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Prepared by:

2nd year student,

Specialty – 081 “Law”

Iryna Dmytrivna Fonotova

Supervised by:

Roman Arestovych Petrov,

Doctor of Laws,

Head, Professor of

International and European Law Department

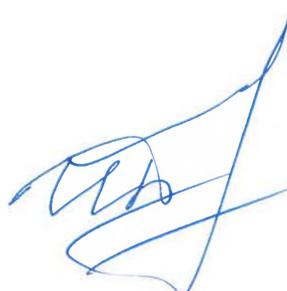
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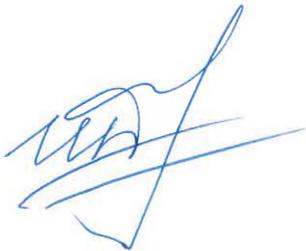
Керівник: Петров Роман Арестович,
доктор юридичних наук,
завідувач, професор кафедри
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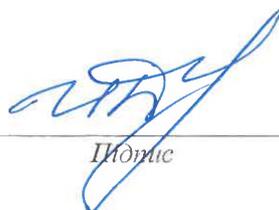


Декларація
академічної доброчесності
студента/ студентки НаУКМА

Я Ромотова Ірина Дмитрівна,
студент(ка) 2 року навчання факультету правничих наук,
спеціальність право (081),
адреса електронної пошти i.fonotova@ukma.edu.ua

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Ромотова І.І.
Прізвище, ініціали

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LIST OF ABBREVIATIONS

“Barroso II Commission”	Second Commission led by José Manuel Barroso (2009 – 2014)
“Charter of Fundamental Rights”	Charter of Fundamental Rights of the European Union
“CJEU”	Court of Justice of the European Union
“Council”	Council of the European Union
“DSM Strategy”	Digital Single Market Strategy for Europe, presented by Juncker Commission in 2015
“DSM”	Digital Single Market
“EC” or “Commission”	European Commission
“EESC”	European Economic and Social Committee
“EP” or “Parliament”	European Parliament
“EU-Ukraine Association Agreement” or “Association Agreement”	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part
“EU”	European Union
“GDPR”	General Data Protection Regulation
“ICTs”	information and communication technologies
“Juncker Commission”	Commission led by Jean-Claude Juncker (2014 – 2019)
“SEM”	Single European Market
“SMEs”	small and medium-sized enterprises
“TEU”	Treaty on the European Union
“TFEU”	Treaty on the Functioning of the European Union
“Von der Leyen Commission”	Commission led by Ursula von der Leyen (2019 – present)

INTRODUCTION

Relevance of the master's thesis' topic. Living in the 21st century, we are witnessing an impressive digital transformation of the world. Pretty much spheres of our lives have already upgraded their names by the prefix “e”, thus, turning into e-commerce, e-health, e-learning, e-government, e-business, e-justice, e-banking, *etc.* This upgrade, undoubtedly, has a positive impact on our lives since, for example, it opens up access to a larger scale of data and content, increases our social networks, optimises business processes, introduces new ways of illness treatment, makes lifelong learning possible, boosts the trade given that there are no borders on the Internet, and, overall, makes societies more inclusive.

Moreover, in the COVID-19 reality, the Internet and digital devices become the instruments in order we can reach the outside world. The pandemic along with multiple lockdowns make societies across the globe explore the new levels of distance learning, remote work and online interactions and, as such, became the new driving force of more deep digital transformations of our day-to-day activities.

While appreciating all the positive impact digitalisation brings in our lives, it, as well, carries out some threats to societies' stability and well-being. Notably, our personal data and privacy became much vulnerable. One of the most famous examples in this reference is the *Facebook – Cambridge Analytica* scandal.¹ In 2018, the media reported the huge misuse of personal data of millions of Facebook users by Cambridge Analytica, a political consulting company.² Cambridge Analytica, via the app launched by Facebook, has collected without consent the information on the identity of a user, its Facebook friends and “*liked*” posts, to build up its personality portrait.³ This data was then exploited to create a customised political campaigns.⁴

¹ Granville, K. (2018). *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*. Published in *The New York Times*. Available at: <https://nyti.ms/3vNXWvm>. Confessore, N. (2018). *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*. Published in *The New York Times*. Available at: <https://nyti.ms/33w2rBy>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

Similarly, mass digitalisation affects the freedom to conduct business along with free and fair competition contemplated by this freedom. The prominent example in this reference is the *Google Shopping* case, whereby Google, being currently the dominant search engine and, certainly, the main “*gateway to the Internet*”, has abused its market power by promoting its own-developed products since putting them at the top of the search results while shifting the similar products of the third parties down.⁵

Furthermore, the digitalisation challenges the traditional consumer laws given the emergence of the “*free services*” like social media or mailbox.⁶ In fact, these services are not free of charge but paid up with our personal data instead of usual money.⁷ Therefore, the consumers of such “*free services*” requires the similar level of protection as being purchasing the traditional chargeable services.⁸

The number of threats cannot be exhaustive and change constantly with the further digital development.

In the light of discussed above, the author is confident that neither further maximising of the positive impacts of the digitalisation nor the proper addressing of the threats that it puts are possible without effective and up-to-date policy and legal regulation. In the European Union (the “EU”), the relevant policy and legal frameworks are building up under the aegis of the Digital Single Market (the “DSM”). *Therefore, the overview and analysis of the evolution of the DSM’s ideas, aims and principles along with already adopted or still developing laws, of the challenges the DSM permanently faces and of the ways of improvement of its functioning is of special interest and constitutes the relevant topic.*

⁵ European Commission (2017). Press Release: *Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*. Available at: <https://bit.ly/3ysEEvi>. Tremosa i Balcells, R. (2019). *Time to bring Google Shopping case to a close*. Published in *The Parliament Magazine*. Available at: <https://bit.ly/3fah174>.

⁶ European Commission (2018). Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: *A New Deal for Consumers*, COM/2018/0183 final, section 2. Available at: <https://bit.ly/33rNWIM>.

⁷ *Ibid.*

⁸ *Ibid.*

Object and subject matter of the master's thesis. The *object* of this thesis is the legal relations that forms and develops under the umbrella of the DSM specifically and in the digital sector in general, while the *subject matter* of this thesis is fundamentals of the EU's past and current policies, adopted and developing the EU legislation, case law of CJEU, scholar works and practitioners' findings, legal instruments of Ukraine's cooperation with the EU (including, the EU-Ukraine Association Agreement), experience of Ukraine in the approximation of the national laws to the EU *acquis* – all the listed – with respect to the digitalisation, digital rights and freedoms, development of information society, *etc.*

Goals and objectives of the master's thesis. The main *goals* of this thesis are to establish and assess (a) what relations compose the subject matter of the DSM and how they are regulated at the EU level from the policy and legal perspectives; (b) how the EU responds to the modern digital challenges, in particular in terms of securing the fundamental rights and key freedoms; and (c) the prospects of Ukraine's integration into the DSM.

To reach the above goals, the author has set out the following *objectives*:

- (1) To explore the formation and evolution of the DSM's ideas along with strategies pursued under the umbrella of the DSM;
- (2) To assess the results achieved under the multiple DSM's strategies;
- (3) To identify the key features and principles of the DSM;
- (4) To determine the link between the DSM and the Internal Market of the EU;
- (5) To analyse the competences of the EU bodies in the digital area;
- (6) To find out the techniques of integration that are used to develop the DSM;
- (7) To designate the relations and spheres composing the DSM as well as the legal measures that have been adopted or are to be adopted at the EU level to regulate them;

- (8) To assess how the digitalisation affects fundamental human right as well as what measures are taken at the EU level to ensure their due protection;
- (9) To examine the legal basis for the integration of Ukraine into the DSM; and
- (10) To evaluate the challenges that Ukraine faces on the way to and benefits that Ukraine may enjoy of the integration to the DSM.

Importance of the master's thesis' topic. In the light of the above goals and objectives, the importance of this thesis lies in the in-depth analysis of policy and legal frameworks of the DSM, the consolidating the whole history of the DSM evolution and the identification of the full spectrum of the relations forming it. Besides, given that Ukraine on multiple occasions has declared its intention to integrate in the near future in the DSM of the EU, first, it gathers the experience of the EU in the regulation of the digital sector and, second, it contributes to the proper understanding to what EU *acquis* the national laws have to be approximated.

Methodology. In the course of performing the above objectives the following *methods* were used: (1) *descriptive* method – to outline the development of the DSM's ideas and strategies as well as to provide the overview of the legal and policy framework of the relations and spheres contemplated by the concept of the DSM; (2) *axiological* method – to evaluate the impact of the rapid digitalisation on an individual specifically and societies in general as well as to determine the importance of proper policy and legal regulations and enhancing of the human rights protection for them; (3) *dialectical* method – to identify the causes, stages of evolution of the DSM, further trends in its development, as well as to determine the relations between the multiple spheres forming the DSM and relations between the DSM and Internal Market; (4) *legalistic* method – to analyse legal acts covering the relations under the DSM's umbrella and relations between the EU and Ukraine in the digital sector; (5) *institutional* method – to find out the authorities responsible for the development of policies and regulation in the digital area (both in the EU and Ukraine); and

(6) *comparative* method – to compare the EU and Ukraine’s approaches to the regulation of the digital-related matters.

Sources and authorities. The main sources and authorities of this thesis are the respective EU’s acts of hard (*e.g.*, regulations or directives) and soft (*e.g.*, communications of the European Commission) law accompanied by the case law of the CJEU. Besides, the answers to the proposed objectives were found out by the author in the works (both *scholar* and *analytical*) of Gráinne de Búrca, Paul Craig, Alexandre de Stree, Stefano Micossi, Inge Govaere, Sacha Garben, Malcolm Harbour, Johan Bjerckem, Tanel Kerikmäe, Maciej Maciejewski, Georgios Petropoulos, Timothy Yeung, Paul-Jasper Dittrich, Stuart N. Brotman and others.

1. POLICY CONTEXT OF THE DSM

The Digital Single Market (the “DSM”) path can be roughly divided into the following stages: (a) the first stage from 1993 to 2010, representing the first attempts to create the EU’s digital framework; (b) the second stage from 2010 to 2014, rooted in the Barroso II Commission initiative; (c) the third stage from 2015 to 2019, associated with Juncker Commission strategy; and (d) the fourth stage from 2019 to the nowadays, resulting from the commitments of Von der Leyen Commission.

1.1 First steps towards the DSM: from Delors’ White Paper to eEurope initiatives

Although some actions or policies related to the digital area can be tracked already in late 1970s, the starting point of the EU’s discussion on this topic is generally accepted to be the so-called Delors White Paper on Growth, Competitiveness and Employment published in 1993 (the “Delors’ White Paper”).⁹

The Delors’ White Paper stressed the importance of the development of an “*information society*”, meaning a society where a substantial extent of activities focuses on the creation, distribution, use and reuse of information by means of information and communication technologies (the “ICTs”),¹⁰ to be able for the EU to compete worldwide, restore the economic growth and improve employment situation.¹¹

The Delors’ White Paper suggested the set of actions for developing the *information society*¹² and creation of the *EU’s common information area*.¹³ In particular, they

⁹ Named after Jacques Lucien Jean Delors, the 8th President of the European Commission from 1985 to 1995.

Shahin, J., & Finger, M. (2009). The history of a European information society: Shifts from governments to governance. In *Global E-governance: Advancing E-governance Through Innovation and Leadership*, Tubtimhin, J., & Pipe, G. R. (Eds.), IOS Press, page 64. Available at: <https://bit.ly/2OcWaH1>. Feijóo, C., Gómez-Barroso, J. L., & Karnitis, E. (2007). More than twenty years of European policy for the development of the information society. *Netcom. Réseaux, communication et territoires*, (21-1/2), para. 6. Available at: <https://bit.ly/3eezhO0>.

¹⁰ Eur-Lex. Glossary of summaries, “*Information Society*”. Available at: <https://bit.ly/3kVhs7K>.

¹¹ Commission of the European Communities. (1993). *Growth, competitiveness, employment: The challenges and ways forward into the 21st century*. Luxembourg: Office for Official Publications of the European Communities, pages 107-108. Available at: <https://bit.ly/3bjGPg0>.

¹² *Ibid.*

¹³ *Ibid.*, page 109.

include: (a) diffusion of best practice in the use of ICTs; (b) liberalization of the telecommunications sector; (c) acceleration of the standardization process and integration of standards into services; (d) setting credible information infrastructure; (e) conducting trainings on the use of ICTs; and (f) establishing regulatory framework to protect data and privacy.¹⁴ Eventually, these actions were expected to facilitate economic and social changes and improve the quality of the EU's citizens life.¹⁵

Even prior to the concept of the DSM was first introduced by the Commission in 2010, secondary EU's legislation already provided for a complex set of legislative acts aimed to ease cross-border electronic transactions.¹⁶ Already in 1990 early 2000 the EU Directives have been adopted in the fields of data protection (1995), distance selling (1997), e-money and e-commerce (2000), copyright and e-invoicing (2001),¹⁷ etc. For example, Article 3(2) of Directive on electronic commerce established the freedom to provide information society services, meaning services that are provided at a distance, electronically, and at the individual request of a recipient of services,¹⁸ from one Member State to another Member State.¹⁹ Further, this Directive established the way of treatment of the contracts concluded by electronic means as well as the liability service provider for the transmission and storage of the information received from the service recipient (Articles 9, 12 and 13).²⁰

In 2000, at the Lisbon European Council, the EU sets the aim “*to become the most dynamic and competitive knowledge-based economy in the world, capable of*

¹⁴ *Ibid.*, pages 112-115.

¹⁵ *Ibid.*, pages 114-115.

¹⁶ Adamski, D. (2018). Lost on the digital platform: Europe's legal travails with the digital single market. *Common market law review*, 55(3), page 727.

¹⁷ Thelle, M. (2010). The Economic Impact of a European Digital Single Market, European Policy Centre, Copenhagen Economics, 16 March 2010, page 8. Available at: <https://bit.ly/3gp7toB>.

¹⁸ Recital 16 of the Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 5.8.1998, p. 18–26. Available at: <https://bit.ly/3sXv3L8>.

¹⁹ Article 3(2) of the 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 ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16. Available at: <https://bit.ly/3qt56F4>.

²⁰ *Ibid.*, Articles 9, 12 and 13.

sustainable economic growth with more and better jobs and greater social cohesion” by 2010.²¹ Further, the Lisbon strategy introduced new concept of “*knowledge-based society*” (as opposed to previous “*information society*”).²² In this respect, we can draw the distinction between the information and knowledge. Information cannot be automatically equated to knowledge.²³ The information is rather raw material that upon analysis and processing can generate knowledge.²⁴

To achieve the above goals, the EU adopted three consecutive plans: “eEurope 2002”, “eEurope 2005” and “i2010 strategy”.²⁵

The eEurope 2002 plan, approved by the Feira European Council in June 2000, was mostly targeted the three overall aims, namely:

- (a) providing cheaper, faster and secure Internet (among others, via allocation of funds for deployment of adequate infrastructure, fostering privacy-enhancing technologies, *etc.*);²⁶
- (b) investing in people and skills (among others, via adapting schools (their facilities, curricular, *etc.*) to the requirements of the digital age, transforming work organisation processes, increasing accessibility to information technologies for people with disabilities);²⁷ and
- (c) stimulating the use of the Internet (among others, via accelerating e-commerce (by making regulation of this field more flexible, improving legal certainty for the small and medium-sized enterprises (the “SMEs”) offering cross-border services, boosting consumer confidence), launching and promoting

²¹ Presidency Conclusions (2000). LISBON EUROPEAN COUNCIL 23 AND 24 MARCH. Retrieved March, 25, 2016, para. 5. Available at: <https://bit.ly/3bsxumF>.

²² *Ibid.*

²³ European Commission (1997). Building the European Information Society for us all. Final policy report of the high-level expert group. EU Employment and Social Affairs, pages 15-16. Available at: <https://bit.ly/3c4YkOI>.

²⁴ *Ibid.*, pages 15-16.

²⁵ Negreiro M., Madiaga T. (2019). Briefing: EU policies – Delivering for citizens: Digital transformation, European Parliamentary Research Service, PE 633.171, June 2019, page 5. Available at: <https://bit.ly/2zxeH9D>.

²⁶ Commission of the European Communities. Draft Action Plan prepared by the European Commission for the European Council in Feira: eEurope 2002, An Information Society For All, COM (2000) 330 final, 24.5.2000, pages 6-12. Available at: <https://bit.ly/2AYMSr2>.

²⁷ *Ibid.*, pages 13-17.

public services online, deployment of intelligent systems in road, rail, air and maritime transport, *etc.*).²⁸

This eEurope 2002 plan was pretty successful given that Internet penetration in homes was doubled by 2002, prices for access to Internet have fallen, more companies and schools became connected to the network and more government services became available online.²⁹ But fast progress in digital technologies required to update the approaches.

The eEurope 2002 plan was succeeded by eEurope 2005 plan, approved by the Seville European Council in June 2002.³⁰ This plan established two primary goals: (a) to modern online public services (in particular, e-government, e-health and e-learning services); and (b) to create a dynamic e-business environment, by 2005.³¹ As prerequisites for these goals, the plan considers (a) the deployment of broadband networks at reasonable prices and (b) the establishment of a secure information infrastructure.³²

In 2005, the Commission brought a new policy framework: i2010 – European Information Society by 2010.³³ According to Ms Viviane Reding, European Commissioner for Information Society and Media at the relevant times (2004 – 2010), the prefix “i” is put in the name of the policy to symbolise “*an internal market*

²⁸ *Ibid.*, pages 19 – 28.

²⁹ Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: eEurope 2005, An information society for all, COM (2002) 263 final, 28.5.2002, page 6. Available at: <https://bit.ly/3eks5wA>.

³⁰ Feijóo, C., Gómez-Barroso, J. L., & Karnitis, E. (2007). More than twenty years of European policy for the development of the information society. Netcom. Réseaux, communication et territoires, (21-1/2), para. 18. Available at: <https://bit.ly/3eezh00>.

³¹ Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: eEurope 2005, An information society for all, COM (2002) 263 final, 28.5.2002, page 9. Available at: <https://bit.ly/3eks5wA>.

³² *Ibid.*, page 9.

³³ Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: i2010 – A European Information Society for growth and employment, COM (2005) 229 final, 1.6.2005, page 3. Available at: <https://bit.ly/3enltwo>.

in information services”, “*investment in ICT research and innovation*” and “*inclusion and a better quality of life*”.³⁴

The abovementioned policy suggested a range of actions starting from the revision of the legal basis for audio-visual services to the adoption of e-business policies that allow SMEs to use ICTs without technological, organisational and legal barriers.³⁵

To sum up, the first EU’s policies are usually perceived as targeting mostly technological aspects of the informational society and digital space.³⁶ In the meantime, it is fair to note, that at the respective times most countries followed the same approach as it was required to set up the basic infrastructure to lay the ground for the further goals.³⁷ Also, the first strategies are criticised for concentrating more on economic benefits from the use of ICTs while issues with privacy, data, consumer protections, while were also raised, remained low-developed.³⁸ Yet, no one can deny the solid foundation formed by the above discussed for the current DSM.

