

# European Integration from a Single to a Digital Single Market

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### A. Shaping a Connected Digital Single Market

#### I. Europe's Vision of a Digital Single Market facing Legal, Economic and Technological Challenges

The Commission initiated in 2010 the Digital Agenda for Europe<sup>1</sup> 2010-2020 as part of its Strategy 2020, which is one of seven flagship initiatives.<sup>2</sup> It is an evolutionary step for a new digital market understanding with huge social and economic potential for further European integration. Both of the terms 'digitalization' and the 'digital market' are abstract, not framed by a clear legal definition. It is more an evolution, often described as a transformation.<sup>3</sup> In legal literature, profound socioeconomic and political questions on the transformation of societies are raised.<sup>4</sup> Even in legal literature, digitalization is discussed as a transformation in connection with other disciplines in the light of technologies and business models.<sup>5</sup>

Different characterizations are used to converge to a joint understanding. A rather limited approach is provided through a purely technical view. Simplified, it is a transformation from analog to digital expression, but with huge economic, legal and social views are part of the transformation.

A holistic understanding is needed to capture causalities, conditions and impact. In this spirit, the Digital Single Market agenda of the EU Commission does not claim to provide a complete view but aims to govern the transformation of the Single Market driven by technologies in parallel to economic and social benefits into a Digital Single Market. Other Member States and market players have missed to shape development timely out of a driver seat instead of running after. From a legal point of view this requires governance with responding and guiding legislation. There is a need to become familiar with framework pre-conditions, developments in economy and society. A passive attitude may lead to competitive disadvantages. The more economic strength other market players gain, the more serious the Member States of the EU are. Doubtless, it will be a challenge to combine economic and social benefits.<sup>6</sup> It is not easy to

1 *European Commission*, Communication on a Digital Agenda for Europe, COM/2010/0245 final, 2010.

2 *European Commission*, Communication on Europe 2020, Flagship Initiative Innovation Union, COM/2010/0546 final, 2010, p. 6.

3 *Becker/Eierle/Fliaster/Ivens/Leischnig/Pflaum/Sucky* (eds.), *Geschäftsmodelle in der digitalen Welt*, 2019; *Kruse Brandao* (ed.), *Digital Connection*, 2018; *Neugebauer*, *Digitalisierung*, 2018.

4 *Fehling/Schliesky* (eds.), *Neue Macht- und Verantwortungsstrukturen in der digitalen Welt*, 2016; *Körber/Immenga* (eds.), *Daten und Wettbewerb in der digitalen Ökonomie*, 2017.

5 *Henseler-Unger*, *Zukünftige Regulierung des Internet of Things in Europa: Ein Überblick*, Teil 1: Auf dem Weg zur Industry 4.0 – Eine Einführung, in: *Sassenberg/Faber* (eds.), *Rechtshandbuch Industry 4.0 and Internet of Things*, 2017, pp. 1 ff.

6 *Formbusch* (ed.), *Digitalisierung*, in *Wirtschafts- und Finanzsoziologie*, 2019, pp. 177 ff.; *Bär/Grädler/Mayr* (eds.), *Digitalisierung im Spannungsfeld von Politik, Wirtschaft, Wissenschaft und Recht*, 2018.

find a balance between liberty and protection, regulation and self-regulation, full or partial harmonization.<sup>7</sup> A comparison with the more offensive entrepreneurial spirit in the US shows differences in liberal understanding, type and intensity of regulations.<sup>8</sup> These differences are coming from different legal cultures. Regulatory intensities can vary in dependence on progress in other disciplines. Legislation is more and more inter-disciplinary, context-dependent and multi-dimensional. This shows the mutual effects on legal frameworks with a change of traditional governance understanding.

The Commission speaks of an 'Innovation Union'. This sounds rather self-conscious. Maybe, the Union is not the most innovative organization but it is often more willing than many of its Member States. Besides white spots, weaknesses in knowledge, understanding and missing consensus among Member States, the Commission shows its will to govern innovation. Positively, the Commission deems the EU has the potential for innovation to cope with fundamental technological, economic and social challenges, even to convert these fields into competitive edges.<sup>9</sup> At the beginning of the digital agenda this seemed rather passionate. But it was in 2010 when many people were not very familiar with the dimensions of digitalization and many enterprises in Europe were conservative. In the meantime, the development of digitalization has proved that there are many governance-needs on digitalization.<sup>10</sup>

The Digital Single Market is governed by the Commission, but not as a solo run of the Commission. The strategy was also agreed on by the Member States.<sup>11</sup> Already in 1994, the Council of Europe had raised legal questions from different disciplines to be clarified.<sup>12</sup> Answers from individual disciplines would not be enough to adequately respond to the matrix of digitalization. A response of the Commission with a governance framework was needed. Such a framework must cope with nearly all legal fields of public, civil and criminal law such as data protection rights, cyber tax rights, cybersecurity rights, intellectual property rights and fundamental freedoms.<sup>13</sup>

Moreover, legal questions are interwoven with interdisciplinary fields. Digitalization has a cross-sectional impact on different areas, traditional industries such as smart

7 Fehling/Schliesky (eds.), (fn. 4); Körber/Immenga (eds.), (fn. 4).

8 Schönauf, Zukünftige Regulierung des Internet of Things in Europa: Ein Überblick, in: Sassenberg/Faber (eds.), (fn. 5), pp. 479 ff.; Otto/Kennedy, Regulation and Self-Regulation of the Internet of Things in the United States, in: Sassenberg/Faber (eds.), (fn. 5), pp. 504 ff.

9 E.g. Hoeren/Kolany-Kaiser (eds.), Big Data in Context, Legal, Social and Technological Insights, 2018.

10 Kruse Brandao/Wolfram (eds.), Digital Connection, 2018; Bär/Grädler/Mayr (eds.), (fn. 6); Neugebauer, (fn. 3).

11 European Commission, Communication on EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM/2010/2020 final, 2010.

12 European Parliament/European Council at Corfu, 24-25 June 1994, Presidency Conclusions, [http://www.europarl.europa.eu/summits/cor1\\_en.htm#infosoc](http://www.europarl.europa.eu/summits/cor1_en.htm#infosoc), I. 4 (15/10/2018).

