

# Digitalisation as a Catalyst for Legal Harmonisation: The EU Digital Single Market

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## Abstract

With the establishment of the digital single market strategy, the EU is about to elevate the concept of its single market to the next level. While legal approximation has mostly been achieved from an economic perspective to date, digitalisation can be seen as a new catalyst for further expansion. The decentralised concept of the Internet diminishes nation state borders, and challenges the traditional perception of territoriality given that data itself is intangible and crosses borders far more easily than goods, services, capital, or people, making legal harmonisation increasingly necessary.

## I. The single market and legal harmonisation

The conceptual origin of the European Union (EU) dates back to the idea of the creation of a common market among nation states that previously were opposed to each other during repeated wars. The communitarisation of the crucial industries for war, namely coal and steel, by the European Coal and Steel Community<sup>(1)</sup> in 1951 should have, according to Robert Schuman, prevented any future possibilities of war between its member states. Despite the recent struggles with the Euro-crisis or Brexit, we can state that this idea of the common market has been a huge success, and not just because Europe has experienced a long period of peace. The Treaty of Rome<sup>(2)</sup> in 1957 broadened the concept to other industrial areas, aiming to create a single market for all kinds of goods, services, and people with the European Economic Community (EEC). Today, the EEC has been merged into the EU, which currently has 28 Member States, having already realized the concept of the common single market to a large extent, and facilitating economic growth and welfare improvement for its Member States.

One of the key instruments for the implementation of the single market is that of the approximation of laws according to Art. 114 TFEU<sup>(3)</sup>. As different legal regulations in Member States created trade barriers for goods, services or people from another Member

State, Member States had to adapt to the specific national laws by creating approximated or harmonised legal regulation to overcome these obstacles, which led to increasingly diminishing legal borders, and less legal differences between Member States. This shows that the concept of the single market can be considered as the motor of legal unification in the EU, and shaped and created EU law above the national level. As this process spread to a variety of fields, the EU was criticized for overusing their mandate for approximation of laws based on the realisation of the common market, contradicting the principle of subsidiarity (Art. 5 TEU<sup>(4)</sup><sup>(5)</sup>). Nevertheless, achieving an increasingly consistent legal system at the EU level has also had the advantage of maintaining a stronger position towards concurring legal concepts, such as those in the U.S. The demand for access to the EU single market from companies all over the world gives the EU the power to insist on the respect of legal standards, such as in the area of competition law or data protection law, for instance<sup>(6)</sup>.

As the concept of the single market is naturally broad, it covers all types of goods, services and the general free movement of capital and people. Examples range from the approximation of civil law, especially consumer protection law, to technical standardisation. In this sense, the EU has also set up a harmonised telecommunication framework<sup>(7)</sup> as well as a directive on certain aspects of information society services (Directive on electronic commerce)<sup>(8)</sup> or on

certain aspects of copyright and related rights in the information society<sup>(9)</sup>, to name a few examples. The single digital market strategy aims to conceptualize this one step further to overcome the merely selective regulation to a more comprehensive approach.

## II. A new comprehensive approach: The 'digital single market' and its three pillars

With sector-specific regulations already having been established for a variety of fields affected by digitalisation, such as telecommunications regulations, the 'digital single market' aims to fully and comprehensively address the digital dimension of the single market. The concept was introduced in 2010 as a part of the EU's *Digital Agenda for Europe* that covers the time period until 2020<sup>(10)</sup>, which is one of the seven flagship initiatives announced by the *Europe 2020 Strategy*<sup>(11)</sup>. The Digital Agenda addresses seven problem areas that the EU intends to tackle in the field of information and communication technologies (ICT). In addition to investment in networks, sufficient research and innovation efforts and cybercrime, the Digital Agenda has in its core the idea of creating a digital single market<sup>(12)</sup>. The goal is to overcome the discrepancy between national online markets fragmented by multiple barriers and the borderless Internet<sup>(13)</sup>. To this end, the concept includes access to pan-European telecom services, as well as free circulation of online services and content<sup>(14)</sup>. To reach this goal, the European Commission announced the *Digital Single Market Strategy for Europe*<sup>(15)</sup> in May 2016. The strategy positions the digital single market as a special implementation of the European single market from the perspective of digitalisation. To realise this vision, the Commission pursues a bundle of legal measures, fostering legal approximation among the Member States. Through the implementation of the strategy, the Commission expects to be able to create an additional growth of EUR 250 billion in the EU, which is already the world's largest economic market with 28 Member States<sup>(16)</sup>. A mid-term review on the implementation of the Digital Single Market Strategy was published in May 2017<sup>(17)</sup>.