1.2 Initiative of Barroso II Commission

The DSM concept was for the first time mentioned under the “*Digital Agenda for Europe*” (the “**Digital Agenda**”), one of the seven flagship initiatives of the “*Europe 2020 Strategy*”, presented in 2010 by the second Commission of José Manuel Barroso (the “**Barroso II Commission**”).³⁹ The aim of set out by the Digital Agenda was “*to maximise the social and economic potential of ICT, most notably the internet, a vital medium of economic and societal activity: for doing business,*

³⁴ Reding, V. (2005). i2010: How to make Europe’s Information Society competitive. SPEECH/05/107. Available at: <https://bit.ly/2PRrdc1>.

³⁵ Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: i2010 – A European Information Society for growth and employment, COM (2005) 229 final, 1.6.2005, pages 6 and 9. Available at: <https://bit.ly/3enltwo>.

³⁶ Feijóo, C., Gómez-Barroso, J. L., & Karnitis, E. (2007). More than twenty years of European policy for the development of the information society. Netcom. Réseaux, communication et territoires, (21-1/2), paras. 24-25. Available at: <https://bit.ly/3eezh00>.

³⁷ *Ibid.*, paras. 24-25.

³⁸ *Ibid.*, para. 26.

³⁹ European Commission. Communication from the Commission: EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, pages 3-4. Available at: <https://bit.ly/2XwaafJ>.

working, playing, communicating and expressing ourselves freely".⁴⁰ In the view of the Barroso II Commission, successful implementation of the Digital Agenda will boost innovations, lead to economic growth and advance everyday life of both people and enterprises.⁴¹

Worth noting that as opposed to the previous policies the Digital Agenda straightforwardly enumerate obstacles to effective exploit of the ICTs. They include the following seven obstacles:

- (a) fragmented digital markets, meaning that the EU is fragmented on multiple national markets that set their own complex regulatory framework which, in turn, limits the free flow of commercial and cultural content and services inside the EU;
- (b) lack of interoperability, meaning poor standardisation processes and lack of coordination between public authorities;
- (c) rising cybercrime and low trust in networks;
- (d) lack of investment in networks;
- (e) insufficient research and innovation efforts;
- (f) lack of digital literacy and skills; and
- (g) weak response to the societal challenges, meaning the EU poorly use the ICTs to address such challenges as climate change, ageing population, integration of people with disabilities *etc.* could be addressed better.⁴²

Accordingly, to tackle the listed obstacles the Digital Agenda proposed a comprehensive list of legislative and non-legislative actions. For example, the

⁴⁰ European Commission. 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, 19.5.2010, page 3. Available at: <https://bit.ly/2X4uNkb>.

⁴¹ *Ibid.*, page 3.

⁴² *Ibid.*, pages 4-6.

fragmented digital markets had to be changed with the vibrant DSM.⁴³ To achieve this, the following actions were suggested to undertake:

- (a) to open up access to the cultural, journalistic, creative and other content, among others, via simplifying copyright clearance rules, adopting regulation cross-border on licensing.⁴⁴ The necessity of this action was reasoned, for example, by the fact the European citizens struggled to buy creative content (e.g., music) online, while on the opposite side, the right holders had to undergo number of burdensome licensing procedures to protect their rights at each Member State separately given the EU had no common regulation on this point;⁴⁵
- (b) to make online cross-border transactions simple, among others, via revision of the e-money, e-commerce and e-invoicing regulations.⁴⁶ The necessity of this action was caused by the fact that the European citizens remained deprived of the wide choice and competitive prices that the SEM was expected to offer, because online transactions were restricted given technical and legal issues, such as refusal of foreign credit cards;⁴⁷
- (c) to boost digital confidence, among others, via revision of the EU data protection and consumer protection regulatory frameworks, introduction of EU-wide Online Dispute Resolution platform for e-commerce transactions.⁴⁸ According to the Digital Agenda, the European consumers avoided buying online because they are not confident that their rights are clear and properly protected;⁴⁹ and

⁴³ *Ibid.*, page 7.

⁴⁴ *Ibid.*, page 9.

⁴⁵ *Ibid.*, pages 7-8.

⁴⁶ *Ibid.*, pages 10-11.

⁴⁷ *Ibid.*, page 10.

⁴⁸ *Ibid.*, page 13.

⁴⁹ *Ibid.*, page 12.

- (d) to create single rules for telecommunications services.⁵⁰ This concerns, among others, numbering systems (in particular, the EU is required to unify socially important numbers).⁵¹

Overall, the Digital Agenda included nearly one hundred actions under seven pillars (apart from the vibrant DSM pillar discussed above, there were also pillars covering (a) interoperability and standards, (b) trust and security, (c) fast and ultrafast broadband access, (d) research and innovation, (e) digital literacy, skills and inclusion and (f) use of ICTs.⁵² Pursuant to the Overview of progress on the Digital Agenda's actions prepared by the Commission in 2014, many planned actions have either been achieved or are on course to be achieved.⁵³

1.3 Strategy of Juncker Commission

1.3.1 Overview of the DSM Strategy for Europe

The concept of the DSM goes hand in hand with the name of the former President of the EC, Jean-Claude Juncker. Back in 2014, Mr Juncker, while presenting its Political Guidelines before the European Parliament (the “**EP**” or “**Parliament**”), introduced his key priority – to build the “*Connected Digital Single Market*”.⁵⁴ Mr Juncker intended to take “*ambitious legislative steps towards a connected [DSM]*” to ensure the better use of digital technologies and, thus, to bring the ultimate benefits to the EU citizens and businesses (e.g., by means of creating new

⁵⁰ *Ibid.*, page 13.

⁵¹ *Ibid.*, page 14.

⁵² Directorate-General for Communications Networks, Content and Technology (DG CONNECT) of the European Commission. Table: Overview of progress on the 132 Digital Agenda actions inclusive Digital Agenda Review package, 11 August 2014 (last update), pages 1-13. Available at: <https://bit.ly/2TJvCZX>.

⁵³ Directorate-General for Communications Networks, Content and Technology (DG CONNECT) of the European Commission. Table: Overview of progress on the 132 Digital Agenda actions inclusive Digital Agenda Review package, 11 August 2014 (last update), pages 1-13. Available at: <https://bit.ly/2TJvCZX>. Szczepański M. (2015). Briefing: A Digital Single Market Strategy for Europe, Tracking European Commission priority initiatives in 2015, European Parliamentary Research Service, PE 568.325, September 2015, page 8 (endnote 2). Available at: <https://bit.ly/3el7IET>.

⁵⁴ Juncker J. C. (2014). 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, page 5. Available at: <https://bit.ly/2TD8qju>.

jobs, ensuring access to the services, sports or cultural events regardless of borders, making easy for companies to expand their goods or services).⁵⁵

In May 2015, Juncker Commission introduced the “*Digital Single Market Strategy for Europe*” (the “**DSM Strategy**”).⁵⁶ Juncker Commission set out ambitious financial expectations to “*generate up to EUR250 billions of additional growth in Europe*” by creating the DSM.⁵⁷

The DSM Strategy for the first time introduced the definition of the DSM:

*“A Digital Single Market is 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 personal data protection, irrespective of their nationality or place of residence.”*⁵⁸

The proposed DSM Strategy is based on three pillars:

- (a) *“Better access for consumers and businesses to online goods and services across Europe”*⁵⁹

Under the abovementioned pillar Juncker Commission raised a number of areas where the actions are required.

First, Juncker Commission committed to set cross-border e-commerce rules that both EU citizens and enterprises will trust.⁶⁰

From the traders’ perspective, they, in particular, encounter difficulties relating to divergent national contract laws and different mandatory remedies afforded to the consumers at the national levels.⁶¹ Further, traders appear to have difficulties in

⁵⁵ *Ibid.*

⁵⁶ European Commission. 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, 6 May 2015, COM(2015) 192 final. Available at: <https://bit.ly/2XxWOzp>.

⁵⁷ *Ibid.*, page 2.

⁵⁸ *Ibid.*, page 3.

⁵⁹ *Ibid.*, page 3.

⁶⁰ *Ibid.*, page 4.

⁶¹ 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

understanding number of labelling, packaging rules and other selling arrangements applicable in particular areas.⁶² These issues stop them from active engagement into e-commerce. While from the consumers' perspective, they have concerns, among others, with data protection and payment security, consumer rights, delivery costs and time, unbalanced terms and conditions for purchasing goods online, *etc.*⁶³

To address the above concerns and make the e-commerce flourish, the DSM Strategy suggested to make the legislative proposals that will simplify and harmonise the e-commerce rules (in particular, to adopt regulation that will allow transnational traders to rely on their national laws while trading online), establish online dispute resolution platform, review approaches to cooperation related to consumers' protection.⁶⁴

Second, Juncker Commission committed to make cross-border delivery affordable and efficient.⁶⁵

In this respect, accompanying study to the DSM Strategy noted that the EU delivery market remained fragmented, meaning, in particular, that most delivery services across the EU developed independently relying in terms of quality, labelling, tracking requirements on the provisions of national laws.⁶⁶ Apart from fragmentation, there were also a number of other concerns such as lack of user-friendly services, lack of transparent information and effective communication regarding cross-border deliveries, high shipping costs and others.⁶⁷

European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 192 final, 6.5.2015, page 11. Available at: <https://bit.ly/3bxAJsU>.

⁶² *Ibid.*, page 11.

⁶³ *Ibid.*, pages 13-14.

⁶⁴ European Commission. 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, 6 May 2015, COM(2015) 192 final, page 4-5. Available at: <https://bit.ly/2XxWOzp>.

⁶⁵ *Ibid.*, page 5.

⁶⁶ 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) 192 final, 6.5.2015, pages 18-19. Available at: <https://bit.ly/3bxAJsU>.

⁶⁷ *Ibid.*, page 20. European Commission. GREEN PAPER, An integrated parcel delivery market for the growth of e-commerce in the EU, Brussels, 29.11.2012, COM(2012) 698 final, pages 9-10. Available at: <https://bit.ly/3ce7tac>.

To address the above, the DSM Strategy suggested to amend regulation on cross-border deliveries in a way to increase price and information transparency as well as to make these services high-quality.⁶⁸

Third, Juncker Commission committed to stop unjustified geo-blocking.⁶⁹

Accompanying study to the DSM Strategy in this reference notes that the EU citizens often faced with the problem that they cannot buy goods, services and digital content selling in the other Member State or they may be redirected to the other platforms where the same things are sold at different conditions (*e.g.*, different prices).⁷⁰ These stem from the market practices of geo-blocking and geo-filtering.⁷¹

According to the DSM Strategy, these practices deprive EU citizens and enterprises of taking full advantage of the SEM.⁷² To resolve the issue, Juncker Commission committed to adopt regulation prohibiting unjustified geo-blocking and geo-filtering as well as to consider application of competition rules.⁷³

(b) *“Creating the right conditions for digital networks and services to flourish”*⁷⁴

Similarly to the above, Juncker Commission identified several areas to work on. In particular, Juncker Commission committed to create sufficient regulatory framework for platforms and intermediaries.⁷⁵

Online platform is a software facility that create an environment where goods/service/content providers and their customers can meet.⁷⁶ The examples of

⁶⁸ European Commission. 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, 6 May 2015, COM(2015) 192 final, page 6. Available at: <https://bit.ly/2XxWOzp>.

⁶⁹ *Ibid.*, page 6.

⁷⁰ 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) 192 final, 6.5.2015, page 21. Available at: <https://bit.ly/3bxAJsU>.

⁷¹ *Ibid.*, page 21.

⁷² European Commission. 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, 6 May 2015, COM(2015) 192 final, page 6. Available at: <https://bit.ly/2XxWOzp>.

⁷³ *Ibid.*, page 6.

⁷⁴ *Ibid.*, page 3.

⁷⁵ *Ibid.*, page 11.

⁷⁶ 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

such platforms are social media, messengers, app stores, search engines, e-commerce websites *etc.*⁷⁷

Online platforms play a central role in the modern digital world as they allow consumers to find relevant online information as well as SMEs (operating in huge variety of areas from manufacturing to transport) to reach their consumers and to offer their goods or services.⁷⁸

Despite all benefits online platforms bring, both consumers and SMEs experience the following concerns in their respect: (a) low awareness of how the personal data is processed; (b) lack of transparency on how the platforms present information (*e.g.*, whether results of the online searches are organic or paid-for); (c) low clarity on who is ultimate contracting party, in particular, in terms of identifying responsible party to seek the redress; (d) discrimination in terms of listing third-party services and platform's services (if the latter acts also as a retailer); and (e) not-transparent pricing.⁷⁹

To resolve the above concerns, Juncker Commission undertook to revert with the legislative proposals that, among others, issues of transparency of search results, use of personal data, delimitation of liability, *etc.*⁸⁰

(c) “*Maximising the growth potential of our European Digital Economy*”⁸¹

This pillar implies, in particular, the following areas for improvement: (a) to tackle restrictions in the free flow of data; (b) to set the common standards in such areas as health (telemedicine), transport (travel planning, e-freight), environment and energy;

European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, SWD(2015) 192 final, 6.5.2015, page 52. Available at: <https://bit.ly/3bxAJsU>.

⁷⁷ *Ibid.*, page 52.

⁷⁸ *Ibid.*, page 53.

⁷⁹ *Ibid.*, page 53-55.

⁸⁰ European Commission. 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, 6 May 2015, COM(2015) 192 final, page 12. Available at: <https://bit.ly/2XxWOzp>.

⁸¹ *Ibid.*, page 4.

(c) to enhance digital skills of EU citizens; and (d) to make more public services available online.⁸²

1.3.2 Mid-Term Review on the implementation of the DMS Strategy

On 10 May 2017, the Commission presented the Communication on the Mid-Term Review on the implementation of the DSM Strategy (the “**Mid-Term Review**”).⁸³ It estimates the achievements already made towards building the DSM and outlines the areas where new or more actions required to reach the progress.

Per two year from the publishing the DSM Strategy, the Commission managed to submit a number of proposals under three pillars identified above. For example, proposals for adoption of regulations or directives regulating (a) contracts for the supply of digital content; (b) parcel delivery; (c) geo-blocking and other forms of discrimination; (d) copyright and (e) privacy in the DSM, *etc.*⁸⁴

Despite the progress made, the DSM still remained uncompleted. Given that the Mid-Term Review identifies the following three directions to devote special efforts:

- (a) “*Tackling cybersecurity challenges*”.⁸⁵ The Mid-Term Review notes that the number of gadgets in our life is growing constantly.⁸⁶ People become dependent on them and, thus, vulnerable.⁸⁷ Feeling this vulnerability,

⁸² *Ibid.*, pages 13-17.

⁸³ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the Mid-Term Review on the implementation of the Digital Single Market Strategy, A Connected Digital Single Market for All, COM(2017) 228 final, 10.5.2017. Available at: <https://bit.ly/3gqyrfS>.

⁸⁴ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the Mid-Term Review on the implementation of the Digital Single Market Strategy, A Connected Digital Single Market for All, COM(2017) 228 final, 10.5.2017, pages 2-4. Available at: <https://bit.ly/31xg4ZD>.

⁸⁵ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the Mid-Term Review on the implementation of the Digital Single Market Strategy, A Connected Digital Single Market for All, COM(2017) 228 final, 10.5.2017, page 12 Available at: <https://bit.ly/3gqyrfS>.

⁸⁶ *Ibid.*, page 12.

⁸⁷ *Ibid.*, page 12.

cybercriminals day to day attack multiple computers and networks, in turn, breaching sensitive personal data, damaging different businesses, *etc.*⁸⁸

To response to these cyberthreats, the Commission undertook to review the EU's cybersecurity strategy, to create special bodies responsible for improving online security in the EU, to develop and adopt new cybersecurity standards.⁸⁹

- (b) *“Developing the European Data Economy”*.⁹⁰ The Mid-Term Review points that for the EU business to grow, to foster innovation and scientific research, the free flow of non-personal data is required.⁹¹ Meanwhile, national laws of the Member States contain lots of unjustified restrictions for the free flow of data, *e.g.*, data location requirements, allowing to store and process the data within specific territories.⁹²

As such, the Commission committed to evaluate existing legislative frameworks and revert with the proposal on the EU free flow of data cooperation framework.⁹³

- (c) *“Promoting online platforms as responsible players of a fair internet ecosystem”*.⁹⁴ The Mid-Term Review raises an issue of unfair practices widely employed by the online platforms, like favouring own products over products of third suppliers or restricting access to data.⁹⁵ Another issue that Mid-Term Review indicates is a huge amount of illegal online content placed on the online platforms.⁹⁶

Thus, the Commission undertook to work on the legislative proposals to address the identified discriminating practices in platform-to-business

⁸⁸ *Ibid.*, page 12.

⁸⁹ *Ibid.*, page 13.

⁹⁰ *Ibid.*, page 9.

⁹¹ *Ibid.*, page 11.

⁹² *Ibid.*, page 10.

⁹³ *Ibid.*, page 11.

⁹⁴ *Ibid.*, page 7.

⁹⁵ *Ibid.*, page 8.

⁹⁶ *Ibid.*, page 8.

relationships.⁹⁷ Further, the Commission committed to develop effective procedures for removal of illegal content from online platforms.⁹⁸

1.3.3 Criticisms of the DSM Strategy

The DSM Strategy commonly referred as an ambitious attempt to address the challenges of online realities the EU faced with.⁹⁹ Though being the largest single market in the world, in the online or digital dimension the EU rather remains “a patchwork of national online markets”.¹⁰⁰ It is therefore not surprising that such global online leaders as Facebook, eBay, Amazon or Google chose to develop outside the EU.¹⁰¹

Besides, the Member States make different progress in digital development: while the Nordic region (*e.g.*, Denmark, Norway, Sweden) is an absolute leader in digitisation, such countries as Romania or Bulgaria are lagging behind.¹⁰²

Apart from the above, the DSM Strategy was developed with the background that the EU citizens find the EU’s digital space to be uncertain and unclear to develop the businesses online and EU consumers remain constrained in purchasing cross-border goods, services and content.¹⁰³

To revive the digital prospects of the EU, the Juncker Commission set up the DSM Strategy as its first priority for the period of its election and channelled many resources into it.¹⁰⁴

⁹⁷ *Ibid.*, page 8.

⁹⁸ *Ibid.*, page 8.

⁹⁹ Brotman, S. N. (2016). the European Union’s Digital Single Market Strategy: a conflict between government’s desire for certainty and rapid marketplace innovation. Centre for Technology Innovation at Brookings Working Papers, page 2. Available at: <https://brook.gs/3tKa5Ub>.

¹⁰⁰ *Ibid.*, page 2.