13 Formbusch (ed.), Wirtschafts- und Finanzsoziologie, 2019; Hoeren/Kolany-Kaiser (eds.), (fn. 9).

factories,<sup>14</sup> automotive,<sup>15</sup> smart grids,<sup>16</sup> classical investment areas such as fintech,<sup>17</sup> insurances<sup>18</sup> and socio-economic areas such as e-health.<sup>19</sup> Expressions thereof include smart cities, smart homes, smart hospitals and automated driving.<sup>20</sup> These technologically influenced areas and systems are driven by other technological fields such as artificial intelligence<sup>21</sup> and algorithms.<sup>22</sup> This shows that the digital world with its technologies consists of multiple layers which legally require multilevel governance. Thereby, several legal disciplines are impacted. The whole lifecycle of a product or service has to be taken into account.<sup>23</sup>

## II. Digital Evolution of the Single Market

### 1. The Single Market on its Way into a Digital Era

The idea of a digital market arose already during the period of the European Economic Community.<sup>24</sup> The Commission aims to frame the impact of technologies with a more holistic governance approach. Accompanying the legislation, the Commission also uses policies and initiatives to provide political and economic power. After years of preparatory and visionary work, the Commission implemented the Single European Act in 1986 to establish the internal market.<sup>25</sup> This establishment shows that such a huge framework needs years or decades. Comparably, when the Digital Single Market

14 *Marschollek/Wirwas*, Digitalisierung der Elektroindustrie, in: Sassenberg/Faber (eds.), (fn. 5), pp. 420 ff.; *Wagner*, Industrie 4.0 für die Praxis, Heidelberg, 2018.

15 *Frauenhofer-Institut für Arbeitswirtschaft und Organisation*, Hochautomatisiertes Fahren auf Autobahnen – Industriepolitische Schlussfolgerungen, Dienstleistungsprojekt 15/14, Studie im Auftrag des Bundesministeriums für Wirtschaft und Energie; *Von Bodungen*, Automatisiertes Fahren, in: Sassenberg/Faber (eds.), (fn. 5), pp. 361 ff.

16 *Vom Wege/Reichwein*, Digitalisierung des Energiesektors, in: Sassenberg/Faber (eds.), (fn. 5), pp. 385 ff.

17 *Weber*, Digitalisierung der Bankenwelt, in: Sassenberg/Faber (eds.), (fn. 5), pp. 437 ff..

18 *Oelssner*, Digitalisierung bei Versicherungen, in: Fend/Hofman (eds.), Digitalisierung in Industrie-, Handels und Dienstleistungsunternehmen, 2018, pp. 349 ff.; *Schaloske*, Digitalisierung der Versicherungswirtschaft, in: Sassenberg/Faber (eds.), (fn. 5), pp. 404 ff.

19 *Schickert/Schweigert*, Digitalisierung des Gesundheitswesens in Sassenberg/Faber (eds.), (fn. 5), pp. 333 ff.

20 *Vogel/Weißer/Hartmann* (eds.), Smart City: Digitalisierung in Stadt und Land, 2018; *Pelton/Singh* (eds.), Smart Cities of Today and Tomorrow, 2019; *Dubbett/Müller/Meyer* (eds.), Advanced Microsystems for Automotive Applications, 2018; *Isermann*, Fahrassistentensysteme, 2017; *Eckstein/Dittmar/Zlocki/Woopen*, in: ATZ worldwide Sonderheft 1/2018, Automated Driving – Potentials, challenges and solutions, pp. 58 ff.

21 *Buxmann/Schmidt*, Künstliche Intelligenz, 2019; *Ertel*, Grundkurs Künstliche Intelligenz, 2016; *Akerkar*, Artificial Intelligence, 2019.

22 *Von Rimscha*, Datenschutz – Konzepte, Algorithmen und Anwendung, 2017; *Gütting/Dieker*, Datenstrukturen und Algorithmen, 2018; *Von Schönfeld/Webkamp*, Big Data and Smart Grid, in: Hoeren/Kolany-Kaiser (eds.), (fn. 9), pp. 93 ff.

23 *Zehbold*, Product Lifecycle Management im Kontext der Industrie 4.0, in: Fend/Hofman (eds.), (fn. 18), pp. 69 ff.

24 *Marcut*, Crystalizing the EU Digital Policy, 2017, p. 13.

25 *Pechstein*, in: Streinz (ed.), EUV/AEUV, 2018, Art. 1 EUV, para. 1.

agenda was launched in 2010, media and the public were still not as aware of digitalization as they are today. The Digital Single Market is characterized by the free movement of persons, services and capital, with individuals and businesses which can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality and place of residence.<sup>26</sup>

The Digital Single Market represents a further level of market enhancement, an information and knowledge society. The Commission speaks of the transformation of our world through internet and digital technologies. The four fundamental freedoms may not capture all dimensions of digitalization. Partially, it has been suggested to add a further freedom representing the content of digitalization: knowledge.<sup>27</sup> Even single legislative reforms such as on copyright are embedded in the spirit of the Single Market.<sup>28</sup> Furthermore, as intended by the economic system of the EU welfare and economic interests were drivers of the internal market as economic and social benefits are goals of the Digital Single Market.<sup>29</sup>

In the Lisbon Agenda the European Council recognized the necessary change towards a knowledge society and economy:<sup>30</sup> '1. The European Union is confronted with a quantum shift resulting from globalization and the challenges of a new knowledge-driven economy. These changes are affecting every aspect of people's lives and require a radical transformation of the European economy. The Union must shape these changes in a manner consistent with its values and concepts of society and also with a view to the forthcoming enlargement. 2. The rapid and accelerating pace of change means it is urgent for the Union to act now to harness the full benefits of the opportunities presented. Hence, the need for the Union to set a clear strategic goal and agree a challenging program for building knowledge infrastructures, enhancing innovation and economic reform, and modernizing social welfare and education systems.' Thus, the coming of a digital era is not a question. Defensive, fragmented governance by governments of Member States can prove as an obstacle, in particular, with worldwide competition. New governance structures are needed combining liberal and social requirements.

In 1985-1994 under Jacques Delors the Commission increased the horizontal and vertical internal market dimensions.<sup>31</sup> In 1985 the Commission initiated white papers

26 Schröder, in: Streinz (ed.), EUV/AEUV, (fn. 25), Art. 26 AEUV, paras 18 ff.

27 Zuleeg, Why the EU needs a Digital Single Market now?, European Policy Centre, p. 1, <http://www.epc.eu/dsm/3/> (15/10/2018).

28 Refer to the steps of modernization on the copyright reform *Rauer/Ettig*, Europäische Urheberrechtsreform X.0 – Weitere Schritte hin zu einem modernisierten Urheberrecht, Kommunikation und Recht 1/2017, pp. 7 f.

29 Schröder, in: Streinz (ed.), EUV/AEUV, (fn. 25), Art. 26 AEUV, para. 1; Jones/Sufrin, EU Competition Law, 2016, pp. 26 ff.

30 *European Parliament*, Lisbon European Council 23 and 24 March 200, Presidency Conclusions, [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm) (15/10/2018).

31 Marcut, (fn. 24), p. 13.

on the completion of the internal market.<sup>32</sup> After a first framework program in 1984, the Commission adopted in 1987 a second framework program.<sup>33</sup> A priority was to connect the large market with new technologies to achieve a market while at the same time being an information and communication society. This direction was supported by the third framework program in 1990-1994.