Conceptually, the digital single market is built on the following three pillars: (1) access to online goods and services, (2) environment: digital networks and (3) European digital economy.

### 1) Access to online goods and services across Europe

The first pillar focuses on better access for consumers and businesses to online goods and services across Europe through the removal of market barriers. It refers to the very concept of the single market with the availability of goods and services regardless of borders between Member States. While this is considered to be already widely achieved offline, tearing down barriers for cross-border online activity still remains a task to be fulfilled<sup>(18)</sup>.

A conceptual precondition for the implementation of the digital single market is the harmonisation of legal conditions for access to this market, namely for online goods and services. Accordingly, the rules for cross-border e-commerce are an important point. The EU has already achieved harmonisation for certain legal aspects of online sales with its Directive on electronic commerce<sup>(19)</sup>, namely information requirements for service providers and questions of liability for intermediary service providers. What remains to be harmonised are on the other side, for instance, rules for remedies regarding digital content such as e-books purchased at online stores. This point will be covered by two proposals for directives setting up harmonised rules for contracts for the online and other distance sales of goods as well as for contracts for the supply of digital content<sup>(20)</sup>. Furthermore, after the review and reassessment<sup>(21)</sup> of the Regulation on Consumer Protection Cooperation<sup>(22)</sup>, the Commission published a legislative proposal to strengthen the enforcement of consumer rights also with regards to cross-border trade in the digital economy, which was finally adopted in December 2017<sup>(23)</sup>. This new regime will be applicable from January 2020. In February 2016 the Commission also launched an EU-wide online dispute resolution platform where consumers can submit disputes with traders about online purchases of goods and services<sup>(24)</sup>.

These rules taken together should increase the amount of cases where citizens from one Member State purchase goods in another Member State. With their applicability to both offline and online purchases, the goal is to create a common regime for both types of transactions. Digitalisation is the driving force for rendering a common ground for cross-border sales all the more urgent. Furthermore, as a subsequent consideration, the implementation of the digital single

market would also require diminishing barriers for cross-border parcel delivery, namely higher prices in comparison to domestic delivery, a point which the Commission also plans to tackle with a proposal for a regulation on cross-border parcel delivery services<sup>(25)</sup>.

Another important goal is the prevention of unjustified geo-blocking. This refers to cases where customers, for example, having purchased digital content like video-streaming are denied access when they try to access the content from another Member State or cases where they are prohibited from making purchases from a certain location<sup>(26)</sup>. The Commission also targets cases where users are re-routed to a local website with different prizes or conditions causing a fragmentation of the internal market<sup>(27)</sup>. All these cases can occur when websites use IP filter technology to treat a certain territorial range of addresses differently than others, whether due to the territoriality of copyrights or out of business considerations. In 2016, the Commission published a proposal for a regulation on addressing geo-blocking of online goods and services (but not yet for audiovisual services), and aimed to prevent discrimination based, directly or indirectly, on the nationality, place of residence or place of establishment of customers<sup>(28)</sup>.

Geo-blocking is not the only case where the concept of territoriality is challenged due to the decentralised nature of the Internet. Another key initiative is the expansion of copyright law at the EU level<sup>(29)</sup>. Difficulties in accessing or using digital content are grounded in different copyright regimes among Member States. To overcome the territoriality of copyrights, the Commission proposed<sup>(30)</sup> in 2015 a regulation on cross-border portability of online content services in the internal market, which was finally adopted in June 2017<sup>(31)</sup>. This new regulation will be directly applicable in all Member States from 20 March 2018. Article 3(1) of the regulation imposes a direct obligation to providers of online content to enable a subscriber temporarily present in one Member State to access and use the online content service in the same manner as in his/her Member State of residence. A more comprehensive approach is intended with the proposal for a directive on copyright in the digital single market<sup>(32)</sup>, which is currently under discussion. The proposed directive focuses particularly on digital and cross-border uses of protected content, and addresses issues such as 'data mining', exceptions for out-of-commerce