¹⁰¹ *Ibid.*, page 2. Dittrich, P. J. (2017). Balancing Ambition and pragmatism for the digital single market. *Jacques Delors Institut, Policy Paper, 204*, page 3. Available at: <https://bit.ly/3vHxYxk>.

¹⁰² Brotman, S. N. (2016). the European Union’s Digital Single Market Strategy: a conflict between government’s desire for certainty and rapid marketplace innovation. Centre for Technology Innovation at Brookings Working Papers, page 2. Available at: <https://brook.gs/3tKa5Ub>.

¹⁰³ *Ibid.*, pages 2-3.

¹⁰⁴ Dittrich, P. J. (2017). Balancing Ambition and pragmatism for the digital single market. *Jacques Delors Institut, Policy Paper, 204*, page 3. Available at: <https://bit.ly/3vHxYxk>.

Though initially the Member States, stakeholders, business community much welcomed the ambitious goals of the DSM Strategy, upon the pass of time the latter was criticised enough. In particular, the DSM Strategy was criticised for over-regulation and contradictions in regulation, paradoxes of the results achieved, as well as for ignoring the social dimension.¹⁰⁵

The above criticism may be illustrated with reference to so-called Portability Regulation, that was adopted in June 2017.¹⁰⁶ The aim of this Portability Regulation to ensure that the EU citizens that paid for certain online services, like games, music or films, in the Member State where they reside can access and use such services freely without any blocking while travelling to another Member State.¹⁰⁷

However, as criticized by Prof. Dariusz Adamski, the Portability Regulation is rather concentrated on setting burdens on providers of online services, than easing and broadening their operation across the EU.¹⁰⁸ Further, this Portability Regulation has very limited effect in the sense that it is not focused on creating a framework allowing the travellers across the EU to purchase new online content and then use it at home Member State on the same terms.¹⁰⁹ In the same vein, the Portability Regulation is not aimed at establishing the unified rules for purchasing the online content throughout the EU that, in turn, could put an end to the existing restrictions.¹¹⁰ Thus, the deliverables of the Portability Regulation are pretty modest.

The inconsistencies within the regulation are well-noted in the case of General Data Protection Regulation (the “GDPR”) and so-called e-Privacy Regulation.¹¹¹ In

¹⁰⁵ *Ibid.*, page 6. Opinion of the European Economic and Social Committee on the ‘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). *OJ C 71, 24.2.2016, p. 65–74*, paragraph 1.8. Available at: <https://bit.ly/3retg6Y>.

¹⁰⁶ Adamski, D. (2018). Lost on the digital platform: Europe’s legal travails with the digital single market. *Common market law review*, 55(3), pages 731-732.

¹⁰⁷ Recitals 4 and 12 to the 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*. Available at: <https://bit.ly/3taNpMH>.

¹⁰⁸ Adamski, D. (2018). Lost on the digital platform: Europe’s legal travails with the digital single market. *Common market law review*, 55(3), pages 731-732.

¹⁰⁹ *Ibid.*, pages 731-732.

¹¹⁰ *Ibid.*, pages 731-732.

¹¹¹ Dittrich, P. J. (2017). Balancing Ambition and pragmatism for the digital single market. *Jacques Delors Institut, Policy Paper, 204*, page 6. Available at: <https://bit.ly/3vHxYxk>.

particular, the GDPR requires the explicit consent of the data subject in each case without exceptions for its data to be tracked by the special tracker.¹¹² In the meantime, the e-Privacy Regulation authorised to track the data without the consent of the data subject in certain cases, thus, loosening the protection granted under the GDPR and creating loopholes for the manipulations.¹¹³

Finally, as for the social side, the European Economic and Social Committee (the “EESC”) in its assessment opinion of the DSM has stressed that the DMS does not address the current challenges of labour market that are caused by the digitalisation of business processes,¹¹⁴ ignores the issue of the great gender imbalance in the market given that the majority of IT specialists are men,¹¹⁵ does not contribute to the responsible use of the ICTs, *etc.*¹¹⁶

To sum up, despite the criticism mentioned, in the authors opinion, the DSM Strategy of the Junker Commission is a pretty successful attempt to address the challenges of the modern digital world. It can and should be by no way exhaustive and cover each and every aspect that is associated with digitalisation given the unstable nature of this phenomena. But rather it should set the guidance vector and principles that will be attainable to follow in order to keep up with the pace of changes. This is actually what the DSM Strategy did, which, in turn, allowed to form the DSM that we know today.

1.4 Commitments of Von der Leyen Commission

In December 2019, Ursula von der Leyen replaced Mr Junker, becoming the new President of the EC. As each new leader, Ms Von der Leyen presented her own political priorities for the period of the term of office, where she set out an ambition

¹¹² Dittrich, P. J. (2017). Balancing Ambition and pragmatism for the digital single market. *Jacques Delors Institut, Policy Paper, 204*, pages 6-7. Available at: <https://bit.ly/3vHxYxk>. Matthew, S. (2017). Preparing for ePrivacy Regulation in the European Union. Published at Lexology. Available at: <https://bit.ly/3228Nbh>.

¹¹³ *Ibid.*

¹¹⁴ Opinion of the European Economic and Social Committee on the ‘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), *OJ C 71, 24.2.2016, p. 65–74.*, para 3.14. Available at: <https://bit.ly/3g4NnSW>.

¹¹⁵ *Ibid.*, para 3.17.

¹¹⁶ *Ibid.*, para 3.12.

to make “*Europe Fit for the Digital Age*”.¹¹⁷ In the view of Ms Von der Leyen this is achievable via ensuring the free flow and wide use of data as well as development of and investments in Artificial Intelligence.¹¹⁸

In February 2020, the Von der Leyen Commission published its Communication on “*European strategy for data*”.¹¹⁹ This Communication describes the desire of the EC to continue the digitalisation of the EU digitalisation but in contrast to its predecessors’ strategies shifts the focus on the issue of the free flow of data.¹²⁰ Under the Commission’s vision, data “*can serve to combat emergencies, ... to ensure that people can live longer and healthier lives, to improve public services, and to tackle environmental degradation and climate change, ... to ensure more efficient fight against crime*” and, thus, should be used for the public good.¹²¹ As well, the free flow of data will boost the economic growth, help to create the breakthrough innovations and contribute to the EU’s competitiveness.¹²²

Yet, the EC sees, among others, the following challenges towards to the listed benefits: (a) fragmented legislative landscape of Member States, (b) low of access and imbalances in access to both publicly and privately held data, (c) insecure or low-quality data infrastructures, (d) shortcomings in data and digital literacy and (e) cybersecurity threats.¹²³

Measures to combat the above challenges the EC grouped under the four pillars: (a) establishing a legal framework of free data access and use (the measures under this pillar, in particular, are aimed in facilitating business-to-government and business-to-business data sharing);¹²⁴ (b) investing in data sharing architectures;¹²⁵

¹¹⁷ Von der Leyen U. (2019). A Union that strives for more, My agenda for Europe. Political Guidelines for the next European Commission 2019-2024 presented in opening statement in the European Parliament Plenary Session in Strasbourg on 27 November 2019, page 13. Available at: <https://bit.ly/3d66NVy>.

¹¹⁸ *Ibid.*, page 13.

¹¹⁹ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European strategy for data, COM(2020) 66 final, 19.2.2020. Available at: <https://bit.ly/2TL7OjU>.

¹²⁰ *Ibid.*, page 1.

¹²¹ *Ibid.*, page 6.

¹²² *Ibid.*, pages 1-4.

¹²³ *Ibid.*, pages 6-11.

¹²⁴ *Ibid.*, pages 12-13.

¹²⁵ *Ibid.*, page 19.

(c) investing in skills and data literacy,¹²⁶ and (d) create the common EU data spaces in the number of the sectors of strategic importance (*e.g.*, energy, manufacturing, health, finance, agriculture, public administration).¹²⁷

In line with the political guidelines presented by Ms Von der Leyen, in February 2020, the EC published the White Paper on Artificial Intelligence (the “AI”).¹²⁸ To put it simply, the AI is described as machines embedded with an intelligence analogous to humans, such as learning from mistakes and adapting to new experience (*e.g.*, self-driving automobiles or e-mail spam filters).¹²⁹ While recognising how much benefits the AI may bring to both people and businesses, the EC also pays attention on the harm that the use of AI can make to them. The White Paper on AI divides harm associated with AI on material (*e.g.*, loss of life, destruction of property) and immaterial (*e.g.*, breach of privacy, different forms of discrimination).¹³⁰ This is mostly due to the fact that AI systems become to replace humans for many jobs.¹³¹ As such individuals and legal entities become increasingly subject to automated decision-making that could not be easily understood and challenged from time to time.¹³² Further, the AI systems are actively used to track and analyse personal data which, in turn, creates much space for privacy interferences.¹³³ Last but not least, the AI systems create new safety risks associated with the flaws in their design (*e.g.*, an autonomous car due to not recognising the approaching object may cause an accident resulting in injuries and property damages).¹³⁴

¹²⁶ *Ibid.*, page 20.

¹²⁷ *Ibid.*, page 20.

¹²⁸ European Commission. White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, 19.2.2020. Available at: <https://bit.ly/3c3dSCM>.

¹²⁹ Amiel, S. (2020). Artificial intelligence: How is the EU planning to make up ground on US and Chinese firms? Published at Euronews. Available at: <https://bit.ly/2OcuCCc>.

¹³⁰ European Commission. White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, 19.2.2020, page 10. Available at: <https://bit.ly/3c3dSCM>.

¹³¹ *Ibid.*, page 11.

¹³² *Ibid.*, page 11.

¹³³ *Ibid.*, page 11.

¹³⁴ *Ibid.*, page 12.

Thus, the Von der Leyen Commission is very much concerned in setting the policies and adjusting the current legislative framework in a way that allow to safeguard the fundamental rights of EU citizens.

In February 2021, Ms Von der Leyen spoke at virtual summit “*Masters of Digital 2021*”, where she confirmed that digital innovations remain her key priority, and that the free flow of data and the development of AI can serve as the main sources that allow the EU to revive from the Covid-19 crisis.¹³⁵

* * *

The digital revolution is well going: it constantly changes our everyday life – from the way we are shopping to the way we are communicating with one another; it impacts every industry from manufacturing to service, business models, ways of engagement with customers and suppliers; it transforms our jobs and skills through automation and AI; it opens the unprecedented access to the data and different types of content.¹³⁶ It is, without a doubt, digital developments help us not to lose up in the new COVID-19 reality. In the meantime, such a rapid digital transformation put new threats, in particular, in the spheres of data protection, privacy and cybersecurity. The EU fully realises both advantages and threats of the mentioned and, thus, carefully shapes its policies in a way to multiply the former and minimise the latter.

This chapter illustrates that the current policy context of the DSM was not formed in one day. It is rather a constant work from the Commission to Commission that led to the DSM that we know today. We may see how the priorities have changed with a pass of time from setting up the basic digital infrastructure and spreading the use of the Internet to caring about how digital technologies impact fundamental human

¹³⁵ Von der Leyen, U. (2021). Keynote speech by President von der Leyen at the ‘Masters of Digital 2021’ event. Published at the website of the European Commission. Available at: <https://bit.ly/3mEVe bd>.

¹³⁶ Mayo A. (2016). The transformation to a digital economy: The need for a contextualised and holistic approach to policy. In the Digital Economy and the Single Market: Employment prospects and working conditions in Europe (ed. by Wobbe W., Bova E.), Foundation for European Progressive Studies, 2016, pages 156-159. Available at: <https://bit.ly/3gnDtcR>. Mühleisen M. (2018). The long and short of the digital revolution. Finance & Development, 55(2), June 2018, pages 6-7. Available at: <https://bit.ly/2A5POcV>.

rights (like privacy, data protection or consumer rights) and how to protect competition in the digital markets.

Starting from the Delors' time to Von der Leyen's term, each Commission has committed to creating a full-fledged harmonised digital space for the EU citizens and businesses. Is that achieved by 2021? In the author's opinion, it is not. And, given the evolving nature of digitalisation, it will rather never be "*achieved*". Thus, further constant actions and adjustment will be required to ensure that the EU keeps up with the pace of changes.

2. LEGAL FRAMEWORK OF THE DSM

2.1 Relationship between the Internal Market and the DSM

The notion of the DSM was for the first time introduced under the DSM Strategy of the period of Juncker Commission and reads as follows:¹³⁷

“A Digital Single Market is 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 personal data protection, irrespective of their nationality or place of residence.”

Basically, the above notion extends the one of the Single European Market (the “**SEM**”, also known as a common/internal market), set out in Article 26(2) of the Treaty on the Functioning of the European Union (the “**TFEU**”):¹³⁸

“The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured [...]”

Such an overlap in the notions evidences that the DSM pursues the same aims as the SEM, *i.e.*, to preserve and promote the key four fundamental freedoms of the SEM (the free movement of goods, persons, services and capital), established under Articles 28 – 66 of the TFEU, thus, creating the single space where EU citizens and enterprises may live and operate freely. However, at the same time, it shifts the focus from the offline activities to the network.

Besides, the notion of the DSM highlights the importance of preserving and respect to such fundamental rights as the right to privacy (Article 7 of the Charter of fundamental rights of the European Union (the “**Charter of Fundamental Rights**”)), the right to data protection (Article 8 of the Charter of Fundamental

¹³⁷ European Commission. 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, page 3. Available at: <https://bit.ly/2XxWOzp>.

¹³⁸ Article 26(2) of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

Rights) and the right to non-discrimination (Article 21 of the Charter of Fundamental Rights), while building the single digital space.

Finally, the notion of the DSM stresses the importance of following the rules of fair competition, provided under Articles 101 – 106 of the TFEU, when doing business online.

Considering the above, the DSM, in other words, should be understood as the area with the:¹³⁹

- (a) harmonised sets of rules, meaning the same standards and requirements are to be applied to the same activities (whether it would be the digital commerce activity, copyright issue or the other area) across all the Member States;
- (b) reduced barriers, meaning it should be easy for the EU citizens to obtain the goods or services online and to have the access to the cultural/creative content or data, as well, the businesses should have the possibility to expand their services or goods to the other markets freely;
- (c) coordinated actions, meaning the local authorities, governments of the Member State and the EU levels shall cooperate with each other to ensure consistency of the rules and increase the confidence of EU citizens and businesses in the pro-digital approach; and
- (d) robust and fair competition, meaning the businesses should be able to conduct businesses without, for example, facing the requirement to obtain local licenses or duplicate their infrastructures.

¹³⁹ Pinset Masons (2020). Special Report: Digital Single Market – A Europe fit for the Digital Age, February 2020, page 4. Available at: <https://bit.ly/2XCd6aW>.

Apart from the mentioned, the DSM implies the market that:

- (a) respects the European values and fundamental rights and is created on the belief that “*the human being is and should remain at the centre*”;¹⁴⁰
- (b) is built on the laws that are “*digital by default, principle-based, and technologically neutral*”;¹⁴¹
- (c) encourages investments in digital infrastructure and networks;¹⁴² and
- (d) boost e-skills and expertise.

Further, the DSM should be perceived as an instrument of deepening the SEM. Already 36 years have passed from the moment Delors Commission has presented the White Paper called “*Completing the Internal Market*”. Under this White Paper, the Commission has called the Council of the European Union (the “**Council**”) “*to pledge itself*” in order to complete a fully unified internal market by 1992.¹⁴³ At the same time, despite the statutory established deadline, it could not be said that the SEM can be completed by a certain date and no more changes are required. As well noted by Prof. Gráinne de Búrca: “*attaining the internal market is not once-and-for-all, static objective*”.¹⁴⁴

The SEM constantly faces internal and external challenges that force the EU to adapt the SEM and to review the established approaches. The challenges can be of social, political or economic nature and arise from market fragmentation, distorted competition, protectionists measures, climate changes, the Member States’

¹⁴⁰ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European strategy for data, COM(2020) 66 final, 19.2.2020, p. 4. Available at: <https://bit.ly/2TL7OjU>.

¹⁴¹ European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI)), OJ C 100, 30.3.2017, para. 3. Available at: <https://bit.ly/3gqcdJ>.

¹⁴² Thelle M. (2010). The Economic Impact of a European Digital Single Market, European Policy Centre, Copenhagen Economics, 16 March 2010, p. 11. Available at: <https://bit.ly/3gp7toB>.

¹⁴³ European Commission (1985). Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 final, 14 June 1985, page 7. Available at: <https://bit.ly/3deSILh>.

¹⁴⁴ Craig P., De Búrca G. EU law: text, cases, and materials. Oxford University Press, 4th Edition, 2007, p. 613.

unwillingness to adopt or correctly apply the EU rules.¹⁴⁵ The COVID-19 pandemic has been testing the EU's strength and stability.

However, as recognised by the Council, the digitalisation is a prerequisite for more integrated SEM.¹⁴⁶ It allows smoothly and effectively deal with challenges and recover from the crisis triggered by the COVID-19 pandemic. Finally, building the SEM is, eventually, a way for the EU to preserve the status of “*the world's largest single market and most integrated transnational market*”¹⁴⁷.

To sum up, it is the author's understanding, that the idea of DSM stems from the SEM one, which is supported by the clear coincidence of the definitions of the mentioned concepts. Though in the focus of the DSM are online activities. The unprecedented digital transformation of the world pushes the EU to think about not only traditional physical barriers impeding the four core freedoms of the EU but also about new digital ones (by the way of example – different requirement of the Member States in the e-commerce sphere or restrictions on the free flow of non-personal data). Thus, the concept of DSM was created to remove these digital barriers. In turn, the removal of such barriers in the digital dimension will result in stronger, deeper and integrated SEM.

2.2 EU competences in the DSM

In order to build the DSM and to tackle digital barriers, the EU committed to undertake “*ambitious legislative steps*”.¹⁴⁸ In this light, the author believes, that it is necessary to establish whether the EU possess enough competence to legislate in the digital sphere.

¹⁴⁵ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Upgrading the Single Market: more opportunities for people and business, 28 October 2015, COM(2015) 550 final, p. 1. Available at: <https://bit.ly/3grr4oo>. Bjerkem J., Harbour M. (2019). Making the Single Market work: Launching a 2022 masterplan for Europe. EPC Discussion Paper, 28 August 2019, pp. 4-6. Available at: <http://aci.pitt.edu/100409/>.

¹⁴⁶ Council of the European Union. Conclusions on a deepened Single Market for a strong recovery and a competitive, sustainable Europe. No. prev. doc. 10066/20, MI 324 COMPET 397, 11 September 2020, page 12. Available at: <https://bit.ly/3g8PXrk>.

¹⁴⁷ Bjerkem J., Harbour M. (2019). Making the Single Market work: Launching a 2022 masterplan for Europe. EPC Discussion Paper, 28 August 2019, p. 6. Available at: <http://aci.pitt.edu/100409/>.