Digitalization was not a direct goal of the internal market in the Eighties. But already in the Eighties, telecommunication infrastructures were significant market conditions, although the motivation was concentrated on liberalization to break up monopolies and therefore increasing competition. Here, the EU reacted with more sector-specific legislation accompanied by harmonization measures. The idea was to achieve one telecommunication market. Now, years after 2002, access to and use of telecommunication networks is strengthened through the Digital Single Market.

Already in 2001, the bundle of directives indicated the governance needs on the development of digitalization. Directives on e-Commerce and copyright together with previously implemented directives, such as on data protection in 1995, constituted a partial framework for a Digital Single Market. The e-Commerce directive was even deemed as innovative.<sup>34</sup> For instance in mobile technology, the EU was on the same level with other players. The 3G mobile technology was an expression thereof. But the 4G mobile technology was dominated by the US and the EU lost on equal footing. Now, with the next steps within the Digital Single Market agenda, the EU intends to compensate at least infrastructural disadvantages. There is a huge consensus on the need for 5G mobile technology to be able to establish connections for the internet of everything.<sup>35</sup> And the internet of everything will require many more governance actions.<sup>36</sup> A further example is the automotive industry. The hardware may not be the primary goal of traffic digitalization, it will be more and more the data economy. Openly, many of the leading automotive companies envisage to become mobility service providers. Shares among traditional, mechanical and software fields rapidly change. Knowledge, skills and people are required in an amount and aspiration level currently not existing. It is a question if it will be possible to find, to educate or to create the needed power for a new digital environment. Here, Member States have to establish a competitive edge towards other markets.<sup>37</sup>

32 *European Commission*, Communication on completing the internal market, COM/1985/0031, 1985.

33 *Marcut*, (fn. 24), pp. 24 ff.

34 *Savin*, The 2015 EU Digital Single Market Strategy, in: *Revision & Regnskabsvæsen* (original text in Danish), No. 10, 2016, p. 6, <https://ssrn.com/abstract=2842327> (15/10/2018).

35 *Schröder*, 5G: New Opportunities?, in: *Krüssel* (ed.), *Future Telco*, 2019, pp. 63 ff.

36 *Pelton/Singh* (eds.), *Challenges and Opportunities in the Evolution of the Internet of Everything in Smart Cities of Today and Tomorrow*, 2019, pp. 159 ff.

37 *Lubian/Estevés* (eds.), *Value in a Digital World*, 2017; *Cavanillas/Curry/Wahlster*, *New Horizons for a Data-Driven Economy*, 2016.

## 2. Economic Potential and Social Impact of Digitalization

The Commission aims to shape the Digital Single Market with the goal to exploit new economic potentials and foster the social framework. Many needs are following the impact of digitalization evoked through emerging technologies accelerated through business models with an ideal of a fully globalized, liberal economy.<sup>38</sup> For the Commission, economic growth to improve welfare seems to be the main driver. Overproportional growth shall leverage effects, innovations and connections.<sup>39</sup> One of the motivation indicators for the agenda in 2007 was gross domestic product (GDP). An industry-society such as the EU with its traditional Member States follows macro-economic key performance indicators. It was estimated that the value added by the information and communication technologies industry at current prices amounted to EUR 592.7 bn, representing around 5 % of the GDP of the EU economy.<sup>40</sup> This was in 2007. Estimations now and for the future have reached other scales. The shaping of a Digital Single Market is estimated to contribute €415 billion per year to the EU economy.<sup>41</sup> Even this estimation can be assessed as conservative because not all aspects are included, such as the further establishment of new companies and jobs and subsequent effects. At least, the analysis of the current status in the EU is sobering. The Commission deems 47% of the EU population as not properly digitally skilled, yet in the near future, 90% of jobs will require some level of digital skills.<sup>42</sup>

Here, the Commission receives support by the existing market players.<sup>43</sup> The next generation of mobile communication networks 5G is expected to be an unavoidable standard for the digital infrastructure to connect things, machines and people. But 5G is not really a disruption. It is a pre-condition for basic steps of connectivity. Currently, digitalization is limited to the update of single subjects of digitalization.

There is a strong will of the Commission to establish a Digital Single Market. Besides the technological and economic challenges, the vertical and horizontal relationships among the EU and the Member States are influencing factors. It is the traditional question of how much harmonization is needed. In the meanwhile, competitive advantages are increasingly fostered by single Member States. For instance, the Minister of Economic Affairs in France wants to open the streets in France in 2020 for auto-

38 Körber/Immenga (eds.), *Daten und Wettbewerb in der digitalen Ökonomie*, 2017; Marcut, (fn. 24), pp. 2 ff.; Cavanillas/Curry/Wahlster, (fn. 37).

39 Zuleeg, (fn. 27), p. 4.

40 *European Commission*, Commission staff working document on Europe's Digital Competitiveness Report Vol. 1, SEC/2010/0627, 2017, p. 7.

41 *European Commission*, Commission staff working document on A Digital Single Market Strategy for Europe – Analysis and Evidence, SWD/2015/0100 final, 2015, p. 5.

42 *European Commission*, Commission staff working document on A Digital Single Market Strategy for Europe – Analysis and Evidence, SWD/2015/0100 final, 2015, pp. 69 f.

43 *European Commission*, *Technologies and Systems for Digitizing Industry, The Fourth Industrial Revolution*, <https://ec.europa.eu/digital-single-market/en/fourth-industrial-revolution> (15/10/2018).



mated driving.<sup>44</sup> Of course, the French automotive companies shall be in the driving seats for the testing. With respect to the US and Chinese speed on development of automated driving, it is questionable if joint European standards within the framework of the Digital Single Agenda would not be a competitive advantage. At least, a heterogeneous infrastructure should not be a market obstacle.

## **B. Access, Environment, Economy and Society as Governance Pillars of the Digital Single Market framework**

The Commission's governance framework on the Digital Single Market is defined by three main pillars providing a consolidated view on mutual effects of structures and regulations. The three pillars form an architecture of a set of initiatives in diverse legal fields ranging from access and environment to economy and society. They are key actions to have a maximum impact within the Commission's mandate and its Digital Single Market agenda, rather than covering all legal and economic aspects of digitalization.<sup>45</sup>

### **I. Access – Better access for consumers and businesses to digital goods and services across Europe**

The first pillar is called 'Access'. It indicates the gate function for cyber participation with particular emphasis on electronic commerce (e-Commerce). The Commission's concrete goal is to ensure better online access for consumers and businesses to digital goods and services across Europe, enabling the full potential of intra-EU trade in electronic e-Commerce. In focus are commercial transactions between economic entities through the internet, in particular, online purchases and sale of goods and services.<sup>46</sup> While internet and e-Commerce laws have reached a certain level of harmonization, they are still characterized by comprehensive national laws.<sup>47</sup> The initiatives aim for the next level of harmonization. In a positive sense the Commission's 'Access' pillar can be deemed as the harmonization field for consumer and enterprises addressing the legal fragmentation in intra-EU trade, an crucial obstacle for cross-border

44 *Stahl*, Roboter Autos, Handelsblatt, 15/05/2018, <https://www.handelsblatt.com/unternehmen/industrie/roboter-autos-frankreich-will-ab-2020-autonome-fahrzeuge-zulassen/22388506.html?ticket=ST-7683499-9g6KNMDiw7rOWZUETglz-ap5> (15/10/2018); *Weinrich*, Autonomes Fahren in Frankreich, EuroTransportMedia, 16/05/2018, <https://www.firmenauto.de/autonomes-fahren-in-frankreich-ab-2020-ohne-fahrer-unterwegs-10145234.html> (15/10/2018); compare the approach of the German government: BMVI, Digitale Testfelder, <https://www.bmvi.de/DE/Themen/Digitales/Digitale-Testfelder/Digitale-Testfelder.html> (15/10/2018).