works, access to audiovisual works on video-on-demand platforms such as YouTube or the digital use of press publications. Furthermore, regulation on the exercise of rights on ancillary online transmissions or retransmissions of broadcasting is envisaged<sup>(33)</sup>. In this context, the Commission also plans to review the existing Satellite and Cable Directive<sup>(34)</sup> and its applicability to online broadcasting<sup>(35)</sup>.

Finally, to complete the picture, harmonisation in the area of value-added tax (VAT) overcoming different national taxation regimes has been scheduled, such as introducing the possibility to pay VAT in the businesses' Member States instead of in the customers' Member States separately<sup>(36)</sup>.

## 2) Environment: Digital networks and services

While the first pillar focuses on the access of online goods and services, a conceptual precondition is the existence of a suitable environment in terms of connectivity speed, security and trustworthiness of digital networks and content services<sup>(37)</sup>.

The first key element of this approach is the review of the existing EU telecommunications framework of 2002, which was last revised in 2009<sup>(38)</sup>. The current framework consisting of four directives (Framework Directive, Access Directive, Authorisation Directive and Universal Service Directive)<sup>(39)</sup> will be recast and simplified into one single directive, the new Directive establishing the European Electronic Communications Code, proposed by the Commission in 2016<sup>(40)</sup>. Due to the convergence of telecommunications, media and information technology sectors, a single European electronic communications code should cover all electronic communications networks and services<sup>(41)</sup>. The purpose of the harmonised regulatory framework to implement an internal market in electronic communications networks and services would remain the same under the new regime while ensuring effective competition<sup>(42)</sup>. Given the lengthy period that this regime had been divided into different directives, the merger into one single directive can be considered a mini revolution. Finally, these measures are complemented by the Commission's strategy to further develop gigabit connectivity with high-capacity networks across the EU<sup>(43)</sup>.

Another focus of the second pillar is the scheduled review of the existing media framework with the

Audiovisual Media Services Directive (Directive (EU) 2010/13)<sup>(44)</sup>. The directive is already, to a certain degree, consistent with digitalisation since it covers not only traditional television broadcasting, but also on-demand audiovisual media services on the Internet, such as YouTube and Netflix<sup>(45)</sup>. The Commission is, however, planning to simplify the framework, enhancing the protection of minors, and broadening its scope by specifying new terms such as ‘video-sharing platform services’<sup>(46)</sup>.

Overall, the Commission has taken up the term ‘online platform’ and other intermediaries as central objects of regulation. The term ‘online platform’ is perceived in a broad sense by the Commission, referring to all kinds of platforms from search engines to social media platforms like Facebook or Twitter, to e-commerce platforms like Amazon or eBay<sup>(47)</sup>. Because of the effective market power of some of these platforms owing to the amount of data they handle and also owing to their roles in controlling access to online markets, the Commission aims to regulate app-stores where developers offer their applications, and also to regulate access to social media, which is increasingly important for private companies<sup>(48)</sup>. To maintain a balanced legal framework between attracting these platforms to the EU and maintaining responsibility towards topics like liability, effective competition, and content regulation, the Commission presented a comprehensive assessment of online platforms in 2016, addressing topics like the ‘sharing economy’, online intermediaries and ‘over-the-top (OTT) services’ such as YouTube or Netflix that are increasingly substituting traditional telecommunications services<sup>(49)</sup>.

In so far as the liability of intermediaries for illegal content on the Internet is concerned, the EU already has specific rules in the aforementioned Directive on electronic commerce<sup>(50)</sup>, which states that, in principle, mere conduit, caching and hosting of illegal content does not trigger liability. However, as the amount of illegal content on the Internet grows, as do the technical possibilities to remove this content, the Commission published a communication dealing with the handling of illegal content in September 2017<sup>(51)</sup>. While this communication does not contain binding rules, it provides guidance for online platforms regarding their responsibilities towards tackling illegal content that they might host<sup>(52)</sup>. The existing “Code of

Conduct on countering illegal hate speech online” also tends in this direction<sup>(53)</sup>.