¹⁴⁸ *Ibid.*

The EU possesses only those powers that were attributed to it by the Member States.¹⁴⁹ This statement stems from the principle of conferral, enshrined under Article 5(2) of the Treaty on European Union (the “TEU”). This Article provides that “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties [...]*”.¹⁵⁰ Besides, this Article delimits the competences between the Member States and the EU¹⁵¹ providing that the “*competences not conferred upon the Union in the Treaties remain with the Member States*”.¹⁵²

Apart from the vertical delimitation of powers between the EU and the Member States, the principle of conferral also concerns the horizontal division of competences between the EU bodies.¹⁵³ Under Article 13(2) of the TEU, “*each institution shall act within the limits of the powers conferred on it in the Treaties*”.¹⁵⁴

The Lisbon Treaty of 2007 introduced three categories of the EU competences, *i.e.*, exclusive, shared and supporting, that apply to different subject areas.¹⁵⁵ This categorisation is of particular importance due to its legal consequences, meaning, in particular, whether an adopted by the EU body act will be valid, legally binding and enforceable.¹⁵⁶

The *exclusive* competence is governed by Article 2(1) of the TFEU which implies that only the EU may legislate and adopt legally binding acts in a specific area.¹⁵⁷ By the way of example, the EU maintains exclusive power to legislate with respect

¹⁴⁹ Garben S., Govaere I. (ed.). *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future*. Hart Publishing (Bloomsbury Publishing Plc), *Modern studies in European Law*, Vol. 79, 2017, p. 5. Available at: <https://bit.ly/3dii6ld>.

¹⁵⁰ Article 5(2) of the TEU.

¹⁵¹ Govaere I. (2016). *To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon*. Research Paper in Law 04/2016, page 2. Available at: <http://aei.pitt.edu/85832/>.

¹⁵² Article 5(2) of the Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012.

¹⁵³ Thies A. *Principles of EU External Action* Anne (University of Reading). In Wessel R., Larik J. *EU External Relations Law: Text, Cases and Materials*. Hart Publishing (Bloomsbury Publishing Plc), 2nd Edition, 2020, page 45. Available at: <https://bit.ly/2ZCUuts>.

¹⁵⁴ Article 13(2) of the TEU.

¹⁵⁵ Craig P. *The Lisbon Treaty: law, politics, and treaty reform*. Oxford University Press, 2010, p. 158. Available at: <https://bit.ly/2Xnd9Hh>.

¹⁵⁶ *Ibid.*

¹⁵⁷ Articles 2(1) of the TFEU.

to the customs union, monetary issues, competition matters that impact the internal market or common commercial policy.¹⁵⁸

Further, Article 2(2) of the TFEU defines *shared* competence, meaning that both the EU and the Member States empowered to legislate and to adopt legally binding acts in a specific area.¹⁵⁹ For example, such areas are internal policy, environment or consumer protection.¹⁶⁰ Yet, the powers of the Member States are limited to the extent that the EU has not previously exercised its competence.¹⁶¹

Finally, the *supporting* competence of the EU, established under Article 6 of the TFEU, entails that the EU may only “*carry out actions to support, coordinate or supplement the actions of the Member States*” in specific areas.¹⁶² By way of example such areas are tourism, culture, education or industry.¹⁶³

Thus, in light the above, all legal actions adopted by the respective EU body shall have a proper legal basis.¹⁶⁴ Otherwise, different parties may bring a claim to the Court of Justice of the European Union (the “**CJEU**”) against such an EU body asking to review the legality of the adopted action.¹⁶⁵ The claim may be brought with the help of Article 263 of TFEU, which sets the rules for action for annulment of an EU act.¹⁶⁶ According to Article 263(2) of TFEU, the case may be initiated, among others, on the ground of lack of competence. The lack of competence can take several forms: first, it may stem from the violation of the principle of conferral provided for under Article 5(2) of the TEU and delimiting powers between the EU and the Member States; second, it may arise in case one EU institution overstep the

¹⁵⁸ Articles 2(1), 3(1) of the TFEU.

¹⁵⁹ Article 2(2) of the TFEU.

¹⁶⁰ Article 4(2) of the TFEU.

¹⁶¹ Article 2(2) of the TFEU.

¹⁶² Article 6 of the TFEU.

¹⁶³ *Ibid.*

¹⁶⁴ Maňko R. (2019). Briefing: Action for annulment of an EU act. European Parliamentary Research Service, PE 642.282, November 2019, page 2. Available at: <https://bit.ly/2O9GeWY>.

¹⁶⁵ Adam C., Bauer M.W., Hartlapp M., Mathieu E. (2020) The Legal Background. In: Taking the EU to Court. Palgrave Studies in European Union Politics. Palgrave Macmillan, Cham, page 51. Available at: <https://bit.ly/3vbdImT>.

¹⁶⁶ *Ibid.*

competence of another.¹⁶⁷ If the CJEU establishes the violation, it declares the act at dispute to be void.¹⁶⁸

Having analysed how the powers within the EU are divided in general, it is the proper time to move forward to their division specifically within the digital sphere. The complexity of this issue relates to the fact that the DSM covers the great scale of matters, *e.g.*, data and consumer protection, copyrights, e-commerce, telecom, e-learning, e-government, taxes *etc.*

Upon analysis of the TFEU provisions, it is become apparent that the EU bodies do not have a specific catch-all digital provision to deal with all of the matters covered by the concept of the DSM, so that they have to rely on interconnected provisions.

Shared competence is considered as a default position under the TFEU.¹⁶⁹ Therefore, the EU heavily relies exactly on such competence to legislate in the DSM field.

In particular, the EU uses Article 4(2)(a) that provides for shared competence in the area of the internal market.¹⁷⁰ To support the mentioned article, the EU relies on Articles 26 and 27 of the TFEU requiring the EU in order to adopt measures that will establish and ensure the functioning of the internal market.¹⁷¹

The above once again confirms the idea expressed in the previous sub-chapter that building the DSM, in essence, means deepening and strengthening the internal market.

In this reference, further, Article 114 of the TFEU plays the crucial role, as the one of most important for creating the internal market.¹⁷² This Article confers powers to the EU to adopt measures for the approximation (or, in other words, harmonisation)

¹⁶⁷ *Ibid.*, page 55.

¹⁶⁸ Article 264(1) of the TFEU.

¹⁶⁹ Craig, P., & de Búrca, G. (2020). *EU Law: Text, Cases, and Materials UK Version*. Oxford University Press, page 138. Available at: <https://bit.ly/3eh7BGO>.

¹⁷⁰ Kerikmäe T. (ed.). *Regulating E-Technologies in the European Union: Normative Realities and Trends*. Springer, 2014, p. 8. Available at: <https://bit.ly/2LSEZpx>.

¹⁷¹ *Ibid.*

¹⁷² Barnard, C. (2013). *Competence Review: the internal market*. Published at Gov.UK, page 28. Available at: <https://bit.ly/3ajGw4h>.

of national laws covering establishment and functioning of the internal market.¹⁷³ To put it simply, where divergent rules or standards of the Member States impede the operation of, for instance, manufacturer of certain goods, by way of making it adapt the product to 27 different national standards before it can proceed to selling the product there, the EU is entitled, based on Article 114, to enact a single standard.¹⁷⁴

Though, Article 114 of the TFEU appears to be broad enough, certain limits exist for its application.¹⁷⁵ The one of such limits was explained by the CJEU in the so-called *Tobacco Advertising* case. In this case the CJEU ruled that “[...] a measure adopted on the basis of Article [114] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market”.¹⁷⁶

Further, the CJEU said that: “[t]o construe that [Article 114] as meaning that it vests in the [EU] legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article [5(1) TEU] that the powers of the [EU] are limited to those specifically conferred on it”.¹⁷⁷

Thus, the first limit implies that in order for the EU to legislate based on Article 114 of the TFEU there must be a clear relation between the adopted act and the elimination of impediments within the single market.

In addition, another limit that author believe to be important enough to stress is that use of Article 114 of the TFEU shall result in approximation of divergent national

¹⁷³ Article 114(1) of the TFEU. Mañko, R. (2015). *EU competence in private law: the Treaty framework for a European private law and challenges for coherence*. European Parliamentary Research Service, PE 545.711, January 2015, page 5. Available at: <https://bit.ly/3n0AY3R>.

¹⁷⁴ Barnard, C. (2013). *Competence Review: the internal market*. Published at Gov.UK, page 28. Available at: <https://bit.ly/3ajGw4h>.

¹⁷⁵ Mañko, R. (2015). *EU competence in private law: the Treaty framework for a European private law and challenges for coherence*. European Parliamentary Research Service, PE 545.711, January 2015, page 6. Available at: <https://bit.ly/3n0AY3R>.

¹⁷⁶ Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, case C-376/98, ECLI:EU:C:2000:544, para. 84. Available at: <https://bit.ly/3mUOlgy>.

¹⁷⁷ *Ibid.*, para 83.

rules and enactment of a single standard.¹⁷⁸ This is specifically confirmed by the CJEU in the *EP v. Council* case. In this case the CJEU explained that the adopted act, that leaves unchanged the different national laws already in force, cannot be treated as directed at harmonisation of the laws of the Member States, but rather pursue the aim of creation of new standard to the existing one.¹⁷⁹

Article 114 of the TFEU is used extensively within the DMS *acquis*. By way of illustration, it serves as a legal basis for directives regulating copyright and related rights in the Digital Single Market,¹⁸⁰ contracts for the supply of digital content and digital services,¹⁸¹ cybersecurity of network and information systems¹⁸² along with the regulation prohibiting geo-blocking and other discriminatory practices.¹⁸³

Moving further, as was described in previous chapter, the EU is much concerned about protection of consumer rights in the digital age. In particular, it is not always clear how the marketplaces form the list of results based on our searches, as well as who we should seek to sue when by online through the intermediate. In light of this background the author believes that the EU bodies may rely, in particular, on Article 169 of the TFEU to promote the consumer rights in the online dimension. In the meantime, the author concludes upon review of the DSM *acquis*, that this Article is not used much and even in the acts directly devoted to consumer rights the EU rather chooses to rely on Article 114.

¹⁷⁸ Barnard, C. (2013). Competence Review: the internal market. Published at Gov.UK, page 28. Available at: <https://bit.ly/3ajGw4h>.

¹⁷⁹ Judgment of the Court (Grand Chamber) of 2 May 2006, *European Parliament v Council of the European Union*, case C-436/03, ECLI:EU:C:2006:277, para. 44. Available at: <https://bit.ly/32shzPK>.

¹⁸⁰ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125. Available at: <https://bit.ly/3uZazGv>.

¹⁸¹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1–27. Available at: <https://bit.ly/3sCYBkt>.

¹⁸² 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, pp. 1–30. Available at: <https://bit.ly/3n01LND>.

¹⁸³ 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, pp. 1–15. Available at: <https://bit.ly/3svmvxg>.

Protection of personal data and privacy are not less important than consumer rights. The key act enacted in the context of the DSM is well-known GDPR.¹⁸⁴ Article 16 of the TFEU, where the right of everyone for the protection of personal data enshrined, is a legal basis for the GDPR.

The next important law in the sphere of data protection, that is anticipated to be adopted, is a so-called e-Privacy Regulation. This Regulation aims primarily to secure privacy in all electronic communications and will replace the current e-Privacy Directive, also known as the “*cookies law*”.¹⁸⁵ According to the text of the proposal for the e-Privacy Regulation, it is based on both Article 16 of the TFEU (right for data protection) and Article 114 of the TFEU (approximation of laws).¹⁸⁶ The reliance on Article 114 explained in a way that the Regulation concerns not only protection of personal data (*i.e.*, electronic communications of individuals) but also targets achieving the internal market for the electronic communication in general.¹⁸⁷

To conclude with the shared competence, Article 173 of the TFEU may serve as the basis for the EU competence.¹⁸⁸ This Article focuses on advancement of industry competitiveness and, in particular, requires the EU and Member States to take actions that will foster “*better exploitation of the industrial potential of policies of innovation, research and technological development*”.¹⁸⁹ Articles 179-180 of the TFEU that specifically provides for the research and technological development may be used.¹⁹⁰

¹⁸⁴ European Commission. 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, 6 May 2015, COM(2015) 192 final, page 13. Available at: <https://bit.ly/2XxWOzp>.

¹⁸⁵ KPMG (2020). Newsletter, The new ePrivacy regulation: How can your business prepare for the new ePR regulation? Available at: <https://bit.ly/3y1Z41a>.

¹⁸⁶ 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 - 2017/03 (COD), para. 2.1. Available at: <https://bit.ly/3duhO3q>.

¹⁸⁷ *Ibid.*

¹⁸⁸ Negreiro M., Madiaga T. (2019). Briefing: EU policies – Delivering for citizens: Digital transformation, European Parliamentary Research Service, PE 633.171, June 2019, p. 4. Available at: <https://bit.ly/2zxeH9D>.

¹⁸⁹ Article 173(1) of the TFEU.

¹⁹⁰ Negreiro M., Madiaga T. (2019). Briefing: EU policies – Delivering for citizens: Digital transformation, European Parliamentary Research Service, PE 633.171, June 2019, p. 4. Available at: <https://bit.ly/2zxeH9D>.

Regarding the *exclusive* competence, the number of categories covered by it are rather narrow.¹⁹¹ With that said, the author believes, that some of them may be used for building the DSM. They relate to the setting the competition rules important for the SEM (Articles 101 – 106 of the TFEU), along with creating common commercial policy (Articles 206 and 207 of the TFEU). Though per the research made by the author, it was not found out that the mentioned articles were used as a legal basis to legislate on the issues related to the DSM.

The listed provision gives the EU a wide margin for manoeuvre in the digital sphere. With that said, some directions remain purely within the Member States' competence and the EU may only support them on the way of digitalisation. Such a direction is, for instance, the e-government. The EU may contribute to the improvement of the e-government by means of increase of the “*the interoperability between the different national public services, as for example by the setting up a single digital gateway*”.¹⁹² Also, the EU itself may become the example for the Member States by means of digitalising of its own services.¹⁹³ For the rest, the EU shall respect national measures and refrain from setting the mandatory measures.

The same findings are also relevant to the e-skills,¹⁹⁴ employment and social protection¹⁹⁵ areas where the EU entitled to coordinate, but not legislate.

To sum up, the EU, as an organisation, enjoys only those powers that were attributed to it by the Member States. Hence, prior to undertaking any actions in the digital area, it should carefully consider the proper legal basis. At the same time, the TFEU

¹⁹¹ Craig, P., & de Búrca, G. (2020). *EU Law: Text, Cases, and Materials UK Version*. Oxford University Press, page 138. Available at: <https://bit.ly/3eh7BGO>.

¹⁹² De Streef, A. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament's Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2019, p. 19. Available at: <https://bit.ly/2AYI3v6>.

¹⁹³ *Ibid.*

¹⁹⁴ Negreiro M., Madiaga T. (2019). Briefing: EU policies – Delivering for citizens: Digital transformation, European Parliamentary Research Service, PE 633.171, June 2019, p. 4. Available at: <https://bit.ly/2zxeH9D>.

¹⁹⁵ Marcus S., Petropoulos G., Yeung T. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament's Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, January 2019, p. 14. Available at: <https://bit.ly/2zqA8ZN>.

provisions provide the EU with the great possibility to legislate, especially, in terms of building the internal market and harmonisation activity.

2.3 Legal instruments and techniques of integration

The EU exercises the competences described in a previous sub-chapter by way of enacting of a number of legally binding and non-binding instruments.¹⁹⁶ These instruments are listed in Article 288 of the TFEU and include regulations, directives, decisions, recommendations and opinions.¹⁹⁷

The unification and harmonisation of the substantive DSM rules are mostly achieved by means of the hard law instruments, namely, regulations and directives, and the soft law ones, namely, recommendations.¹⁹⁸ The hard law also includes EU decisions while the soft law encompasses EU opinions, but these instruments are used rarer in the digital sector.¹⁹⁹

EU regulations²⁰⁰ are the instruments of the general application (meaning that they apply in their entirety across the whole EU), as well as they are binding on (meaning the Member States are obliged to give effect to them) and directly applicable in all Member States (meaning that they do not require national implementation measures). As an example of the regulation in the digital sector relating to e-commerce can be used the Regulation on cross-border parcel delivery services of 2018²⁰¹ aimed to set out the unified rules on the cross-border parcel delivery services, to improve their quality, to make them safe and affordable with transparent tariffs and effective national regulatory oversight.

¹⁹⁶ Article 288 of the TFEU; Bauer, M. (2017). Right Direction, Wrong Territory: Why the EU's Digital Single Market Raises Wrong Expectations. American Enterprise Institute, March 2017, p. 17. Available at: <https://www.jstor.org/stable/resrep03276>.

¹⁹⁷ Article 288 of the TFEU.

¹⁹⁸ De Streef, A. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament's Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2019, p. 13. Available at: <https://bit.ly/2AYI3v6>.

¹⁹⁹ *Ibid.*

²⁰⁰ Craig P., De Búrca G. EU law: text, cases, and materials. Oxford University Press, 4th Edition, 2007, pp. 83-84.

²⁰¹ Recital 3 and Article 1 of the Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services, OJ L 112, 2.5.2018. Available at: <https://bit.ly/3c9TD6l>.

In contrast to the EU regulations, EU Directives²⁰² are not necessarily to be addressed to all the Member States; and they are binding to the extent of what result is to be achieved, while leaving the space for the Member States as to forms and methods of its achieving. Thus, the Member State needs to decide how to transport the directive, should it be addressed to it, into the national legal order.²⁰³ As an example of the directive in the digital sphere relating to the telecoms can be used the Directive establishing the European Electronic Communications Code of 2018. This Directive pursues the objectives to promote the take-up of very high-capacity networks, such as 5G networks, to ensure that these networks will be secure and accessible for citizens, to boost the efficient investment and innovation in new and enhanced infrastructures, to set the high level of end-user protection.²⁰⁴

Moving to the soft law instruments, in particular, to the recommendations, Article 288 of the TFEU specifically provides that they do not have binding force.²⁰⁵ Yet, without introducing the strict legal obligations, recommendations can be used as the means of clarification of issues or interpretation of the hard law provisions.²⁰⁶ Moreover, in *Grimaldi* case, the European Court of Justice took the view that national courts have to take into account the EU soft law instruments when deciding on the case.²⁰⁷ The recommendations are commonly named as “*communications*” or “*guidelines*”.²⁰⁸ As example of this soft law instrument can serve the EC Communication on European Cloud Initiative of 2016 created to “*move, share and re-use data seamlessly across global markets and borders*”²⁰⁹ as well as to “*help*

²⁰² Craig P., De Búrca G. EU law: text, cases, and materials. Oxford University Press, 4th Edition, 2007, p. 85.

²⁰³ *Ibid.*

²⁰⁴ Article 3 of the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (PE/52/2018/REV/1), OJ L 321, 17.12.2018. Available at: <https://bit.ly/2vxVxju>.

²⁰⁵ Article 288 of the TFEU.

²⁰⁶ Storey T., Pimor A. Unlocking EU law. Routledge, 5th edition, 2018, subchapter 3.2.2. Available at: <https://bit.ly/2WWMet3>.