45 *European Commission*, Communication on a Digital Single Market Strategy for Europe, COM/2015/0192 final, pp. 3 ff.

46 *Stallmann/Wegner* (eds.), Internationalisierung von E-Commerce-Geschäften, 2015, p. 6.

47 *Eichhorn/Heinze/Tamm/Schubmann* (eds.), Internetrecht im E-Commerce, 2016, p. 4.



e-Commerce.<sup>48</sup> In the spirit of liberal markets, the idea is the fewer borders, obstacles and burdens, the better.

The policy field of e-Commerce is driven by eight major measures within the Digital Single Market agenda:

- ‘Geo-Blocking’ Regulation
- ‘Consumer Protection Cooperation’ Regulation
- ‘Parcel Delivery’ Regulation
- Directive on value added tax for supplies of services and distance sales of goods
- ‘Digital Contracts’ Directives
- ‘Digital Copyright’ rules
- Regulation on copyright for online access of television and radio programs
- E-Commerce sector inquiry<sup>49</sup>

In line with the existing rules – in particular the ‘e-Commerce’ Directive<sup>50</sup> and ‘Consumer Rights’ Directive<sup>51</sup> – they shall provide a comprehensive, integrated approach to stimulate e-Commerce.<sup>52</sup>

### 1. ‘Geo-Blocking’ Regulation

The newly established ‘Geo-Blocking’ Regulation (EU/2018/302) shall remove unjustified access limitations to online content based on nationality, place of residence or place of establishment within the internal market. It amends the revised ‘Consumer Protection Cooperation’ (CPC) Regulation (EU/2017/2394). Nevertheless, geo-blocking may partly remain since access limitations to comply with Union law or national laws of Member States are excluded (Art. 3 (3)).<sup>53</sup> While enhancing access to consumers, certain business models with differing pricing and distribution approaches may get limited and additional compliance obligations to avoid geo-discrimination.<sup>54</sup> The regulation entered into force March 2018 and will apply from December 2018.

48 Savin, (fn. 34), p. 6; *European Commission*, Amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM/2017/0637 final – 2015/0288 (COD), 2017, p. 11.

49 Refer to: *European Commission*, Communication on Final report on the E-commerce Sector Inquiry, COM/2017/0229 final, 2017.

50 Directive 2000/31/EC on electronic commerce.

51 Directive 2011/83/EU on consumer rights.

52 Refer to: *European Commission*, Communication on A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses, COM/2016/0320 final, 2016.

53 Trimble, The role of geoblocking in the Internet legal landscape, *Revista de Internet, Derecho y Política*, No. 23, 2016, p. 53.

54 Blaikie/Donovan, Geo-blocking: new rules for traders, Slaughter and May, p. 4, <https://www.slaughterandmay.com/media/2536811/geoblocking-regulations-plc-article.pdf> (15/10/2018).

## 2. 'Consumer Protection Cooperation' Regulation

The revised CPC Regulation (EU/2017/2394) repeals the former Regulation EC/2006/2004 and aims to effectively and efficiently enforce cross-border consumer protection laws in the Digital Single Market. The focus is on a new level of cooperation by national authorities needed in evolving digital areas such as investigation powers on digital infringements or new legislation as the geo-blocking regulation.<sup>55</sup> The revised CPC-Regulation entered into force January 2018 and will apply from January 2020.

## 3. 'Parcel Delivery' Regulation

In terms of competition in the parcel market the newly established 'Parcel Delivery' Regulation (EU/2018/644) shall enhance regulatory oversight and transparency of tariffs on parcel delivery services, as the parcel market in Europe is rather complex with its diverse services and pricing strategies.<sup>56</sup> Thereby, it complements the Postal Service Directive<sup>57</sup> as regulatory framework for the internal postal services market.<sup>58</sup> The regulation entered into force May 2018 with immediate application.

## 4. Directive on value added tax for supplies of services and distances sales of goods

In the field of tax-law the newly established Directive EU/2017/2455 aims to update and simplify the value added tax (VAT) obligations for supplies of services and distance sales of goods amending Directive 2006/112/EC and 2009/132/EC. The directive entered into force January 2018 and will apply in two stages. From January 2019 amendments to Directive 2006/112/EC by Art. 1 shall apply. Therefore, in particular, introducing a threshold of EUR 10,000 for cross-border sales below which suppliers may remain VAT taxable in the Member State of the supplier. Further, certain overall simplifications on the determination of a cross-border customer's location will be introduced. From January 2021 amendments to Directive 2006/112/EC by Art. 2, 3

55 *European Commission: DG Health and Consumers*, Support study for the impact assessment on the review of the CPC, Regulation 2006/2004/EC, 2015, p. 22.

56 *Groves*, The 2016 European Commission Proposal for a Regulation on Cross-Border Parcels, in: *Parcu/Brennan/Glass* (eds.), *The Contribution of the Postal and Delivery Sector*, 2018, pp. 115-128.

57 Directive 97/67/EC, amended by Directive 2002/39/EC and Directive 2008/6/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service.