Additional measures contain countermeasures against cyber threats<sup>(54)</sup> with the new Network and Information Security Directive (NIS Directive)<sup>(55)</sup>, in force since August 2016, that *inter alia* requires the Member States to provide a Computer Security Incident Response Team (CSIRT), and sets up security requirements for ‘essential services’ such as energy operators. The Commission proposed as well a Cybersecurity Act, a regulation that implements *inter alia* a European cybersecurity certification<sup>(56)</sup>.

The respect of rights to privacy and personal data protection is also considered to be essential in establishing trust in networks and services<sup>(57)</sup>. The new General Data Protection Regulation<sup>(58)</sup> is applicable from May 2018. For electronic communication services, the ePrivacy Directive<sup>(59)</sup> contains special privacy rules for electronic communication services. However, this still needs to be adapted to the new GDPR and thus will be replaced by a new Regulation on Privacy and Electronic Communications, which *inter alia* broadens its scope to over-the-top (OTT) services<sup>(60)</sup>.

### 3) European digital economy

The third pillar of the digital single market strategy addresses challenges and opportunities around ‘Big Data’, cloud services and the Internet of Things. These services can contribute to the growth of the single market, but fragmentation of national legislation or the lack thereof are crucial barriers for the successful utilization of these technologies. Accordingly, the strategy attempts to maintain a balance between legal incentives for innovation and competitiveness on one side, and social aspects like inclusiveness on the other. Envisaged measures aim to overcome restrictions on data locations to ensure the free flow of data across the single market, namely restrictions other than data protection law, which remains an important aspect of legal protection<sup>(61)</sup>. The Commission has specified these objectives in its communication on *Building a European Data Economy*<sup>(62)</sup>. Firmly based on the concept of a digital single market, the objective is to establish a legal framework for data flows throughout the Union. At the same time, this provides an opportunity to overcome legal uncertainties created by new data technologies, such as ‘Big Data’, referring to the increasing amount of data, its increasing diversity and,

finally, increasingly cheaper and easier accessing, processing and storage technologies<sup>63</sup>.

Specifically, a regulation on a framework for the free flow of non-personal data in the EU was proposed<sup>64</sup>. Furthermore, the Commission is upholding the concept of ‘Open Data’ by reviewing the existing PSI Directive<sup>65</sup>. With regard to the Internet of Things, a staff working paper was issued<sup>66</sup>. In addition, the Commission aims to establish rules for cloud service certification and civil rules for cloud services and has already announced a *European Cloud Initiative*<sup>67</sup>.

Still aiming at a European digital economy, interoperability and standardisation are envisaged in sectors like telemedicine, transport and energy<sup>68</sup>. Finally the term ‘inclusive e-society’ refers to steps taken towards the development and improvement of digital skills, as well as addresses several issues of ‘e-government’, like, for instance, the interconnection of business registers or cross-border usability of e-signatures<sup>69</sup>.

### III. Going beyond borders: From economisation to digitalisation

The concept of the digital single market marks a conceptual paradigm shift. The initial idea of the single market was born out of a concept to avoid military conflicts in Europe by communitizing the crucial war industries of coal and steel. This can be regarded as the first stage of the single market concept. Soon thereafter, with the foundation of the European Economic Community in 1957, the concept further developed and unfolded itself to the next level with the implementation of a single market for all goods, services, capital, and people. This was considered to be the most efficient way to deepen the bond between nation states in Europe, i.e. through economic integration rather than aiming directly for a political union or mere cooperation. In parallel, the ongoing globalisation phenomenon increased the scale of cross-border trade, likewise based on increased mobility of goods, services, capital and people. On the legal side, the mandate for approximation of the Member States’ national laws (now Art. 114 TFEU) added to the former Treaty establishing the European Economic Community<sup>70</sup> with the Single European Act in 1986<sup>71</sup>, and led to an increased harmonisation of legal systems in Member States. From the conceptual foundation of the four fundamental freedoms, to the Euro as the

common currency of most Member States, the ongoing integration has been characterised by an economic perspective<sup>72</sup>.