²⁰⁷ *Ibid.*; Judgment of the Court (Second Chamber) of 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles, Case C-322/88, ECLI:EU:C:1989:646, para. 18. Available at: <https://bit.ly/3c0CVX9>.

²⁰⁸ De Streef. A. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament’s Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2019, p. 14. Available at: <https://bit.ly/2AYI3v6>.

²⁰⁹ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Cloud Initiative - Building

*science, industry and public authorities in Europe access world-class data infrastructures and cloud-based services”.*²¹⁰

Apart of the understanding of what legal instruments are used, it is necessary to determine how they work and ensure the free movement of goods, persons, services and capital. The two principal techniques are used to establish the internal market in general and the DSM in particular, namely positive and negative integration.²¹¹ Under the *negative* integration technique, the EU law prohibits national measures that hinder the free flow of the mentioned four freedoms and require the Member States to abolish them (this technique is reinforced through the well-known concept of mutual recognition).²¹² The *positive* integration technique instead of abolishing the restrictive measures requires Member States to adopt the common standards and rules that, in turn, leads to harmonisation of national legal orders.²¹³

It is the author’s understanding in the light of the findings outlined in the previous sub-chapter, that at the current state of play the positive integration plays a much more important role in reaching the well-developed DSM. This is substantiated by the fact the EU undertakes lots of harmonisation measures with reference to Article 114 of the TFEU in order to set up common standards among all the Member States.

To conclude, the EU bodies are empowered with a number of legal instruments that, having different characteristics, allows it to pursue the DSM goals.

2.4 Legislative landscape of the DSM

Living in the 21st century, people around the world are witnessing an impressive digital transformation. Pretty much spheres of our lives have already upgraded their

a competitive data and knowledge economy in Europe, COM(2016) 178 final, 19.4.2016, p. 2. Available at: <https://bit.ly/2TA39cx>.

²¹⁰ *Ibid.*, p. 13.

²¹¹ Craig P., De Búrca G. EU law: text, cases, and materials. Oxford University Press, 4th Edition, 2007, pp. 605-606. De Streef. A. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament’s Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2019, p. 15. Available at: <https://bit.ly/2AYI3y6>.

²¹² *Ibid.*

²¹³ *Ibid.*

names by the prefix “e” and turned into e-commerce, e-health, e-learning, e-government, e-business, e-justice, e-banking, *etc.* This upgrade resulted in a positive impact on our lives, by, in particular, opening access to the large scale of data and content, increasing our social networks, introducing new ways of illness treatment, making lifelong learning accessible, automation and optimisation of business processes, creating new jobs opportunities, diminishing such obstacle of trade as geographical distance, developing pro-consumer public services, making societies more inclusive.

Apart from the positive effect that the digital transformation brings in our lives, it also carries out threats to the societies’ stability and well-being. Notably, our personal data and privacy rights become unsecured given that plenty of online platforms, telecom operators, service and product providers day by day collect, process and store the data on its users and clients. Further, when making cross-border online purchases, a consumer cannot assure itself that the product it receives would conform to those we see on a website, or if something goes wrong with it, it will have effective means of redress. Finally, the web is full of illegal content, for instance, in the forms of hate speeches or illegally shared objects of intellectual property.

To address both positive and negative effects of digital transformation, for the last years the EU has developed the impressive legal framework covering numerous digital issues. The formed *acquis* can be conveniently divided into the six building parts: e-commerce; e-government; data protection; cybersecurity; consumer protection; online platforms.²¹⁴ The author of this theses wishes to focus in greater depth on the issues of (a) upgrading consumer protection in e-commerce industry; and (b) development of legal base for online platforms.

²¹⁴ Maciejewski M. et al. (2015). EU Mapping: Overview of Internal Market and Consumer Protection related legislation. Study for the European Parliament’s Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, March 2015, p. 19. Available at: <https://bit.ly/36sOptm>. De Streef, A. (2019). Contribution to Growth: European Digital Single Market. Delivering improved rights for European citizens and businesses, Study for the European Parliament’s Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2019, p. 12. Available at: <https://bit.ly/2AYI3v6>.

2.4.1 Modernising consumer protection in the e-commerce relations

The benefits, that e-commerce brings, cannot be underestimated. E-commerce is an “*enabler of trade*”.²¹⁵ By comprising the digital technologies and innovations, e-commerce removes such an obstacle of the trade as a geographical distance; gives the opportunity to the businesses to expand their activity to the new markets and to attract new customers while not spending the large amounts on investments and operational costs; expanding markets, in turn, boost robust competition and as such brings more choice for consumers, improves the quality of goods or services while lowering the price on them; it improves access of consumers to the product or service in general and to the information on the product or service in particular; it creates new job opportunities; finally, it makes the trade more inclusive for people with disabilities.²¹⁶

At the same time, it is of utmost importance to ensure that the consumer rights remain secure in this fast developed and grown e-commerce industry.

To balance the benefits of e-commerce with due protection of consumer rights, the EC as the political strategist²¹⁷ and the Parliament as the legislative arm²¹⁸ of the EU along with its co-legislator the Council proposed and adopted the number of acts in the e-commerce and consumer protection fields.

In particular, to facilitate the online commerce, in 2018, the so-called Geo-blocking Regulation was enacted. The aim of this Regulation is to prevent unjustified geo-blocking and other forms of discrimination based on the customers’ nationality, place of residence or place of establishment, that, to put it simply, results in restriction of online cross-border sales.²¹⁹ In Recitals to the Regulation, the “*geo-*

²¹⁵ Iacob, N., Simonelli, F. (2020). How to Fully Reap the Benefits of the Internal Market for E-Commerce?, Study for the European Parliament’s Committee on Internal Market and Consumer Protection prepared by Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2020, p. 11. Available at: <https://bit.ly/2TCcuAy>.

²¹⁶ *Ibid.*, pp. 11-16.

²¹⁷ European Commission. Directorate-General Communication: The European Union Explained – How the European Union Works – Your Guide to the EU Institutions. Publications Office of the European Union, 2012, p. 12.

²¹⁸ *Ibid.*, p. 9.

²¹⁹ Article 1(1) of the 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

blocking” is described as the practice carried out by the traders that results in (a) blocking or limiting access to the online interfaces of their websites or apps for cross-border customers; or (b) establishing different terms of purchasing goods (*e.g.*, in terms of price or choice) for cross-border customers in comparison to nationals.²²⁰ The reasons for such differentiating treatment may stem from the divergent legal orders, covering issues of consumer and environmental protection, labelling, taxation, delivery terms and others.²²¹ As such, some traders are unwilling to assume the associated risks and to engage foreign customers.²²²

The prohibition of discrimination on the basis of nationality is a general principle of the EU law provided under Article 18 of the TFEU and Article 21(2) of the Charter of Fundamental Rights.²²³

The Geo-blocking Regulation introduces several cases where there can be no justifications for the discrimination in terms on online cross-border transactions. The first situation targets directly sales, so that: (a) if a customer wishes to purchase certain goods from a trader operating in a foreign state, it has to be entitled to order such goods without direct delivery to its home state (*i.e.*, just like a local); or (b) if a certain service is supplied by electronic means (*e.g.*, cloud services), the foreign customer shall be entitled to purchase such a service on the same terms as a local one (*e.g.*, same pricing terms).²²⁴

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. Available at: <https://bit.ly/2A5YkAM>.

²²⁰ *Ibid.*, Recital 1.

²²¹ *Ibid.*, Recital 2.

²²² *Ibid.*

²²³ Article 18 of the TFEU. Article 21(2) of the Charter of Fundamental Rights. European Commission (2018), Questions and Answers on the Geo-Blocking Regulation in the context of ecommerce, page 10. Available at: <https://bit.ly/3sHOfrv>.

²²⁴ Article 4 of the 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. Available at: <https://bit.ly/2A5YkAM>. European Commission (2018), Questions and Answers on the Geo-Blocking Regulation in the context of ecommerce, pages 7 – 8. Available at: <https://bit.ly/3sHOfrv>.

The second situation relates to the websites' access. The traders are prohibited from blocking access to or re-routing to other websites the cross-border customers.²²⁵

Last but not least one provides that the traders are not permitted to deny the cross-border payments so far that such payments are made by bank wires/credit transfers and in the currency that such traders accept.²²⁶

The Regulation, consequently, requires abolishing the discriminating practices and provide foreign customers with access to the goods and services on equal footing with the local ones.

So that, the Geo-blocking Regulation calls for respecting the non-discrimination principle and consumer rights as well as aims to foster cross-border trading.

Also, to foster the flow of digital content and services, in 2019, the new Directive on Contracts for Supply of Digital Content and Digital Services was introduced. This Directive raises a two-sided problem. First, it noted that consumers lack confidence when buying cross-border and doing that online, in particular, due to the uncertainty with respect to their rights, contractual provisions, quality of digital content or services.²²⁷ Second, it stressed that businesses, while offering cross-border digital content or digital services, face extra costs in virtue of different national consumer contract rules and the subsequent need to adapt their contracts to those rules in each case differently.²²⁸

Under the Directive, the notion of digital content, in particular, includes computer programmes, mobile applications, video and audio files, e-books *etc.*²²⁹ The notion of the digital service comprises, for example, cloud computing environment and social media.²³⁰

²²⁵ *Ibid.*, Article 3. *Ibid.*, page 9.

²²⁶ *Ibid.*, Article 5. *Ibid.*, page 9.

²²⁷ Recital 5 of the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (PE/26/2019/REV/1), OJ L 136, 22.5.2019. Available at: <https://bit.ly/36wkPLo>.

²²⁸ *Ibid.*, recital 4.

²²⁹ *Ibid.*, recital 19.

²³⁰ *Ibid.*

The changes that this Directive brought, first, relates to the conformity (quality) requirements for digital content and digital service.²³¹ The Directive provides that the conformity of digital content or service shall be assessed through the two-fold test, including subjective and objective criteria.²³² The subjective assessment implies that certain content or service shall be checked on conformity with the description laid down in the contract itself, while the objective assessment requires to evaluate the content or service with commonly accepted or reasonably expected characteristics for such type of content or service accordingly.²³³ The objective part is of particular importance given that the contract itself may provide for very low standards, so that in order to secure the consumer's rights, the recourse to the market practice shall be made.²³⁴

What is further important – the Directive places the burden of proof on the trader, so that if the consumer claims that the content or service is non-conforming, it is for the trader to demonstrate otherwise.²³⁵

The second important deliverable of this Directive is that it provides for a number of remedies available for the consumer if it finds the content or service supplied to it to be faulty.²³⁶ They may be divided into primary and secondary ones.²³⁷ First of all, the consumer may request the trader to bring the digital content or service in

²³¹ Šajn, N. (2019). Briefing: Contracts for the supply of digital content and digital services. European Parliamentary Research Service, PE 635.601, March 2019, pages 2-3. Available at: <https://bit.ly/3tJ4WMw>.

²³² *Ibid.*

²³³ Articles 7 and 8 of the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (PE/26/2019/REV/1), OJ L 136, 22.5.2019. Available at: <https://bit.ly/36wkPLo>. Šajn, N. (2019). Briefing: Contracts for the supply of digital content and digital services. European Parliamentary Research Service, PE 635.601, March 2019, pages 2-3. Available at: <https://bit.ly/3tJ4WMw>.

²³⁴ Recital 45 of the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (PE/26/2019/REV/1), OJ L 136, 22.5.2019. Available at: <https://bit.ly/36wkPLo>.

²³⁵ Article 12 of the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (PE/26/2019/REV/1), OJ L 136, 22.5.2019. Available at: <https://bit.ly/36wkPLo>. Šajn, N. (2019). Briefing: Contracts for the supply of digital content and digital services. European Parliamentary Research Service, PE 635.601, March 2019, page 3. Available at: <https://bit.ly/3tJ4WMw>.

²³⁶ *Ibid.*, Article 14. *Ibid.*, page 3.

²³⁷ Šajn, N. (2019). Briefing: Contracts for the supply of digital content and digital services. European Parliamentary Research Service, PE 635.601, March 2019, page 3. Available at: <https://bit.ly/3tJ4WMw>.

conformity (to put it simply, to remedy the flaws).²³⁸ If this is impossible or the trader does not fulfil the request within a reasonable time, the consumer, as a second step, is entitled either to terminate the contract and get the money back, or live the faulty content or service itself, but claim the partial reduction of price.²³⁹

The key importance of this Directive, to the author's view, is that it specifically designed for the flow of non-tangible online goods in contrast to the typical consumer laws where the provisions are targeted at the tangible physical products.

Another important Regulation in the sphere of e-commerce was as well adopted in 2019 and covers online intermediation services. Online intermediation services mean, in particular, online e-commerce marketplaces, online software applications services, online social media services, online search engines.²⁴⁰ This Regulation primarily regulates the relationships between the providers of intermediation services and businesses that use these services for commercial transactions.²⁴¹ At the same time, it aims to ensure that the information provided on the online platforms will be transparent and fair, which is essential for consumer welfare.²⁴²

Further to the above, within the police framework “*A New Deal for Consumers*” that, essentially calls for adapting the consumer protection rules to the digital era,²⁴³ in 2019, the so-called Directive Modernizing Consumer Law was enacted.

In the words of Ms Anna-Maja Henriksson, Finnish minister of justice, “[c]onsumer protection is an essential part of the internal market. The [Directive Modernizing

²³⁸ Article 14 of the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (PE/26/2019/REV/1), OJ L 136, 22.5.2019. Available at: <https://bit.ly/36wkPLo>. Šajn, N. (2019). Briefing: Contracts for the supply of digital content and digital services. European Parliamentary Research Service, PE 635.601, March 2019, page 3. Available at: <https://bit.ly/3tJ4WMw>.

²³⁹ *Ibid.*

²⁴⁰ Recital 11 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

²⁴¹ Article 1 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3gn0igP>.

²⁴² *Ibid.*, recital 3.

²⁴³ European Commission (2018). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE: A New Deal for Consumers, COM/2018/0183 final, page 14. Available at: <https://bit.ly/3sRGt6e>.

*Consumer Law] guarantees higher standards of protection for EU consumers when they buy products or services online. It also provides for more robust measures against unfair or misleading trade practices across the EU”.*²⁴⁴

This Directive introduces the amendments to the following four acts: (a) Unfair Commercial Practices Directive (2005/29/EC), (b) Consumer Rights Directive (2011/83/EU), (c) Unfair Contract Terms Directive (93/13/EEC), and (d) Pricing Directive (98/6/EU).²⁴⁵

Directive Modernizing Consumer Law presents the following key developments:

- (a) **“Free services”**. Consumer Rights Directive became directly applicable to the digital services that are free of monetary charge but in exchange for the personal data.²⁴⁶ The obvious example is Facebook or Instagram platforms, which the users supposedly use for free, but, in the meantime, those platforms collect and trade our data.²⁴⁷ So that the consideration for services in this reference appears to be the personal data of the user.²⁴⁸ In effect, this means that such online platforms are considered as traders (similar to those that sell goods online) and have to comply with the mandatory consumer rules.²⁴⁹
- (b) **New types of prohibited commercial practices**. The Unfair Contract Terms Directive lists the number of specific cases when the commercial practices of

²⁴⁴ Council of the European Union (2019). Press release: EU consumers' protection to be reinforced. Citation of Ms Anna-Maja Henriksson, Finnish minister of justice. Available at: <https://bit.ly/32LmfR5>.

²⁴⁵ Đurović, Mateja. (2020). Adaptation of consumer law to the digital age: EU Directive 2019/2161 on modernisation and better enforcement of consumer law. Anali Pravnog fakulteta u Beogradu. 68. 62-79. 10.5937/AnaliPFB2002062D, page 64. Available at: <https://bit.ly/3xo4DJe>.

²⁴⁶ Article 4(2)(b) of the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (PE/83/2019/REV/1), OJ L 328, 18.12.2019, p. 7–28. Available at: <https://bit.ly/3vgF6id>. Van Quathem K., Oberschelp de Meneses A. (2019), EU adopts New Deal for Consumers, Updates on developments in data privacy and cybersecurity from Covington & Burling LLP. Available at: <https://bit.ly/3exkDji>.

²⁴⁷ Đurović, Mateja. (2020). Adaptation of consumer law to the digital age: EU Directive 2019/2161 on modernisation and better enforcement of consumer law. Anali Pravnog fakulteta u Beogradu. 68. 62-79. 10.5937/AnaliPFB2002062D, pages 67–68. Available at: <https://bit.ly/3xo4DJe>.

²⁴⁸ Van Quathem K., Oberschelp de Meneses A. (2019), EU adopts New Deal for Consumers, Updates on developments in data privacy and cybersecurity from Covington & Burling LLP. Available at: <https://bit.ly/3exkDji>.

²⁴⁹ Đurović, Mateja. (2020). Adaptation of consumer law to the digital age: EU Directive 2019/2161 on modernisation and better enforcement of consumer law. Anali Pravnog fakulteta u Beogradu. 68. 62-79. 10.5937/AnaliPFB2002062D, pages 67–68. Available at: <https://bit.ly/3xo4DJe>.

the traders by default considered as unfair and, thus, shall be banned.²⁵⁰ By way of example, such cases are when the trader provides false information of the product characteristics²⁵¹ or uses aggressive marketing tactics²⁵². Given the digitalisation of trade, new forms of unfair practices have developed and, as such, the laws shall be adapted to them. The Directive Modernizing Consumer Law adds non-disclosure / lack of transparency with respect to the paid-up product advertisement as well as not clear ranking of offers shown per a search query to the types of prohibited practices.²⁵³ Such a practice restricts the consumer's possibility to make a well-informed decision when purchasing some product.²⁵⁴ Thus, from now on, the marketplaces must clearly disclose to the user where the promotion of certain product was paid up by the trader as well as based on what variables the searched results were formed.²⁵⁵ Further, the Directive Modernizing Consumer Law prohibits the commercial practices of publishing false consumer reviews, misrepresentation of consumer reviews or stating that the particular review was drafted by a consumer that used or purchased the product without actually checking that.²⁵⁶ Inclusion of these practices to the unfair and prohibited ones

²⁵⁰ *Ibid.*, pages 68 – 69.

²⁵¹ Article 6 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, pp. 22–39. Available at: <https://bit.ly/3aD4mIA>.

²⁵² Article 8 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, pp. 22–39. Available at: <https://bit.ly/3aD4mIA>.

²⁵³ Article 13(7)(a) of the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (PE/83/2019/REV/1), OJ L 328, 18.12.2019, p. 7–28. Available at: <https://bit.ly/3vgF6jd>. Đurović, Mateja. (2020). Adaptation of consumer law to the digital age: EU Directive 2019/2161 on modernisation and better enforcement of consumer law. *Anali Pravnog fakulteta u Beogradu*. 68. 62-79. 10.5937/AnaliPFB2002062D, page 69. Available at: <https://bit.ly/3xo4DJe>.