58 *European Union*, Briefing on Cross-border parcel delivery services, 05/07/2018, pp. 4 f., [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586616/EPRS\\_BRI\(2016\)586616\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586616/EPRS_BRI(2016)586616_EN.pdf) (15/10/2018).

shall apply. Thereby, the VAT scheme will be extended to all services and distance sales of goods and VAT exemptions for imported goods will be fully removed.<sup>59</sup>

## 5. 'Digital Contracts' Directives

The legal fragmentation on consumer contract law in the digital environment is focused on two proposals for a new 'Supply of Digital Content' Directive (COM (2015) 634 final – 2015/0287(COD)) and a new 'Online Sales of Goods' Directive (COM/2017/0637 final – 2015/0288 (COD)). On the one hand, they aim to harmonize rules for the supply of digital content by common contractual rights with a high level of consumer protection.<sup>60</sup> On the other hand, the intention is to harmonize key aspects of rules for the sales of goods with a particular focus on cross-border sales and e-Commerce transactions.<sup>61</sup> Initiated in December 2015, both proposals are still under negotiation. They are essential for a functioning Digital Single Market highlighted in the EU's legislative priorities for 2018/2019.<sup>62</sup>

## 6. 'Digital Copyright' rules

In the field of intellectual property, the aim is to enhance copyright law in the digital environment through a new 'Digital Copyright' Directive and a new 'Online Content Portability' Regulation.<sup>63</sup>

The proposal for a new directive on copyright in the Digital Single Market abstractly speaks in Art. 1 of further harmonization. A look at the recitals of the proposal shows the matrix of goals and principles driving this harmonization. In recital three and six a balance among rightsholders and users is indicated. But the proposal is geared towards a high level of protection for rightsholders, (refer e.g. to recital two and five) which leads to an alliance of online service providers and users deeming the liberty of the internet limited.

The directive on copyright shows the diverse stakeholder interests, cooperation and consensus needs for such a governance field. In the first half of 2018, strong discussion

59 *Ernst & Young Global Limited*, New EU VAT rules simplify VAT for e-commerce, 29/03/2018, <https://www.ey.com/gl/en/services/tax/international-tax/alert--new-eu-vat-rules-simplify-vat-for-e-commerce> (15/10/2018).

60 *European Commission*, Proposal for a directive on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final, 2015, p. 14.

61 *European Economic and Social Committee*, Opinion on amended proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods, COM/2017/0637 final – 2015/0288 (COD), p. 11.

62 Refer to the Joint Declaration on the EU's legislative priorities for 2018-19.

63 *European Commission*, proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final – 2016/0280 (COD) and Regulation EU/2017/1128 on cross-border portability of online content services in the internal market, proposal for a Regulation on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes, COM/2016/0594 final – 2016/0284 (COD).

took place with a denial of the European Parliament on the proposal of the Commission in June 2018.<sup>64</sup> In September 2018 the European Parliament gave its essential consent on the suggested directive accompanied by more than 200 amendments. Now, the reaction of the Council is awaited to enable the Parliament to finally adopt the directive. But clashes among party interests remain: media houses, publishers, creative minds; and online service providers, users. The first group pursues strong intellectual property rights. The second group demands freedom of the net without disproportional censorship and fees. Interestingly, the big online service providers such as Alphabet or Facebook support the idea of liberty. The reason is that online service providers shall ask for permission or even reimburse publishers or creative minds. Users fear that freedom of speech will be limited by a kind of censorship through the back door.<sup>65</sup> The copyright reform illustrates how difficult it is to find legislative solutions to digital content at the borders of property rights, intellectual property rights, fundamental rights and freedoms.

Further, the newly established Regulation EU/2017/1128 on cross-border portability of online content services in the internal market shall ensure access to online content services that are lawfully provided to consumers in their Member State of residence. Art. 3 defines the providers' obligations to enable cross-border portability of such online content services to a subscriber who is temporarily present in another Member State. This regulation entered into force July 2017 and applies from March 2018.

## 7. Regulation on copyright for online access to television and radio programmes

The proposal for a new 'Digital Copyright' Directive is complemented by a proposal for a new regulation on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, COM/2016/0594 final – 2016/0284 (COD). Its focus is on the clearance of rights for protected content by applying the principle of 'country of origin' to broadcasting organizations' ancillary online services (Art. 2) and through a collective management organization for retransmission (Art. 3,4). Both aim to close identified gaps in the underlying Satellite and Cable Directive 93/83/EEC from 1993.<sup>66</sup> Similarly to the proposal for a directive on copyright, it is still under negotiation with a final Presidency compromise proposal discussed in the Council in December 2017.<sup>67</sup>

64 Refer to the steps of modernization on the copyright reform *Rauer/Ettig*, (fn. 28), pp. 7 ff.

65 *Digitale Grundordnung Europas – Streit ums Urheberrecht vor EU-Abstimmung auf n-tv*, 11/09/2018, <https://www.n-tv.de/politik/Streit-ums-Urheberrecht-vor-EU-Abstimmung-art.20618862.html> (15/10/2018).

66 *European Commission*, Proposal for a directive on copyright in the Digital Single Market, COM/2016/0594 final – 2016/0284 (COD), 2016, p. 1.

67 *Council of the European Union*, Final Presidency compromise proposal on proposal for a Regulation on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, ST 15898 2017 INIT, 2016/0284 (COD), 2017.

## **II. Environment – Creating the Right Conditions for Digital Networks and Services to Flourish**

The second pillar is called ‘Environment’. Here, the Commission emphasizes governance elements of the overall infrastructure with a protection and security governance framework. The Commission aims to create conditions for a level playing field for digital networks and innovative services. It expresses the idea of fair rules or even conditions on eye level in the whole society and economy. Here, the component of rights on equality meets the rights on freedom. It is a traditional dialectic of equality and freedom determining the kind of systems people want to live in. In contrast to the consumer focus in pillar one, pillar two adds further dimensions through five major measures within the Digital Single Market agenda:

- Reform of telecom rules led by ‘European Electronic Communications Code’ Directive
- ‘Audiovisual Media Services’ Directive
- ‘Platform to Business’ Regulation
- ‘e-Privacy’ Regulation after ‘General Data protection’ Regulation
- Cybersecurity after ‘Security of Network and Information Systems’ Directive

It seems as if the Commission is aiming to avoid a Darwinian, one-sided or dominated cyberspace. Liberalism is linked to the idea of fair competition.<sup>68</sup> Considerations include the kind and degree of regulation, the role of state authorities and rights of interference.<sup>69</sup>

### **1. Reform of telecom rules led by ‘European Electronic Communications Code’ Directive**

The reform of telecom rules covers a series of initiatives with the overall goal to ensure connectivity in the Digital Single Market.<sup>70</sup> Its center is the proposal for a new ‘European Electronic Communications Code’ Directive, COM/2016/0590 final – 2016/0288 (COD). Further, it covers the proposal for a new ‘institutional framework for the ‘Body of European Regulators for Electronic Communications’ Directive, COM/2016/0591 final – 2016/0286 (COD). In addition, the new Regulation EU/2017/1953 ‘Promotion of Internet Connectivity in Local Communities’, the Commission Implementing Regulation EU/2016/2286 ‘Wholesale Roaming Markets’ and the Commission Implementing Decision EU 2016/687 ‘694-790 MHz Frequency Band’ have been established. The legislation is accompanied by strategies for the EU broadband targets 2025 and the 5G action plan.<sup>71</sup>

<sup>68</sup> *Jones/Sufrin*, (fn. 29), pp. 51 ff.

<sup>69</sup> *Ibid.*, pp. 25 f., 36 f.