This economic perspective has, however, been increasingly enriched by the possibility of legal approximation in other policy fields beyond the single market. The Single European Act specified and broadened the concept of harmonisation to the area of social policy (now 153 TFEU), research and technical development (now Art. 179 to 188 TFEU) and environment (now Art. 192 TFEU)<sup>73</sup>. Later, amending Treaties deepened this development, such as the concretion of legal approximation in the area of consumer protection with the Treaty of Maastricht (now 169 TFEU).

While the process of economic integration in the EU can still be considered ongoing, the phenomenon of digitalisation can be seen as adding a different perspective to the single market concept. The nature of the Internet as a decentralised network is based on the routing of data to and from IP addresses at times in different nation states. The concrete route of the data is not foreseeable, and thus also potentially independent of administrative borders. Accordingly, legally overcoming these borders is increasingly important. The key focus behind the economic approach of the internal market has always been to enhance economic exchanges through increasing the mobility of goods, services, capital and people. On the other hand, digitalisation refers to the mobility of data. Data mobility or, the ‘un-territoriality of data’<sup>74</sup>, makes the implementation of a common legal framework independent from territorial borders far more necessary than the increasing demands for cross-border trade. Digitalisation can thus be seen as a new catalyst for legal harmonisation. First, the legal framework aimed to create a single market and establish cross-border markets aided by the ongoing globalisation. Now, these markets are pursuing digitalisation, which is completely overturning the traditional thinking in terms of location.

As location itself becomes less important, territoriality as a presumption of our nation state and sovereignty based legal systems is challenged. At the same time, boundaries between traditional legal fields are blurring as well (i.e. areas of administrative law such as telecommunication law or data protection law are just as affected by questions of civil liability of online platforms and contractual relationships to

service providers). The vertical relationship in administrative law is addressed in relation to the question of sovereignty and assignment of regulatory powers. Private law, on the other side, is challenged by a pluralism of potential liable actors along with the assignment of responsibilities being very much connected to questions of technical feasibility and controllability of online content as a logical precondition. What remains to be the common ground is, again, the decentralised concept of the Internet and the intangibility of data, which appear to ignore borders. Regarding this as a global phenomenon requires legal harmonisation to a greater extent than from just considering the economic perspective, and goes beyond the EU level. The EU however, now has the opportunity to proceed and set the standards with their digital single market strategy.

#### NOTE

- (1) See the Treaty establishing the European Coal and Steel Community, signed on 18 April 1951 by the founding Member States Belgium, France, West Germany, Italy, the Netherlands and Luxembourg.
- (2) Treaty establishing the European Economic Community (TEEC), signed on 25 March 1957.
- (3) Treaty on the Functioning of the European Union, OJ C 202 (2016), p. 47 (resulting from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007, entered into force on 1 December 2009).
- (4) Treaty of European Union, OJ C 202 (2016), p. 13 (resulting from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007, entered into force on 1 December 2009).
- (5) See G. Close, *Harmonisation of laws: Use or abuse of the powers under the EEC Treaty?* 3 *European L. R.* 461 (1978).
- (6) For instance, in the case of the EU-U.S. Privacy Shield (Commission Implementing Decision (EU) 2016/1250 of 12 July 2016).
- (7) Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); 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); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).
- (8) 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).
- (9) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- (10) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, COM(2010) 245 final/2.
- (11) EUROPE 2020: A strategy for smart, sustainable, and inclusive growth, COM(2010) 2020 final.
- (12) *Supra* note 10 at 7-10.
- (13) *Supra* note 10 at 5 and 7.
- (14) *Supra* note 10 at 7.
- (15) 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.
- (16) *Supra* note 15 at 2.
- (17) 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.
- (18) *Supra* note 15 at 3.
- (19) *Supra* note 8.
- (20) COM(2015) 634 and COM(2015) 635, amended by COM(2017) 637 final.
- (21) *Supra* note 15 at 5 with reference to Regulation (EC) No 2006/2004. See also, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and Committee of the Regions, A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses, COM (2016) 320 final.
- (22) Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.
- (23) Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.
- (24) See Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) and the Commission Implementing Regulation (EU) 2015/1051.
- (25) Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services, COM(2016) 285 final; also mentioned in Commission, *supra* note 7 at 5.
- (26) *Supra* note 15 at 6.
- (27) *Supra* note 15 at 6.