²⁵⁴ *Ibid.*

²⁵⁵ Van Quathem K., Oberschelp de Meneses A. (2019), EU adopts New Deal for Consumers, Updates on developments in data privacy and cybersecurity from Covington & Burling LLP. Available at: <https://bit.ly/3exkDji>.

²⁵⁶ Article 13(7)(b) of the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (PE/83/2019/REV/1), OJ L 328, 18.12.2019, p. 7–28. Available at: <https://bit.ly/3vgF6jd>.

stems from the fact that in many cases a consumer do not really know whether the review left represents the honest opinion or was paid up to promote the product.²⁵⁷ With that said, consumers heavily rely on the reviews of other persons when make their commercial decisions. Prohibition of such practices allows to secure consumer confidence in the product and make the traders to respect consumer rights.

To sum up, e-commerce is essential for multiple business to offer and sell their goods or services online, expand into new markets and to reach more consumers. For the consumers, in turn, the e-commerce means greater choice as well as more simple and comfortable way of shopping. In the meantime, while enjoying benefits that e-commerce brings, it is important to ensure that the rights of consumers remain properly secured. Digitalisation of trade essentially brought new challenges for the traditional consumers laws by need to address the new forms discriminatory treatment (*e.g.*, geo-blocking based on consumer location), or the new unfair commercial practices (*e.g.*, non-transparent ranking of products per search request made on the marketplaces or publishing fake commercial reviews). In this light, the EU legislators are in ongoing search of ways of balancing the benefits of online commerce (and ensuring its further proper digitalisation and development) with proper protection of consumer rights.

2.4.2 Creating legal environment for online platform economy

Online platforms maintain a central place in the DSM. Online platform can be explained as an infrastructure or an intermediary where individuals and entities may find each other and engage in variety scale of activities²⁵⁸ (*e.g.*, exchange of information, sale and purchase of goods and services)²⁵⁹. Depending on a type of

²⁵⁷ Đurović, Mateja. (2020). Adaptation of consumer law to the digital age: EU Directive 2019/2161 on modernisation and better enforcement of consumer law. *Anali Pravnog fakulteta u Beogradu*. 68. 62-79. 10.5937/AnaliPFB2002062D, page 71. Available at: <https://bit.ly/3xo4DJc>.

²⁵⁸ Fijneman, R., Kuperus, K., & Pasma, J. (2018). Unlocking the value of the platform economy. In *Dutch Transformation Forum*. KPMG (No. V), page 2. Available at: <https://bit.ly/32M9iqf>.

²⁵⁹ European Commission (2016). Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM/2016/0288 final, page 15. Available at: <https://bit.ly/3dRCTF0>.

online platform, such platform may bring together multiple users that seek to communicate with each other or reach a certain content or service, consumers and traders, content publishers and advertisers.²⁶⁰

The key features of online platforms are that (a) their operation is based on collecting, processing, and editing great amounts of data; (b) they reach the users by way of ICTs; and (c) their value increases in direct proportion to the engaged users (*i.e.*, the network effect).²⁶¹ Other important features are that (a) they serve as a mediator between providers and users of content/services; and (b) their aim is to facilitate the exchange of data.²⁶²

The types of online platforms in broad terms may be divided into the following: (a) search engines – infrastructures designed for searching for an information within the Internet (*e.g.*, Google Search or Safari); (b) social media platforms – infrastructures designed for communication, networking, publishing and consuming online content (*e.g.*, Facebook or Instagram); (c) content aggregating platforms – infrastructures designed for collecting information from multiple sources and sharing it with the users upon processing and editing (*e.g.*, Google News); (d) e-commerce platforms – infrastructures designed for connecting consumers and traders (*e.g.*, Amazon or eBay).²⁶³

The world market is in effect monopolised by several large IT entities (also known as “Big Tech”).²⁶⁴ It is well-known fact that Amazon is a leading e-commerce

²⁶⁰ Australian Competition and Consumer Commission (2019), Digital Platforms Inquiry: Final Report, ISBN 978 1 920702 05 2, page 45. Available at: <https://bit.ly/3uSYjrD>.

²⁶¹ European Commission (2016). Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288 final, pages 2 – 3. Available at: <https://bit.ly/3dRCTF0>.

²⁶² Batura, O., van Gorp, N., & Larouche, P. (2015). Online Platforms and the EU Digital Single Market. A response to the call for evidence by the house of lord’s internal market sub-committee. E-Economics, 23-11-2015, page 2. Available at: <https://bit.ly/3et7NCR>.

²⁶³ *Ibid.*

²⁶⁴ Narula, T. (2020). The EU’s Vision for a Digital Single Market: Regulating the Platform Economy. Published at Medium. Available at: <https://bit.ly/32Jgtj0>.

platform, Google is a go-to search engine, while Facebook is dominant social media platform.²⁶⁵

Looking closer, for instance, at the business models of Google and Facebook, it is found out that “[o]n one side, they offer services to consumers for a zero monetary price in order to obtain consumers’ attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers”.²⁶⁶

It is further said that “[t]he ubiquity of these platforms and their presence in related markets enable them to build particularly valuable data sets. This enables them to offer highly targeted or personalised advertising opportunities to advertisers”.²⁶⁷

So that it becomes apparent that the main driver of the online platforms is data, which they heavily use to make customised advertisements or for processing with further preparation of analytics that can be sold to other actors.

The legal status of online platforms in the EU rather remains unclear. One of the cases where the CJEU has attempted to clarify the status of famous online platform and assess the nature of services provided is *Uber Spain* case.²⁶⁸ The court proceedings were initiated per the claim of *Asociación Profesional Elite Taxi* against Uber Systems Spain SL for the alleged breach of Spanish antitrust law.²⁶⁹ Elite Taxi is a professional taxi drivers’ association in Barcelona (Spain).²⁷⁰ Uber is online platform, serving for connecting, among others, non-professional drivers that have their own automobiles with individuals wishing to make a trip within a city.²⁷¹

²⁶⁵ *Ibid.*

²⁶⁶ Australian Competition and Consumer Commission (2019), Digital Platforms Inquiry: Final Report, ISBN 978 1 920702 05 2, page 7. Available at: <https://bit.ly/3uSYjrD>.

²⁶⁷ *Ibid.*

²⁶⁸ Bodiřoga-Vukobrat, N., Pořćić, A., & Martinović, A. (2018). ‘Old Economy’ Restrictions in the Digital Market for Services. *InterEULawEast: journal for the international and european law, economics and market integrations*, 5(2), page 176. Available at: <https://bit.ly/3xmritg>.

²⁶⁹ *Ibid.*

²⁷⁰ Judgment of the Court (Grand Chamber) of 20 December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, Case C-434/15, ECLI:EU:C:2017:981, para. 2. Available at: <https://bit.ly/3u63lRb>.

²⁷¹ *Ibid.*

Meanwhile, neither Uber nor the non-professional drivers had licenses or other regulatory approvals required by the national antitrust law.²⁷²

The main question of the case is whether the services offered by Uber with support of non-professional drivers (for the sake of clarity, it is only one option among Uber's services, Uber as well engages the drivers holding special licenses) should be classified as “*service in the field of transport*” or “*an information society service*”.²⁷³

In this reference, the CJEU first noted that “*an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle*”²⁷⁴ is rather different from “*a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle*”²⁷⁵ and, thus, falls under the umbrella of information services.

At the same time, the CJEU further ruled that the services at dispute are more than mere intermediation services.²⁷⁶ This conclusion was substantiated by two main points: (a) without Uber non-professional drivers will not reach clients and, thus, no transport services will be (to put it simply, connecting service of Uber is indispensably linked to the transport service); and (b) Uber exercises significant control over the terms under which the services are provided (in particular, pricing terms).²⁷⁷

²⁷² *Ibid.*, para. 14.

²⁷³ Torbol P., Carloni F., Campi G., Di Mario A., Aparicio Hill S., Guardans I. (K&L Gates LLP) (2018). European Regulatory/UK Regulatory Newsletter: Uber may face stricter regulation by Member States after EU's highest court rules it is a transport service - Judgment in Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*. Published at Lexology. Available at: <https://bit.ly/3tTrhqP>.

²⁷⁴ Judgment of the Court (Grand Chamber) of 20 December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, Case C-434/15, ECLI:EU:C:2017:981, para. 35. Available at: <https://bit.ly/3u63IRb>.

²⁷⁵ *Ibid.*, para. 35.

²⁷⁶ *Ibid.*, para. 37.

²⁷⁷ Bodiřoga-Vukobrat, N., Pořćić, A., & Martinović, A. (2018). ‘Old Economy’ Restrictions in the Digital Market for Services. *InterEULawEast: journal for the international and european law, economics and market integrations*, 5(2), page 178. Available at: <https://bit.ly/3xmritg>.

Why this classification is at all important? Transport services do not fall under the scope of the EU rules of the freedom to provide services, and, thus, subject to the national laws of each Member State in the field of transport policy separately.²⁷⁸

The bad consequence of that for Uber is that national requirement for the transport services varies greatly from state to state (which, in turn, means that Uber must adapt its business model for each of the 27 Member States where it operates), as well national rules may be much stricter than of the EU.

The ruling of the CJEU in Uber Spain case was much criticised by the public given that it does not account innovative business nature of the newly developed online platform, threatens an application of harmonised EU rules to online platforms (which, in turn, may result in exposure of the companies to unwanted restrictions), as well as limits the expansion and development of new tech companies across the EU.²⁷⁹

Another important case considering the status of online platform is *Airbnb* case. The court proceedings were initiated per the claim of Association for professional tourism and accommodation (AHTOP) against Airbnb Ireland UC for the unfair practices of management of buildings (to put it simply, activity of real estate agent) without holding professional license required by French law.²⁸⁰

Airbnb is online platform serving for connection, on the one side, of professionals or private persons having the apartments for rent (also known as “hosts”) and, on the other side, persons searching for such apartments to rent.²⁸¹ Airbnb provides a searcher with a list of available rental options based on the criteria set by such searcher (*e.g.*, location, number of days, price *etc.*).²⁸²

²⁷⁸ *Ibid.*

²⁷⁹ Computer & Communications Industry Association (2017). Press Release: European High Court Issues Ruling On Uber Case Expected To Impact Digital Single Market. Published at Euractiv. Available at: <https://bit.ly/3sXmuTM>.

²⁸⁰ Judgment of the Court (Grand Chamber) of 19 December 2019, Criminal proceedings against X, Case C-390/18, ECLI:EU:C:2019:1112, para. 22. Available at: <https://bit.ly/3tVJ6Wa>.

²⁸¹ *Ibid.*, para. 18.

²⁸² *Ibid.*, para. 20.

Apart from the above intermediation service, Airbnb also offers per extra fee a number of additional services like photography of accommodation service, liability insurance services, tools of estimation of rental price and others.²⁸³

The main question in this case is essentially the same as in *Uber Spain* case discussed above – whether the intermediation service provided by Airbnb (*i.e.*, connecting hosts with searched for apartment to rent) constitutes “*an information society service*” or it is something else.²⁸⁴ The contemplated question is that whether this intermediation service is actually severable from the whole accommodation rental service or not.²⁸⁵ Why this is important? If it is severable, the Airbnb will benefit of harmonised EU order covering freedom to provide services. If not, it will be subject to strict national rules setting different requirement for real estate agent’s activities, in particular, requirement to obtain special licenses.²⁸⁶

The CJEU found out that Airbnb services constitute “*an information society service*”. First, the CJEU assessed the formal compliance of Airbnb services with the notion of “*an information society service*”, established under Article 1(1)(b) of the Single market transparency directive (Directive 2015/1535), *i.e.*, “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”.²⁸⁷

So that, from the formal point of view, the CJEU reached the conclusions that (a) Airbnb services are provided for remuneration (the searchers for accommodation pay a fee to the platform if they decide to rent something),²⁸⁸ (b) Airbnb services are provided electronically and at a distance (the host and searchers reach each other via websites or special applications);²⁸⁹ and (c) Airbnb services are provided at

²⁸³ *Ibid.*, para. 19.

²⁸⁴ Vannini, C., Triton, M. (2020). FOR THE CJEU, AIRBNB IS ABOVE ALL AN INTERMEDIATION SERVICE BETWEEN GUESTS AND HOSTS. Published at CMS Francis Lefebvre. Available at: <https://bit.ly/3sUYgJK>.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ Article 1(1)(b) of the 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, OJ L 241, 17.9.2015, p. 1–15. Available at: <https://bit.ly/3sVvvEW>.

²⁸⁸ Judgment of the Court (Grand Chamber) of 19 December 2019, Criminal proceedings against X, Case C-390/18, ECLI:EU:C:2019:1112, para. 46. Available at: <https://bit.ly/3tVJ6Wa>.

²⁸⁹ *Ibid.*, para. 47.

individual request (Airbnb forms an individual list of results per each search query).²⁹⁰ Thus, Airbnb services satisfies cumulative criteria of Single market transparency directive for an information society service.

Second, the CJEU analysed Airbnb services via prior conclusion reached in *Uber Spain* case. The main argument of AHTOP at the case at hand was that “*that the service provided by Airbnb Ireland forms an integral part of an overall service, whose main component is the provision of an accommodation service. To that end, it submits that Airbnb Ireland does not just connect two parties through its electronic platform of the same name, but also offers additional services which are characteristic of an intermediary activity in property transactions*”.²⁹¹

The CJEU disagreed with AHTOP advancing the following main arguments: (a) Airbnb creates infrastructure facilitating conclusion of contracts between hosts and searchers for accommodation by means of forming structured lists of available accommodation. Formation of such lists is a primary feature of Airbnb online platform;²⁹² (b) this Airbnb service may be separated from the main or underlying rental accommodation service given that hosts and searchers have a number of other means to reach each other (*e.g.*, with a help of estate agents or other specialised property websites);²⁹³ and (c) Airbnb does not exercise significant control over the terms under which rental accommodation service are provided, in particular, in terms of pricing.²⁹⁴ The tool of estimation of rental price (that is available at Airbnb platform) is for the hosts’ convenience only and the pricing decision rest only with a host itself.²⁹⁵

The CJEU ruling in *Airbnb* case was as well much criticised in the public but now for the lack of coherence with the previous findings in the analogous cases (*e.g.*, *Uber Spain* case) and for cherry picking of case facts in order to come up with the

²⁹⁰ *Ibid.*, para. 48.

²⁹¹ *Ibid.*, para. 51.

²⁹² *Ibid.*, para. 53.

²⁹³ *Ibid.*, para. 55.

²⁹⁴ *Ibid.*, para. 56.

²⁹⁵ *Ibid.*

conclusion that Airbnb is an information society service.²⁹⁶ Essentially, the arguments advanced by the CJEU with respect to the Airbnb services is based on the same assumptions as those was in the Uber case, while reaching exactly the opposite conclusions.²⁹⁷

The above case law evidences the problem of lack of proper regulation of online platforms and the complete understanding what, in fact, they are actually they are. At the same time, online platforms are becoming an indispensable part of people and businesses day to day activity and shapes the way of how they interact. The terms developed to name online platforms are self-explainable in the sense how much control and power they maintain over us at the current days: unavoidable trading partners, gatekeepers, market players holding strategic market status, market players of paramount significance for competition across markets and others.²⁹⁸

One of the problems the EU continuously works on to address is differentiated treatment, meaning the situations where a platform treats differently business users in similar conditions.²⁹⁹

The differentiation techniques commonly employed by the platforms may be divided into the following: (a) pure self-favouring, meaning the cases where the platform treats own or affiliated products more favourably than the products of third parties; (b) secondary differentiation, meaning the cases when the platform treats differently third-party products circulating in the same market but where the platform do not operates itself; and (c) hybrid differentiation meaning the cases where the platform treats differently third-party products in order to favour its own or affiliated ones.³⁰⁰

²⁹⁶ Chapuis-Doppler, A., & Delhomme, V. (2020). Regulating Composite Platform Economy Services: The State-of-play After Airbnb Ireland. *European Papers-A Journal on Law and Integration*, 2020(1), page 422. Available at: <https://bit.ly/32Ov1O7>.

²⁹⁷ Vannini, C., Triton, M. (2020). FOR THE CJEU, AIRBNB IS ABOVE ALL AN INTERMEDIATION SERVICE BETWEEN GUESTS AND HOSTS. Published at CMS Francis Lefebvre. Available at: <https://bit.ly/3sUYgJK>.

²⁹⁸ Busch, C., Graef, I., Hofmann, J., & Gawer, A. (2021). Uncovering blindspots in the policy debate on platform power, Final Report of Expert Group for the EU Observatory on the Online Platform Economy, page 4. Available at: <https://bit.ly/3dZJnBC>.

²⁹⁹ Graef, I., Jeon, D. S., Rieder, B., van Hoboken, J., & Husovec, M. (2021). Work stream on differentiated treatment, Final Report of Expert Group for the EU Observatory on the Online Platform Economy, page 3. Available at: <https://bit.ly/3dZJnBC>.

³⁰⁰ *Ibid.*, page 18.

One of the most famous examples of self-favouring practise is *Google* case. In 2017, the Commission fined Google, a popular search engine, for EUR2.42 billion given the violation of the EU competition law.³⁰¹ Google has abused the market dominance by persistently advantaging its own products as opposed to the third-party ones.³⁰² In particular, Google has provided the top places within search results to own products, while the products of similar nature and purpose designed by the “rivals” due to specifically-implemented algorithm could appear only on the fourth page of search results or even further down.³⁰³ As a consequence, the Google’s products were more visible for consumers and, thus, more purchased with comparison to “rivals”.³⁰⁴

To prevent the above unpleasant consequences, the EU has been working on developing of new sets of rules specifically targeting online platforms. In particular, in 2019, the EU has adopted Regulation on promotion of fairness and transparency while using online platforms (also known as “**P2B Regulation**” (*platform to business*)).³⁰⁵ The non-official name of the Regulation is self-explainable in the sense of what subjects it covers: on the one side, it applies to online intermediation services (*i.e.*, platforms like Amazon or Facebook) and online search engines (*i.e.*, Google) and, on the other side, businesses established within the EU and offering their goods and services via such platforms or engines.³⁰⁶

The aim of the P2B Regulation lays down within the problem it tackles: it is said that in light of the increased and unavoidable dependence on the platforms, the platforms, feeling their power, behave in a way that is unfair and harmful regarding both businesses and consumers’ interests, as well as they employ practices highly

³⁰¹ European Commission (2017). Press Release: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service. Available at: <https://bit.ly/3vsEEvi>.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³⁰⁶ *Ibid.*, Article 1(2). Jan Aerts, P., Van Lierde, C. (2020). Insights: The P2B Regulation - New EU Rules for Platform Providers. Published at Dentons’ website. Available at: <https://bit.ly/3xv0rXu>.

opposite to “*good commercial conduct, [...] good faith and fair dealing*”.³⁰⁷ Thus, the P2B Regulation seeks to promote transparency and fairness in relations of platforms/engines with businesses, as well as to establish effective remedy mechanisms if something goes wrong.³⁰⁸

To reach the above aim, the P2B Regulation requires online platforms and search engines to follow, among others, such rules:³⁰⁹ (a) to adopt clear and precise terms and conditions, meaning that they have to be drafted in plain language, be easily available for the user *etc.*;³¹⁰ (b) to provide criteria that are used to form the rankings of search results;³¹¹ and (c) to disclose any cases of differentiated treatment employed towards own or affiliated products and third-party products.³¹²

Further to the above, in 2020, the Commission has presented a new piece of legislation – Digital Markets Act.³¹³ The Act is focused on world’s “*core platform services*”, which includes (a) online intermediation services (*e.g.*, marketplaces or applications where we can order, for instance, transport services); (b) search engines; (c) social media platforms; (d) content (*e.g.*, video) sharing platforms; and (e) advertising networks, *etc.*³¹⁴

Again, it should be stressed that the Act covers only *core* platforms. For the purposes of the Act, they are named as gatekeepers and to fall under this term they have to

³⁰⁷ Recital 2 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³⁰⁸ Article 1 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³⁰⁹ Jan Aerts, P., Van Lierde, C. (2020). Insights: The P2B Regulation - New EU Rules for Platform Providers. Published at Dentons’ website. Available at: <https://bit.ly/3xy0rXu>.