<sup>70</sup> *European Commission*, Communication on Connectivity for a Competitive Digital Single Market, COM/2016/0587 final, 2016, p. 2.

<sup>71</sup> Refer to European Commissions’ communication on Connectivity for a Competitive Digital Single Market, COM/2016/0587 final and 5G Action Plan, COM/2016/0588 final, 2016.

The proposed ‘European Electronic Communications Code’ Directive has the scope to recast the existing regulatory telecom framework defined by the Framework Directive EC/2002/21, Authorization Directive EC/2002/20, Access Directive EC/2002/19 and Universal Service Directive EC/2002/22 in the interest of clarity as several amendments of each are needed. Additional measures outlined need to be seen in line with this framework. Art. 1 of this proposal spans the scope across communications services, electronic communications networks, associated facilities and associated services to implement a competitive internal market for them. Art. 3(2) of this proposal outlines the general objectives addressed to Member States, national regulatory and other competent authorities as well as EU institutions to promote very high capacity networks and competition in the provision of electronic communications networks and services as well as its framework conditions to establish an efficient, effective internal market. The complexity of the interlacing fields of electronic communication is indicated through the regulation’s 117 articles. After comprehensive work, discussions and amendments since its initiation 2016, a provisional agreement on the proposal was reached in June 2018.

## **2. ‘Audiovisual Media Services’ Directive**

The ‘Audio-Visual Media Services’ (AVMS) Directive 2010/13/EU shall be revised by the legislative proposal COM/2016/0287 final – 2016/0151 (COD)<sup>72</sup> to cope with the requirements of the changed media landscape towards online and mobile content.

The current AVMS Directive provides the regulatory framework for the EU-wide coordination of national legislation on AVMS irrespective of the underlying technology. According to Art. 1, this covers both television broadcasts and on-demand AVMS. As a general principle, Member States shall ensure cross-border freedom of reception and retransmission (Art. 2(2) AVMS Directive). Further, it lays down common conditions for AVMS that Member States shall ensure, such as transparency of media service provider (Art. 5 AVMS Directive). Overall, the country of origin principle shall be followed to ensure legal certainty within the internal market. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this directive provided that such rules are in line with Union law (Art. 4(2) AVMS Directive).

The new proposal on the revised directive continues to follow a minimum harmonization approach. It seeks to reinforce the country of origin principle by simpler rules for determination and improvement of derogation mechanisms (Art. 12 of the proposal). It further strengthens the independence of audio-visual regulators and the role of the European Regulators Group for Audiovisual Media Services (ERGA). Regarding product placement and sponsorship, a balance between competitiveness and con-

<sup>72</sup> *European Commission*, Proposal for a Directive 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/2016/0287 final, 2016/0151/COD, 2016.

sumer protection shall be reached through more flexibility, (Art. 19 ff. of the proposal). The overall scope with certain obligations are proposed to be extended on video-sharing platform services in line with the e-Commerce Directive 2000/31/EC.<sup>73</sup> After a preliminary political agreement in April 2018 the Council adopted the directive in November 2018.<sup>74</sup>

### 3. 'Platform to Business' Regulation

The proposal for a new Regulation 'Promoting Fairness and Transparency for Business Users of Online Intermediation Services' and related measures<sup>75</sup> are the outcome of several assessments on online platforms and business-to-business practices in the last two years.<sup>76</sup> On the one hand, the evolution of online platforms as providers for online intermediation services is a key enabler for digital trade and cross-border market access. On the other hand, the rather limited number of large platforms, due to economic and technological conditions, has led to an increased imbalance of market powers over the strongly fragmented supply-side and business users. In particular, platform-to-business relations, in the form of unfair trading practices and lack of effective redress, and regulatory re-fragmentation of the Single Market were identified as the main issues.<sup>77</sup> Existing EU regulation of competition law with its focus on dominant positions and consumer law with its focus on business-to-consumer transactions are deemed to be not effective enough to address such issues.<sup>78</sup> The proposed regulation aims to address these issues with obligations for online intermediation services and online search engines to grant appropriate transparency and effective redress

73 *European Commission*, Proposal for a Directive 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/2016/0287 final, 2016/0151/COD, 2016, pp. 12 ff.

74 *European Commission*, Press release on Audiovisual media services: breakthrough in EU negotiations for modern and fairer rules, 26/04/2018, [http://europa.eu/rapid/press-release\\_IP-18-3567\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3567_en.htm) (15/10/2018) and *European Council*, Press release on Less hate speech and more European content on video streaming services: Council adopts new EU rules, 06/11/2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/11/06/less-hate-speech-and-more-european-content-on-video-streaming-services-council-adopts-new-eu-rules/> (15/11/2018).

75 *European Commission*, proposal for a Regulation on fairness and transparency for business users of online intermediation services, COM/2018/0238 final, 2018/0112 (COD) and Commission Recommendation, C(2018) 1177 on measures to effectively tackle illegal content online.

76 *European Commission*, communication and related working documents on Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe, COM/2016/0288 final and SWD/2016/0172 final, 2016; further part of final report on the E-commerce Sector Inquiry, COM/2017/0229 final and SWD/2017/0154 final, 2017.

77 *European Commission*, Impact Assessment accompanying the Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, SWD/2018/0138 final, 2018, p. 18.

78 *Council of the European Union*, Discussion on Regulation on Platforms-to-business relations, ST/8601/2018 INIT, 2018, p. 3.



possibilities as outlined in Art. 1 of the proposal. Thereby, in particular, covering corporate website users with regard to online search engines in addition to business users of online intermediation services. Transparency and clarity obligations are focused on standard terms and conditions (Art. 3 of the proposal) and specific information on ranking (Art. 5 of the proposal), differentiated treatment (Art. 6 of the proposal) and access to data (Art. 7 of the proposal). After being proposed in May 2018, the proposal is in regular discussion within the Council and Parliament. Whether a political agreement could be reached before the European elections in May 2019 needs to be seen. Comprehensive debates on the proposal are expected as on the one hand, several Member States support the objectives and on the other hand, global technology firms in this sector, such as Alphabet and Amazon, may highlight the potential slowdown of the digital economy and its innovation.<sup>79</sup>

#### 4. 'e-Privacy' Regulation after 'General Data Protection' Regulation

Data privacy is strengthened by the Lisbon Treaty in primary law, broad competencies given through Art. 16 TFEU<sup>80</sup> and Art. 8, 7 Charter of Fundamental Rights.<sup>81</sup> Privacy of data is part of the overall understanding of the protection and realization of privacy and informational self-determination.<sup>82</sup> The GDPR contributes on the one side to the fundamental rights, on the other side to fundamental freedoms of the economy in a digital era.<sup>83</sup> Effective since May 2018, the Regulation aims to achieve full harmonization on data protection, at a first glance.<sup>84</sup> Data is of main interest in a new emerging data economy.<sup>85</sup>

79 *Fioretti*, EU moves to regulate tech giants' business practices, Reuters, 26/04/2018, <https://www.reuters.com/article/us-eu-tech/eu-moves-to-regulate-tech-giants-business-practices-idUSKBN1HX13T> (15/10/2018); *Pereira*, Online Platforms and Search Engines – Does the new EU Regulation Proposal move the dial?, Freshfields Bruckhaus Deringer, 03/05/2018, <http://digital.freshfields.com/post/102ev9o/online-platforms-and-search-engines-does-the-new-eu-regulation-proposal-move-th> (15/10/2018).