- (28) Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final, Art. 1(1).
- (29) Supra note 8 at 7-8. See critically Jens Brauneck, "Strategie für den digitalen Binnenmarkt" – ein neues europäisches Urheberrecht? ("Digital Single Market Strategy" – a new European copyright law?), GRUR Int. 889 (2015).
- (30) COM(2015) 627 final.
- (31) 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.
- (32) COM(2016) 593 final.
- (33) Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final.
- (34) Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
- (35) Supra note 15 at 7.
- (36) Supra note 15 at 8. See COM(2016) 755; COM(2016) 756; COM(2016) 757 final and COM(2016) 758.
- (37) Supra note 15 at 9.
- (38) Supra note 15 at 9-10.
- (39) Supra note 7.
- (40) Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 590 final/2. This is discussed by Joachim Scherer & Caroline Heinickel, Ein Kodex für den digitalen Binnenmarkt: Vorschlag der EU-Kommission für eine Reform des Rechts der elektronischen Kommunikation (A Codex for the Digital Single Market: Proposal by the European Commission for a review of the law applicable to electronic telecommunications), MMR 71 (2017).
- (41) COM(2016) 590 final/2, recital 7.
- (42) Supra note 40, Art. 1(1), (2).
- (43) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society, COM(2016) 587 final.
- (44) Supra note 15 at 10-11. See the Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final.
- (45) Supra note 15 at 11.
- (46) Supra note 44, Art. 1(1).
- (47) Supra note 15 at 11.
- (48) Supra note 15 at 11.
- (49) 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) 288 final. Furthermore, a group of European researchers submitted a Discussion Draft: Research Group on the Law of Digital Services, Discussion Draft of a Directive on Online Intermediary Platforms, 5 (2016) Journal of European Consumer and Market Law 164-16.
- (50) See supra note 8 at Articles 12, 13, 14.
- (51) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms, COM(2017) 555 final; see also: supra note 8 at 12.
- (52) Supra note 51 at 20.
- (53) See [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf).
- (54) See the European Cybersecurity Strategy, JOIN(2013) 1 final, and the European Agenda on Security, COM(2015) 185.
- (55) 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.
- (56) Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) No 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act"), COM(2017) 477 final/2.
- (57) Supra note 15 at 13.
- (58) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
- (59) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
- (60) Supra note 15 at 13. See the 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) 10 final.
- (61) Supra note 15 at 14-15.
- (62) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "Building a European Data Economy", COM(2017) 9 final.
- (63) Supra note 62 at 4.
- (64) Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, COM(2017) 495 final.
- (65) Directive 2013/37/EU of the European Parliament and of

the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information.

- (66) Staff Working Document: “Advancing the Internet of Things in Europe”, 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: Digitising European Industry - Reaping the full benefits of a Digital Single Market COM (2016) 180”, SWD(2016) 110 final.
- (67) Supra note 15 at 15 and the 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 a competitive data and knowledge economy in Europe, COM (2016) 178 final.
- (68) Supra note 15 at 15-16. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: ICT Standardisation Priorities for the Digital Single Market, COM(2016) 176 final.
- (69) Supra note 15 at 16-17. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU eGovernment Action Plan 2016-2020 - Accelerating the digital transformation of government, COM(2016) 179 final.
- (70) See supra note 2.
- (71) Single European Act, 17.02.1986 and 28.02.1986, OJ of 29.06.1987, No L 169/1.
- (72) See in particular, Completing the Internal Market: White Paper from the Commission and the European Council, COM(85) 310 final and Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 61. EL April 2017, AEUV Art. 114 Rn. 1.
- (73) See Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 61. EL April 2017, AEUV Art. 114 Rn. 18.
- (74) See Jennifer Daskal, *The Un-Territoriality of Data*, 125 *Yale L. J.* 326 (2015); contra: Andrew Keane Woods, *Against Data Exceptionalism*, 68 *Stanford L. R.* 729 (2016).