³¹⁰ Article 3 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³¹¹ Article 5 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³¹² Article 7 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (PE/56/2019/REV/1), OJ L 186, 11.7.2019. Available at: <https://bit.ly/3c0sDWY>.

³¹³ Allen & Overy (2020). Publications: The Digital Services Act package is here. Available at: <https://bit.ly/3vx2Yiy>.

³¹⁴ Explanatory Memorandum to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, page 2. Available at: <https://bit.ly/3vtDIPi>.

meet such criteria: (a) it has a considerable effect on the internal market; (b) it operates in several EU Member States; (c) it is an important gateway for businesses to reach the end-user, meaning it links the certain business and certain end-user of that business' products; and (d) it enjoys or is near to enjoy a firm and durable position at the market.³¹⁵

Though the Act does not name precisely what actually the platforms it seeks to cover, given the above criteria it is apparent that such platforms as Google, Facebook, Amazon or Apple are definitely within its scope.³¹⁶

Given the crucial role of such core online platforms for the society and economy, the EU by this Act puts extra obligations on the platforms to promote “*contestable and fair digital sector*”.³¹⁷

By way of example, the Act requires the gatekeepers: (a) to refrain from treating more favourably in ranking own products compared to similar products of third party; (b) to refrain from combining personal data received via its own services or third-party services without the prior consent of the data subject pursuant to the GDPR; or (c) allow businesses to enter into contracts with customers outside the platform.³¹⁸

To conclude, online platforms become crucial for proper functioning of the societies and economies among the world. In essence, online platform is an environment where multiple users may reach each other and engage in different activities from communication to doing business. Given such connectivity and intermediary functions of the online platforms, in the new COVID-19 reality, they, actually,

³¹⁵ Article 3 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final. Available at: <https://bit.ly/3vtDtPi>. Allen & Overy (2020). Publications: The Digital Services Act package is here. Available at: <https://bit.ly/3vx2Yiv>.

³¹⁶ ANDERSON, J., MARINIELLO, M. (2021). Blog Post: Regulating big tech: the Digital Markets Act. Published at Bruegel. Available at: <https://bit.ly/330nMmi>.

³¹⁷ Recital 79 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final. Available at: <https://bit.ly/3vtDtPi>.

³¹⁸ Articles 5 and 6 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final. Available at: <https://bit.ly/3vtDtPi>.

become the instruments and prerequisites for our reaching the outside world. They ensure our distance learning and remote work, help to maintain the communication and meetings, do shopping swiftly and conveniently, order number of services *etc.*

Given such continually growing dependency over the platforms, the EU authorities are now much concerned not only of the positive effect that the platforms bring, but also of the negative side of sometimes unavoidable interactions with platforms. At the same time, there is no unified practice of how the intermediary services provided by the platforms should be qualified (please see *Uber Spain* case and *Airbnb* case above). This issue is of particular importance in order to determine the proper legal regime that will apply to the activities of the platforms. While this is not always clear how the platforms should be treated within the existing legal framework, the EU actively works on the new sets of rules specifically covering online platforms. The need for new rules is again a result of increasing dependence on platforms and this indispensability in the number of spheres. The platforms, feeling this power, become to employ certain unfair practices (*e.g.*, self-favouring of own products as in case of Google discussed above), thus, severely impacting fair competition within the EU market as well as breaching the consumer rights. Adoption of new rules will contribute to more transparent and fair digital space.

* * *

According to the notion of the DSM, it stands on the following principles: (a) promotion of the key four fundamental freedoms of the internal market (the free movement of goods, persons, services and capital), (b) respect for such fundamental rights as the right to privacy, the right to data protection along with the right to non-discrimination; and (c) compliance with the rules of fair competition. With that said, given the *digital* nature of that single market the listed principles are pursued in the non-physical online dimension.

One of the main questions of this chapter was to determine how and on what basis the EU actually develops the DSM and pursues the above principles in the digital

sphere? It does so largely by means of undertaking multiple legislative measures in the different sectors. But given the nature of the EU as a supranational organisation, the EU may only act within the bounds set out to it by the Member States. Hence, prior to undertaking any legislative measures, it should carefully consider the proper legal basis for the respective measure.

This chapter illustrates that the EU primarily relies on the *shared* competence with the Member States to build up the DSM. Upon conducted analysis of the TFEU provisions, it became apparent that the EU does not have a specific catch-all digital provision to deal with all of the matters covered by the concept of the DSM, so that it has to search for the interconnected provisions. In this respect, Article 114 of the TFEU, that is considered as one of the most important to developing the internal market, is often used by the EU to adopt specific measures in the digital sector. Article 114 of the TFEU pursues the approximation objective, meaning that the EU is authorised to design and enact single and unified rules binding for all Member States with the aim to improve the functioning of the internal market.

Based on Article 114 of the TFEU, the EU has already developed, *inter alia*, the wide set of rules for enhancing the protection of consumer rights in response to the new challenges brought by the digital era (*e.g.*, new forms of discriminatory treatment, like geo-blocking based on consumer location, or the new types of unfair commercial practices, like a non-transparent rankings of products per search requests made on the marketplaces or publishing fake commercial reviews).

On the same legal basis as the mentioned, the EU, as well, is creating the specific regulation for the online platforms, as the key actors in the DSM. Such a regulation primarily covers the issues of increasing fairness and transparency in the relations of the online platforms and businesses and of securing the undistorted competition with a view that some of the online platforms already maintain a significant impact on the common market.

3. PROSPECTS OF UKRAINE’S INTEGRATION INTO THE DSM

Integration into the EU is one of the main topics on political agenda of Ukraine already for many of years.³¹⁹ In recent years, both Ukrainian and EU representatives have expressed their interest, among others, in developing deeper and closer relations in the digital sphere. In particular, during the 21st Ukraine-EU summit, held on 8 July 2019, the EU welcomed the aspiration of Ukraine to approximate its legislation with the EU *acquis* in the area of the digital economy as well as acknowledged the overall progress made in harmonising technical regulations and standards with the EU ones.³²⁰ Further, during the 22nd Ukraine-EU summit, held on 6 October 2020, the EU committed to further support Ukraine in “*approximation with and gradual implementation of the EU Digital Single Market acquis and institutional capacities*”.³²¹

Indeed, with a change of President of Ukraine in 2019 and an upgrade of a system of central executive bodies, issue of digitalisation became a top priority of Ukrainian government. Established in 2019, the Ministry of Digital Transformation of Ukraine, being the main body called for the formation and implementation of Ukrainian digital public policy,³²² has committed to transform Ukraine into the “*digital state*”, “*state in the smartphone*” or “*paperless state*”. In particular, in February 2021, during the presentation of new 94 digital transformation projects, Mr Mykhailo Fedorov, Deputy Prime Minister - Minister of Digital Transformation, declared that: “*we are creating a comfortable state without corruption and queues. The state where the authorities make qualitative decisions. [...] Every Ukrainian will experience the results of digitalisation [...]. And Ukraine will enter the TOP-10 digital countries in*

³¹⁹ Iavorskyi, P., Taran, S. and Shepotylo, O. (2021). Ukraine’s Integration into the EU’s Digital Single Market, page 2. Available at: <https://bit.ly/3350N9P>.

³²⁰ Council of the European Union (2019). Statements and Remarks: Advancing mutual commitment: joint statement following the 21st EU-Ukraine summit. Available at: <https://bit.ly/3e61gvO>.

³²¹ Council of the European Union (2020). Press release: Joint statement following the 22nd EU-Ukraine Summit, 6 October 2020. Available at: <https://bit.ly/3361LCJ>.

³²² Paragraph 1 of the Regulation on the Ministry of Digital Transformation of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 856 as of 18 September 2019. Available at: <https://bit.ly/3nDCMiG>.

the world".³²³ Further, according to Mr Volodymyr Zelenskyi, the President of Ukraine, "2021 will be marked as the beginning of [Ukraine's] entry into the "paperless" mode. No state institution will be able to demand certificates, extracts or other papers from Ukrainians in order to provide public services. Our goal is 100% public services will be provided online".³²⁴

With a view of such ambitious aspirations of Ukraine in the digital sphere, the author suggests analysing (a) how the legal instruments between the EU and Ukraine address the digital-related issues; (b) what advantages the cooperation with the EU in the digital sphere may bring to Ukraine.

3.1 Digital-related provisions in the EU-Ukraine Association Agreement

Bringing Ukraine to the digital age, essentially, is a task arising out from the commitments undertaken under the Association Agreement, concluded by the European Union, its Member States, and Ukraine (the "**EU-Ukraine Association Agreement**" or "**Association Agreement**").

The EU-Ukraine Association Agreement is considered as "*one of the most ambitious and voluminous*" agreement that has ever been entered by the EU with a third country.³²⁵ This is a comprehensive framework agreement, counting around 2,140 pages and covering a wide scope of areas, including trade, foreign and security policy, justice, energy³²⁶ along with digital-related issues (as described below) and others.

Prior to moving directly to the topic at hand, it is necessary to point out several key features of the EU-Ukraine Association Agreement. First, the Association

³²³ Fedorov, M. (2021). Statement of Mr Mykhailo Fedorov, Deputy Prime Minister - Minister of Digital Transformation, made during the presentation of new 94 digital transformation projects on 18 February 2021. Available at: <https://bit.ly/3xGq8ov>.

³²⁴ Zelenskyi, V. (2020). Address of the President of Ukraine Volodymyr Zelenskyi to the Verkhovna Rada of Ukraine on the Internal and External Situation of Ukraine, made during the session of the Verkhovna Rada of Ukraine on 20 October 2020. Available at: <https://bit.ly/3aU1uY6>.

³²⁵ Petrov, R., & Van Elsuwege, P. (2016). What does the Association Agreement mean for Ukraine, the EU and its Member States? A Legal appraisal. *A Legal Appraisal (March 01, 2016). Het eerste raadgevend referendum. Het EU-Oekraïne Associatieakkoord (Montesquieu Institute, Den Haag)*, page 74. Available at: <https://bit.ly/3xHefaf>.

³²⁶ *Ibid.*

Agreement pursues the strict conditionality approach, meaning that Ukraine will benefit from the political association and economic integration with the EU as long as and only if it complies with the provisions of the Association Agreement, shares the common values with the EU and converges in political, economic and legal issues with the EU.³²⁷

Second, the Association Agreement is not about a membership of Ukraine.³²⁸ Indeed, the conclusion of the Association Agreement is a significant development in terms of the EU-Ukraine relations, but it does not establish any direct link with the accession perspectives.³²⁹ Instead, within the Agreement the EU carefully refrains from giving any commitments regarding possible enlargement.³³⁰ In essence, the aim of the Association Agreement is to set up the “*close and lasting relationship*” / “*increase dialogue*” / “*enhance cooperation*” between the EU and Ukraine, as well as to push Ukraine on the track of reforms and approximation of national legislation.³³¹ But, for the sake of completeness, it as well does not discard the possibility of Ukraine one day joining the EU.³³²

Though not offering the membership, in exchange of obliging Ukraine to implement the EU *acquis*, the EU may allow Ukraine to join (integrate into) the particular sectors of the whole EU’s internal market.³³³ Given the nature of such partial integration, within the literature it is commonly named as a *sector* integration.³³⁴ In

³²⁷ Van der Loo, G., Van Elsuwege, P., & Petrov, R. (2014). The EU-Ukraine Association Agreement: assessment of an innovative legal instrument. *EUI Department of Law Research Paper*, (2014/09), page 3. Available at: <https://bit.ly/2RkitOs>. Recitals to the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3–2137. Available at: <https://bit.ly/3udtLiQ>.

³²⁸ Petrov, R., & Van Elsuwege, P. (2016). What does the Association Agreement mean for Ukraine, the EU and its Member States? A Legal appraisal. *A Legal Appraisal (March 01, 2016). Het eerste raadgevend referendum. Het EU-Oekraïne Associatieakkoord (Montesquieu Institute, Den Haag)*, page 75. Available at: <https://bit.ly/3xHgfaf>.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ Recitals to the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3–2137 (the “**Association Agreement**”). Available at: <https://bit.ly/3udtLiQ>.

³³² Petrov, R., & Van Elsuwege, P. (2016). What does the Association Agreement mean for Ukraine, the EU and its Member States? A Legal appraisal. *A Legal Appraisal (March 01, 2016). Het eerste raadgevend referendum. Het EU-Oekraïne Associatieakkoord (Montesquieu Institute, Den Haag)*, page 75. Available at: <https://bit.ly/3xHgfaf>.

³³³ Integration within association: implementation dynamics of the EU-Ukraine Agreement, Policy Paper, 3rd edition, December 2019 (prepared within the Civic Synergy Programme, funded by the European Union and the International Renaissance Foundation), page 8. Available at: <https://bit.ly/33mJC3X>.

³³⁴ *Ibid.*

particular, the Association Agreement provides for fourteen sectors where such integration is possible (*e.g.*, natural gas market, electric energy market, market of agricultural goods).³³⁵ This is specifically true in the context of *Digital Single Market* of the EU.

According to the Programme of activities of the Cabinet of Ministers of Ukraine, adopted in June 2020, joining the DSM of the EU via receipt of the internal market treatment in the sector of telecommunications services along with further gradual integration into the DSM of the EU are within the long-term priorities of the Cabinet of Ministers of Ukraine.³³⁶

The Association Agreement contains pretty much provisions covering digital-related issues, the most important of which, to the author's belief, are listed below. They are:³³⁷

- (a) Whole Sub-section 5 on “*Electronic communications*” of Section 5 on “*Regulatory framework*” of Chapter 6 on “*Establishment, trade in services and electronic commerce*” in Title IV on “*Trade and trade-related matters*”.

This sub-section consists of nine articles designed for regulating electronic communication services.³³⁸ In the words of Association Agreement, electronic communication services mean services of transmission and receipt of electronic signals, that are usually provided for consideration.³³⁹ To put it simply, these services imply transfer of information sent via a phone line or internet (*e.g.*, calls, messages, e-mails, *etc.*).³⁴⁰

³³⁵ *Ibid.*, pages 9-11.

³³⁶ Programme of activities of the Cabinet of Ministers of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 471 as of 12 June 2020, page 14. Available at: <https://bit.ly/337LKft>.

³³⁷ Pashkov, M., Markevych, K., Stetsiuk, P., Honchar, M. (2020). Report: Ukraine's Sectoral Integration into the EU: Preconditions, Prospects, Challenges, Razumkov Centre, “Zapovit” Publishing House (ISBN 978-966-7272-95-1), page 33. Available at: <https://bit.ly/3umVkvay>.

³³⁸ Article 115(1) of the Association Agreement.

³³⁹ Article 115(2) of the Association Agreement.

³⁴⁰ Definition of “*Electronic communication services*”. Section of key concepts and definitions to online guide to Privacy and Electronic Communications Regulations. Available at the website of the UK's Information Commissioner's Office: <https://ico.org.uk/>.

In general terms, the sub-section requires Ukraine to establish a special regulatory body independent from any service provider in the electronic communication sphere and sufficiently empowered to perform its tasks within the sector.³⁴¹ As well, the sub-section sets out general licensing principles (*e.g.*, licensing criteria shall be transparent and publicly available, licensing process shall be carried out within the reasonable period, applicants shall be informed of the reasons for denial in licence in writing, *etc.*),³⁴² prohibition of restricting cross-border provision of services at issue,³⁴³ obligation to ensure confidentiality of electronic communication,³⁴⁴ procedure for resolving disputes between service suppliers,³⁴⁵ *etc.*

Importantly, the sub-section also contains the regulatory approximation provision, implying the obligation of Ukraine to approximate the national legislation to the EU *acquis*.³⁴⁶ The specific list of the EU *acquis* is provided for in Annex XVII to the Association Agreement.³⁴⁷ The consequences of such approximation are outlined below.

- (b) whole Section 6 on “*Electronic commerce*” of Chapter 6 on “*Establishment, trade in services and electronic commerce*” in Title IV on “*Trade and trade-related matters*”.

This section contains only two articles. Article 139 sets out general objectives and principles within the e-commerce sector, including the commitment of both EU and Ukraine to promote the e-commerce relations between them, as well as to develop the e-commerce sector while ensuring the highest level of data protection in order to build the trust of the users in the e-commerce.³⁴⁸

³⁴¹ Article 116(1)-(2) of the Association Agreement.

³⁴² Article 117 of the Association Agreement.

³⁴³ Article 121 of the Association Agreement.

³⁴⁴ Article 122 of the Association Agreement.

³⁴⁵ Article 123 of the Association Agreement.

³⁴⁶ Article 124(1) of the Association Agreement.

³⁴⁷ Article 124(2) of the Association Agreement.

³⁴⁸ Article 139(1)-(2) of the Association Agreement.

Further, Article 140 serves as a basis for having a dialogue between the EU and Ukraine, regarding, in particular, the use of electronic signatures, liability of online platforms in terms of the processing of personal data, consumer rights, *etc.*³⁴⁹

- (c) whole Chapter 14 in Title V “*Economic and sector cooperation*”.

This chapter consists of six articles. In particular, under Article 389, the EU and Ukraine committed to cooperate in developing of information society.³⁵⁰ While the Association Agreement itself does not define the term “*information society*”, the common meaning of it is a society where a substantial extent of activities focuses on the creation, distribution, use and reuse of information with a help of ICTs.³⁵¹ The mentioned cooperation should concern, among others, (a) promotion of extensive use of ICTs by the individuals, business and authorities, (b) increase of network security, (c) development of online services (e-government, e-health, *etc.*), (d) establishment of joint research programmed related to the digital issues, *etc.*³⁵²

Besides, the EU and Ukraine have undertaken to share information, best practices and experience among themselves to ensure effective functioning of the electronic communications markets.³⁵³ Finally, Ukraine has committed to adopt EU legislation in the sector of information society and electronic communication provided for in Appendix XVII-3³⁵⁴ (essentially, the last is as well relevant to the already described above “*electronic communications*” sub-section).