80 *Gellermann/Schröder*, in: Streinz (ed.), EUV/AEUV, (fn. 25), Art. 16 AEUV.

81 *Wolff*, in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar I EUV GRC, 2017, Art. 7, 8.

82 *Bull*, Informationelle Selbstbestimmung – Vision oder Illusion?, 2011; *Maisch*, Informationelle Selbstbestimmung in Netzwerken, 2015; *Schulte*, Vom quantitativen zum qualitativen Datenschutz, 2018; *Beyvers*, Privatheit in der Waagschale, 2018; compare the more abstract understanding of right to privacy in the US: *Posdziech*, US-amerikanische Discovery und deutsches Datenschutzrecht, 2017, pp. 7 ff.; *Fiedler*, Die Einführung eines europäischen Fluggastdatensystems, 2016, pp. 103 ff.

83 *Lang*, Reform des EU-Datenschutzrechts in Kommunikation und Recht 2012, pp. 145 ff.; opinion BITKOM, 18/05/2012; opinion 01/2012 Art. 29-Datenschutzgruppe, Working Papers 191, 23/03/2012; *Mantz/Spittka*, Datenschutz und IT-Sicherheit, in: Sassenberg/Faber (eds.), (fn. 5), pp. 140 ff.

84 *Lewinski*, Europäisierung des Datenschutzrechts in Datenschutz und Datensicherheit, 2012, pp. 564 ff.

85 *Cavanillas/Curry/Wahlster*, (fn. 37); *Cao* (ed.), Data Science Thinking, 2018; *Körber/Immenga* (eds.), (fn. 38).

To align with the new GDPR, the Commission initiated in January 2017 the repeal of the e-Privacy Directive through a revised e-Privacy Regulation proposal.<sup>86</sup> The proposal regulates the use of electronic communication services, in particular, the protection of private life, communication and processing data (Art. 1(1) of the proposal). In parallel to the GDPR, it is emphasized that the free movement of electronic communication data and services is wanted (Art. 1(2) of the proposal). Thereby, the regulation substitutes the e-Privacy Directive from 2002 and the cookie-Directive from 2009.<sup>87</sup> Communication data can be processed as far as necessary to achieve the transformation of communication, for the duration necessary for that purpose (Art. 6(1) (a) of the proposal). Comparable to Art. 6 GDPR, Art. 6 of the proposal captures permitted cases of processing electronic communication data, metadata and content. Remarkably, the proposal is stricter than the GDPR in several cases and does not foresee flexibility clauses or exceptions. Without explicit consent it will be difficult to use data for marketing, tracking cookies or personalized online advertising through behavioral advertising. Thus, business models of different providers are touched upon. Hence, it is not astonishing that online service providers as well as media players resist this proposal. In parallel to the GDPR, Art. 23 of the proposal stipulates general conditions on imposing administrative fines. Infringements or non-compliance can amount to fines up to EUR ten or twenty million; or two or four percent of the total worldwide annual turnover of the preceding financial year.

## 5. Cybersecurity after ‘Security of Network and Information Systems’ Directive

An essential concern of state authorities as well as enterprises is the cybersecurity.<sup>88</sup> In the GDPR several rights demand technical, procedural, methodological security actions and risk, review, information, documentation actions, such as Art. 25, 32 GDPR.<sup>89</sup> With respect to cybersecurity, the ‘Security of Network and Information Systems’ (NIS) Directive entered into force in July 2016 and applies from May 2018 to assure minimum harmonization.<sup>90</sup> It is a typical legislation act of the present time. Different general principles of law are transformed through obligations on transparency, information and documentation as well as technical security requirements

86 *European Commission*, Proposal for a Regulation 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), 2017.

87 Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector; Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services.

88 *Richter*, *Datenschutz durch Technik und die Grundverordnung der EU-Kommission in Datenschutz und Datensicherheit*, 2012, p. 576.

89 *Hartung/Jandt*, in: Kühling/Buchner (eds.), *DSGVO/BDSG*, 2018, Arts 25, 32.

90 *Schneider*, *Meldepflichten im IT-Sicherheitsrecht*, 2017, pp. 73 ff., 101 ff.; *Schmidl*, *Recht der IT-Sicherheit*, in: Hauschka/Moosmayer/Lösler (eds.), *Corporate Compliance*, 2016, pp. 761 ff.

(refer e.g. to Art. 7 ff. on institutional and cooperative requirements as well as to Art. 14 ff. to obligations on reporting and transformation). We can recognize a preventive governance, risk and compliance approach. This leads to a huge amount of efforts, resources and investments as well as technocracy, rationality and bureaucracy. The question is if a balance of formal and material conformity is achieved. It seems as if the legislator and legal counsels are not deeply familiar with the complete development, but are required to provide at least a governance framework. It looks more like a reactive minimum legislation. The NIS Directive has been complemented by several measures to effectively ensure a high level of cybersecurity, covering the proposal for a revised Regulation COM(2017) 477 on EU Cybersecurity Agency and repealing 'Cybersecurity Act' Regulation (EU) 526/2013, Commission Recommendation on Coordinated Response to Large Scale Cybersecurity Incidents and Crises C(2017)6100/3 and Commission Decision (C 2016/4400) on the signing of a contractual arrangement on a public-private partnership for cybersecurity industrial research and innovation.

### III. Economy and Society – Maximizing Potentials of the Digital Economy by the 'Free Flow of Non-Personal Data' Regulation

The third pillar has the broadest umbrella function covering 'Economy and Society'. The Commission particularly aims to maximize the growth potential of the digital economy by three main measures within the Digital Single Market agenda. Here, the legislation is in its infancy:

- 'Free flow of non-personal data' Regulation
- Information and communications technology standardization<sup>91</sup>
- Digitization of employment and government<sup>92</sup>

The proposal for a new 'Free Flow of Non-Personal Data' Regulation, COM/2017/0495 final – 2017/0228 (COD) follows a principle-based approach to eliminate data localization requirements of Member States while ensuring data access to competent authorities. Thus, the principle of free movement of non-personal data (Art. 4) shall be applied in line with the principle of data availability to competent authorities (Art. 5). For the related issue of data portability a self-regulatory approach by market players focusing transparency is followed (Art. 6). The subject and scope of the proposal are clearly limited to non-personal data, meaning data other than personal data as referred to in Art. 4(1) GDPR, and its processing in the Union. Therefore, it shall cover the processing of non-personal data provided as a service to users or carried out by a natural or legal person, provided they are residing or having an establishment in the Union and the activity falls inside the scope of Union law. From an ideal economic

91 Mainly non-legislative measures, refer to European Commissions' communication on ICT Standardization Priorities for the Digital Single Market, COM/2016/0176, 2016.

