základů, které byly naposledy aktualizovány více než před desetiletím.

Třetí a poslední část diplomové práce využívá těchto základů pro zhodnocení současného stavu jednotného digitálního trhu prostřednictvím jeho digitálních politik, jimiž je vedle výše Strategie pro jednotný digitální trh také Digitální program pro Evropu. Autorka postupně přechází od jejich úspěchů, přes nedostatky až k doporučením pro jednotlivé oblasti zájmu, z nichž pro dosažení nadčasového legislativního rámce připraveného na technologický rozvoj považuje za klíčovou otázku posílení postavení volného toku údajů v architektuře vnitřního trhu.

**Key words / Klíčová slova**

**Key words:** Digital single market, digitalization, digital space, information society, internal market, free movement of data, fifth freedom

**Klíčová slova:** Jednotný digitální trh, digitalizace, digitální prostor, informační společnost, vnitřní trh, volný pohyb údajů, pátá svoboda