³⁴⁹ Article 120(1) of the Association Agreement.

³⁵⁰ Article 389 of the Association Agreement.

³⁵¹ Eur-Lex. Glossary of summaries, “*Information Society*”. Available at: <https://bit.ly/3kVhs7K>.

³⁵² Points (a) and (d) of Article 391 of the Association Agreement.

³⁵³ Article 392 of the Association Agreement.

³⁵⁴ Article 394 of the Association Agreement.

To sum up, the Association Agreement includes pretty much provisions covering the DSM's issues. In the meantime, the main attention is devoted to electronic communications.

3.2 Internal market treatment for the e-communications sector

With respect to electronic communications in general and telecommunication services specifically, the EU-Ukraine Association Agreement gives a chance to benefit of an internal market treatment.³⁵⁵ To benefit of such a treatment, Ukraine has to do its “homework”, *i.e.*, to harmonise its legislation with the EU one. As already mentioned, for this sector the Association Agreement includes the regulatory approximation provision.³⁵⁶ The specific acts to be adopted by Ukraine are provided for in Appendix XVII-3 to Annex XVII to the Association Agreement.³⁵⁷

By way of example, the current version of the Association Agreement refers to the so-called EU Framework Directive for regulation of electronic communications³⁵⁸ and EU Authorisation Directive of electronic communications networks and services.³⁵⁹ But these Directives along with a number of others are no longer in force. It follows that from the moment of signing of the Association Agreement, the EU legislation in the electronic communications sector has been heavily amended. In particular, the mentioned Directives were replaced with the European Electronic Communications Code.³⁶⁰ This Code “*is an ambitious recast*” of the former EU regulation of electronic communications services along with networks across the

³⁵⁵ Article 4(3) of Annex XVII to the Association Agreement. Integration within association: implementation dynamics of the EU-Ukraine Agreement, Policy Paper, 3rd edition, December 2019 (prepared within the Civic Synergy Programme, funded by the European Union and the International Renaissance Foundation), page 40. Available at: <https://bit.ly/33mJC3X>.

³⁵⁶ Articles 124(2) and 394 of the Association Agreement.

³⁵⁷ *Ibid.*

³⁵⁸ 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, 24.4.2002, p. 33–50. Available at: <https://bit.ly/3aZkbJB>.

³⁵⁹ 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, 24.4.2002, p. 21–32. Available at: <https://bit.ly/3uqRTzK>.

³⁶⁰ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (PE/52/2018/REV/1), OJ L 321, 17.12.2018, p. 36–214. Available at: <https://bit.ly/2POWo7V>.

EU.³⁶¹ It focuses, in particular, on promotion of competition in the mentioned sector along with better protection of consumer rights.³⁶²

Given such extensive changes in the EU *acquis* and, basically, loss of relevance of the initially agreed list of acts referred in Appendix XVII-3, Ukrainian government was concerned in updating of Appendix XVII-3 by the end of 2020.³⁶³ Pursuant to the publicly available information, Appendix XVII-3 was updated in 2020 to reflect the changes in the EU *acquis*.³⁶⁴ At the same time, the official texts of the Association Agreement, available at the websites of both the EU and Ukraine, contains outdated Appendix (*last check made on 5th of May 2021*).

To start do its “homework” in the Ukraine had to prepare a roadmap, describing how Ukraine will implement the EU *acquis*.³⁶⁵ In 2018, Ukraine has already submitted such a roadmap to the EU.³⁶⁶ However, given the mentioned changes of the EU electronic communications law, such a roadmap had to be amended. Pursuant to the publicly available information, in December 2020, Ministry of Digital Transformation of Ukraine presented an updated Roadmap for Ukraine’s integration into the EU DSM.³⁶⁷

In the words of Mr Mykhailo Fedorov, Deputy Prime Minister - Minister of Digital Transformation: “[t]he Roadmap reflects revolutionary changes in EU law and provides for implementation of EU cutting-edge digital norms and standards.

³⁶¹ D. Konidaris, J., Liberatore, F. (2021). Client Alert: The EU Electronic Communications Code Handbook, Squire Patton Boggs. Available at: <https://bit.ly/3vIZsli>.

³⁶² *Ibid.*

³⁶³ Report on Implementation of the Association Agreement between Ukraine and the European Union in 2019 (Results and Plans), prepared by the Government Office for Coordination of European and Euro-Atlantic Integration of the Secretariat of the Cabinet of Ministers of Ukraine with the support of the EU project “Association4U”, page 53. Available at: <https://bit.ly/3nN9mOl>.

³⁶⁴ Pashkov, M., Markevych, K., Stetsiuk, P., Honchar, M. (2020). Report: Ukraine’s Sectoral Integration into the EU: Preconditions, Prospects, Challenges, Razumkov Centre, “Zapovit” Publishing House (ISBN 978-966-7272-95-1), page 5. Available at: <https://bit.ly/3umVkvay>. Press-office of Ministry and Committee of Digital Transformation of Ukraine (2020). News: Results of the EU-Ukraine Summit: Ukraine is approaching the EU Digital Single Market. Available at: <https://bit.ly/33gvRUd>.

³⁶⁵ Paragraph 2 of the Appendix XVII-6 to Annex XVII to the Association Agreement.

³⁶⁶ Integration within association: implementation dynamics of the EU-Ukraine Agreement, Policy Paper, 3rd edition, December 2019, prepared within the Civic Synergy Programme, funded by the European Union and the International Renaissance Foundation, page 46. Available at: <https://bit.ly/33mJC3X>.

³⁶⁷ Press-office of Ministry and Committee of Digital Transformation of Ukraine (2020). News: MinDigit presented an updated Roadmap for integration into the EU DSM. Available at: <https://bit.ly/2SI01TY>.

Developed in line with Appendix XVII-3 to the Association Agreement, it is one of the mandatory elements of Ukraine's preparation for being granted EU's internal market regime in telecommunications, which will become possible after successful fulfilment of all commitments in the [Association] Agreement. This regime will mean unimpeded provision of telecommunication services in the EU by Ukrainian legal entities and vice versa”,³⁶⁸

It is said that the implementation of the Roadmap will allow, among others, to (a) incorporate into the national order of the European Electronic Communications Code; (b) transform a regulatory body in the electronic communication sector (currently, National Commission for State Regulation of Communications and Informatisation); (c) introduce 5G; (d) boost e-commerce; (e) improve cybersecurity issues, *etc.*³⁶⁹

Once Ukraine implements all required legal acts and the EU check this within the comprehensive assessment procedure,³⁷⁰ the EU and Ukraine undertook to grant each other with internal market treatment in the electronic communications sector.³⁷¹ Essentially, the internal market treatment means: (a) abolishment of restrictions on the freedom of establishment of a legal entity within the territories of both the EU and Ukraine; (b) any legal entity established under the laws of the EU shall be treated in Ukraine in the same way as if it was formed initially in Ukraine and *vice versa*; and (c) abolishment of restrictions to provide services within the territories of both the EU and Ukraine.³⁷²

Despite the fondest hopes of Ukrainian government to receive an internal market treatment for Ukraine in the electronic communications sector, pretty much challenges are still to be overcome. It is evident from the above, that the EU *acquis*

³⁶⁸ Pashkov, M., Markevych, K., Stetsiuk, P., Honchar, M. (2020). Report: Ukraine's Sectoral Integration into the EU: Preconditions, Prospects, Challenges, Razumkov Centre, "Zapovit" Publishing House (ISBN 978-966-7272-95-1), page 60. Available at: <https://bit.ly/3umVkvay>.

³⁶⁹ Press-office of Ministry and Committee of Digital Transformation of Ukraine (2020). News: MinDigit presented an updated Roadmap for integration into the EU DSM. Available at: <https://bit.ly/2SI01TY>.

³⁷⁰ Article 4(2) of Annex XVII to the Association Agreement.

³⁷¹ Article 4(3) of Annex XVII to the Association Agreement.

³⁷² *Ibid.*

in the relevant sector is changing constantly, so that while Ukraine tries to adapt its laws to the EU ones, such the EU laws may be no longer relevant.³⁷³ So that the Ukrainian attempts to keep up with the EU's pace of changes may be burdensome and time-consuming. Apparently, it is not clear when Ukraine actually fulfils all requirements under the Association Agreement to be granted with this internal market treatment.

Further, there is a huge gap and lots of inconsistencies between the current Ukrainian regulation and the EU one in terms of how the telecommunication services are provided to the end-users, ways of dispute resolution with such end-users, licensing and standardisation, application of antitrust law, *etc.*³⁷⁴

On the top of the mentioned, there are general issues with different terminology used, proper translation of the EU acts and constant inability to follow the set deadlines.³⁷⁵

Finally, it is said, that even Ukraine adopts all required *acquis*, there is then no time limits for the EU to take the decision on the internal market treatment. So that, the exact date when Ukraine will be granted with it becomes even more unclear.³⁷⁶

Though the process of integration into the DSM in general and the electronic communications sector specifically is, indeed, burdensome and time-consuming, the author believes that benefits of the integration outweigh the cost. According to the recent analytical report, presented by the Ministry of Digital Transformation of Ukraine, the integration into the DSM will result in the following benefits for Ukraine: (a) boost Ukrainian economy; (b) ease doing business in Ukraine; (c) make public services due paperless; (d) facilitate cross-border e-commerce between

³⁷³ Ukraine's integration into the European Digital Single Market: turning obstacles into windows of opportunity, June 2019, prepared by the International Non-governmental Organization "European Media Platform" with the financial support of the European Union and the International Renaissance Foundation, page 3. Available at: <https://bit.ly/3h4b4eP>.

³⁷⁴ *Ibid.*, pages 3-4.

³⁷⁵ *Ibid.*, page 2.

³⁷⁶ Statement of Klympush-Tsintsadze, I. (2021). News of Verkhovna Rada Committee on Ukraine's Integration into the European Union: Sectoral cooperation is an absolutely practical dimension of realising of our ambitions towards the EU. Available at: <https://bit.ly/3eRp34O>.

Ukraine and the EU; (e) combat corruption in the light of removing of individual while providing public services and, in general, increase of transparency of such services; (f) encourage development of new industries, design of digital products and services; and (g) increase consumer welfare.³⁷⁷

Appreciating the benefits of integration into the DSM, Ukraine, as recognised in the latest Association Implementation Report, step by step making in the adaption of the national e-communication laws to the EU ones.³⁷⁸ In the meantime, much is still ahead, in particular, in terms of the establishment of the telecom regulator that will be sufficiently independent and empowered to regulate the sector as required by the Association Agreement.³⁷⁹

* * *

Adaptation of Ukraine to the new digital reality is one of the key priorities pursued by the current government. Established in 2019, the Ministry of Digital Transformation of Ukraine gradually develops and implement new digital transformation projects, covering a number of spheres, including public services, doing business, justice, security, online learning, *etc.*

Digital upgrade of Ukraine, as well, is laid down within the scope of the commitments undertaken under the EU-Ukraine Association Agreement. In particular, the EU and Ukraine committed to developing the “*information society*”, which, essentially, implies cooperation in the creation of online services, like e-government or e-health, promotion of ICTs use, the enhancement of cybersecurity, *etc.*

In the context of the EU-Ukraine Association Agreement, it is important to understand that this Agreement is not about the EU membership, and the benefits

³⁷⁷ Iavorskyi, P., Taran, S., Shepotylo, O., Hamaniuk, O. (2020). Analytical report: UKRAINE’S INTEGRATION INTO THE EU’S DIGITAL SINGLE MARKET, Potential Economic Benefits, page 10. Available at: <https://bit.ly/3eV6IUD>.

³⁷⁸ European Commission, High Representative of the Union for Foreign Affairs and Security Policy (2020). JOINT STAFF WORKING DOCUMENT: Association Implementation Report on Ukraine, SWD(2020) 329 final, Brussels, 27.11.2020, page 19. Available at: <https://bit.ly/3b6VNWE>.

³⁷⁹ *Ibid.*

suggested by it are subject to strict compliance by Ukraine with the undertaken obligations. Specifically, in terms of the electronic communications sector, the Association Agreement gives a chance to benefit from an internal market treatment. Such treatment, in essence, implies the freedom to provide services across the territory of the EU – for Ukrainian companies, and the same within the territory of Ukraine – for the EU companies. Though to obtain this kind of treatment, Ukraine has to fulfil the “condition”, *i.e.*, to implement a fairly large set of the EU *acquis*.

At the same time, it is not so easy to do, given, in particular, that the EU *acquis* in the e-communications sector is changing constantly, so that while Ukraine tries to adapt its laws to the present EU ones, such the EU laws may become no longer relevant in the short perspective. It follows that Ukraine gets into a closed circle of endless harmonisation, and, thus, it is not clear when Ukraine will fulfil the “condition” to be granted with the internal market treatment. Besides, there is a huge gap in regulation of the e-communications sector between the EU and Ukraine, so many efforts must be applied to bridge this gap.

Despite all the challenges, the author believes that the overall benefits of harmonisation of laws and the gradual integration into the DSM of the EU outweigh the cost. As per the recent study, presented by the Ukrainian government (discussed above), the mentioned will allow, among others, to boost the economy of Ukraine, encourage the development of new industries, reduce corruption as well as make public services more “*client-friendly*”. These, in essence, are of interest of each Ukrainian, so that Ukraine and its authorities shall endeavour to get closer to the EU in the digital sector.

CONCLUSION

The EU was created with an idea to establish an area where no internal barriers will exist and, thus, the key four freedoms, *i.e.*, freedom of goods, services, capital and people, will be ensured. Yet, the establishment of such an area is not “*once and for all*” action. To ensure the true area without internal frontiers or, to put simply, the Internal Market, the EU has to constantly address the number of challenges, adapt the Internal Market to them and to review the established approaches to its regulation. Today, one of the new challenge stems from the rapid and ubiquitous digital transformation.

Digitalisation is transforming the societies, economies and industries across the globe. Such phenomena like e-commerce, e-health, e-learning, e-government, e-banking, e-justice, *etc.* have already taken root among societies and substantially increased the quality of life of pretty everyone. Internet of Things, Artificial Intelligence, Cloud storage, simple digital devices are integrating constantly in each industry from the manufacturing to the service sector. On top of that, today people receive an unprecedented access to creative or other content.

At the same time, the number of barriers exists on the way of the full future digitisation of the markets. By the way of example such barriers may be in the forms of divergent not-unified requirements of the Member States towards the contract law or remedies with respect to consumers’ protection, which, in turn restricts the further development of e-commerce sphere, or general restrictions on the free flow of non-personal data, which, in turn, constraints the research and innovation.

With all of the above, such an uncontrolled and unavoidable digitalisation of the various spheres possess the negative impact as well. This negative impact appears, among others, in: data leaks; cyber-crimes; lowered protection of consumers given that the legislators and policy-makers do not keep up with the pace of transformations and emergence of new forms discriminatory treatment (*e.g.*, geo-blocking based on consumer location), the new unfair commercial practices (*e.g.*,

non-transparent ranking of products per search request made on the marketplaces or publishing fake commercial reviews), or the new types of digital services and goods (e.g., “free” services that are paid up with personal data). As well, it may appear in the form of the distorted competition given the emergence of such dominant players as online platforms and the unprecedented power they possess over individuals and businesses, societies and economies in virtue of their connectivity and intermediary functions.

It goes without saying, to enjoy in full all the benefits, ensure the proper further digitalisation and to effectively address the threats it brings, the appropriate policy and legal frameworks are required. In the EU, the relevant legal and policy frameworks are building under the aegis of the DSM.

The concept of the DSM is primarily associated with the name of the former President of the EC, Mr Jean-Claude Juncker (2014-2019), and the DSM Strategy presented by his Commission in 2015.

According to the definition of the DSM introduced first under the DSM Strategy, it stands on the following principles: (a) promotion of the key four fundamental freedoms of the internal market (the free movement of goods, persons, services and capital), (b) respect for such fundamental rights as the right to privacy, the right to data protection along with the right to non-discrimination; and (c) compliance with the rules of fair competition. As illustrated in this thesis, the suggested definition of the DSM largely follows the definition of the single market under Article 26(2) of the TFEU but, with this said, given the *digital* nature of that single market the listed principles are pursued in the non-physical online dimension.

At the time of Juncker’s term of office, the EC led by him proposed and the EP along with the Council adopted under the umbrella of the DSM the number of measures aimed at facilitating the development of e-commerce, ensuring consumer and data protection, harmonising copyright and contract rules, providing access to the creative content, *etc.* It is said that the adoption and application of such measures

will allow to create a full-fledged harmonised digital space for the EU citizens and businesses.

The current President of the EC, Ms Ursula von der Leyen, continues the work started by her predecessor, but shifts more attention to free flow and ubiquitous use of data as well as development of and investments in Artificial Intelligence, since believes that these are the key to boost of the EU economy, revolving from the COVID-19 crisis and complete the creation of the true digital space of the EU.

While talking about the creation of the true digital space, the author means, in particular, the adoption of legislative base suited to the digital age. Prior to introducing such a legislative base, the EU bodies have to carefully consider the proper legal basis for them. This requirement stems from the fact that the EU, as an any created organisation, enjoys only those powers that were conferred to it by the creators (in the present case, by the EU Member States under the TFEU provisions). The analysis of the TFEU provisions revealed that the EU bodies are not entrusted with a specific catching-all digital provision but have to seek for the interconnected provisions. Given that the DSM is, essentially building on the premises of the Internal Market, Article 114 of the TFEU, that is considered as one of the most important to developing the Internal Market, is often used by the EU to adopt specific measures in the digital sector. Article 114 of the TFEU pursues the approximation objective, meaning that the EU is authorised to design and enact single and unified rules binding for all Member States with the aim to improve the functioning of the internal market.

Based on Article 114 of the TFEU, the EU for the last six years formed the impressive *acquis* for the number of different areas, including, e-commerce, e-government, data protection, cybersecurity, consumer protection, and telecommunications. These *acquis* digitalise the Internal Market and, thus, bring the EU closer to the true area without internal frontiers. At the same time, the relationships comprising the listed areas constantly evolve. Thus, to further ensure the benefits of the single market and maximise the prosperity of the citizens and

businesses, the EU has to keep up with the pace of changes, timely amend already adopted measures and introduce the new that will reflect the actual state of digital transformation.

To conclude the above discussion the author wishes with a reference to Ukraine. During past several years Ukraine has on multiple occasions declared its intent to, first, transform into the true digital state and, second, to join the DSM of the EU. Undoubtedly, both goals are ambitious and interconnected. The EU-Ukraine Association Agreement given its broad scope outlines the way how Ukraine may achieve these goals. Though the way suggested by the Agreement is rather challenging and time-consuming, the overall benefits of this way are rewarding and, thus, Ukraine should endeavour to go through it.

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