92 Mainly non-legislative measures, refer to European Commissions' communication on a new (digital) Skills Agenda for Europe, COM/2016/0381, communication on Digitalizing European Industry, COM/2016/0180 and EU e-Government Action Plan 2016-2020, COM/2016/0179.

perspective data should flow as freely as possible across Member States creating a European data ecosystem.<sup>93</sup> A free flow of data without restrictions through localisation or other barriers to the free movement of non-personal data is an important competitive edge.<sup>94</sup> Overall, data free flow is a framework condition of the Digital Single Market comparable to the fundamental freedoms of the Single Market.<sup>95</sup> After, the European Parliament, Council and the European Commission reached a general political agreement in June 2018, the Parliament approved the regulation in October 2018 awaiting final approval by the Council in November 2018<sup>96</sup>.

#### IV. Coherent Governance on Economy and Society

Overall, the Digital Single Market has to be developed in light of the principle of coherency with the existing Single Market.<sup>97</sup> The Single Market is the basis and governance framework for information and communication technologies, now converting to the next level of evolution, the Digital Single Market. The Commission follows a coherent governance understanding, not limited to traditional legislation.<sup>98</sup> However, the Digital Single Market agenda, in particular its third pillar, is initiating the idea of connectivity, obviously not formally covering all legal sources and disciplines needed. Therefore, multi-level governance has to be accompanied by holistic, hermeneutic approaches with enhanced logic, methodology in how to think and approaching.<sup>99</sup> Legal approaches have to be seen in light of other disciplines on digitalization for an inter-disciplinary approach. Big data is a good, because rather simple example.<sup>100</sup> It is extensively used in practice, but its methodology and coherency are questionable.

93 Curry, The big data value chain: definitions, concepts, and theoretical approaches, in: Cavanillas/Curry/Wahlster (eds.), (fn. 37), p. 34.

94 *Business Europe*, Position paper on the European Commission's Public Consultation on Building the European Data Economy, 2017, p. 4; *European Commission*, Commission staff working document on a Digital Single Market Strategy for Europe – Analysis and Evidence, SWD/2015/0100 final, 2015, pp. 12, 61 ff.; Outlined in *Committee of the European Economic and Social Committee*, Opinion on the proposal for a regulation on a framework for the free flow of non-personal data in the European Union, OJ C 227 of 11/06/2018, pp. 12, 81 ff.; DIGITALEUROPE, 2017, p. 3.

95 Briefing on Public Security Exception in the area of non-personal Data in the European Union by Policy Department for Economic, Scientific and Quality of Life Policies; Irion, Institute for Information Law, University of Amsterdam, Directorate-General for Internal Policies PE 618.986, 2018, p. 1.

96 *European Council*, Press release on Free flow of data: EU adopts new rules, 09/11/2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/11/09/free-flow-of-data-eu-adopts-new-rules/> (15/11/2018)

97 Streinz (ed.), EUV/AEUV, (fn. 25), Art. 7.

98 Marcut, (fn. 24), p. 47; Savin, (fn. 34).

99 Wittpahl, Digitalisierung, 2018.

100 Reinhardt, Der falsche Glaube – Big Data wird's schon richten, in: Schuster/Lutz (eds.), Chefsache Digitalisierung 4.0, 2018, pp. 19 ff.; Härdle/Lu/Shen (eds.), Handbook of Big Data Analytics, 2018.

### **C. Perspectives on the Digital Single Market**

The Digital Single Market agenda was a long overdue step. Although the Commission's actions are diverse, it is an approach towards a coherent governance. The implementation of different regulations and directives are fruits of this agenda. Digitalization bears risks and potentials, but it is unavoidable and moreover opens new fields of socioeconomic actions. Market players become aware of the need for governance. Single technologies or interests cannot be enforced without public consent, in particular if states are demanded to provide structures and services. The current reform needed in the EU can be seen as opportunity to create a sustainable and at the same time open architecture for Europe's digital transformation. This transformation can be used as chassis for further European integration.

All these steps raise legal questions, on the one side generally on principles of law such as coherency and effectiveness, on the other side specifically on sectoral legislation such as enabling infrastructural proceedings for new technologies. The Digital Single Market is only an enhancement of the existing Single Market, a core element of European law. Many questions are related to general principles of law, legal logic and methodology. In focus are general principles of law, degrees of harmonization, regulation and self-regulation, general and sectoral regulations. Overall, a balance has to be achieved.

The multi-layered digitalization requires a multi-level governance approach. Member States have to be on eye level with market developments. Frankness and innovation are essential characteristics of governance more than they ever were in the past. For the sectoral or specific questions deeper knowledge is needed. The interdisciplinary-evolution will change education and work hugely.

Reactive governance is insufficient. New ideas on governance benefits by member states show that governments have awoken. Traditional legal scales such as taxes on profits are put into question through new ideas on 'digital taxes'. With respect to huge profiteers such as Alphabet or Google, the EU is considering a tax of 3% on internet turnover. This is only one of many creative proposals. With respect to smart factories, for instance, it is possible to establish a tax on automated systems or robots. This can happen through a flexible percentage on the degree or level on the automatization within a factory or system.

Remarkably, governance evolution and balance are intensively driven by courts. In the recent years it seems as if courts in Europe have a more coherent view on digital transformation than other state powers. Data protection is a well-known example. For over a decade the Court of Justice of the EU has had to correct legislation, interpretation and application. Here, the field of data protection with clarification of general principles of law such as a kind of right to be forgotten or strict necessity are strong examples of the role of the Court of Justice in the EU as a player in the primary framework orchestra supporting other general principles of law such as the rule of

law, proportionality, coherency, legal security, confidence and sustainability.<sup>101</sup> Digitalization must not lead to antagonisms. There is no black or white between economic expansion and social security. Consumers are not only antagonists, they are citizens, thinkers and entrepreneurs. On the other side, the GDPR may serve as an example. It is not only a one-way protection shield of fundamental rights and freedoms. Data governance is needed to streamline and steer processing of data. Often it is noted that Art. 1 GDPR focuses both on the free flow and protection of data. The spirit of the regulation is to achieve a balance, not to hamper data use. There are many steps between full liberalization and overregulation. Digitalization itself is not good or bad. But legal security and confidence are pillars of economy and society, of a profound democracy and entrepreneurial society. It is not contradictory to be both frank, innovative and to provide a confident, sustainable governance framework.

101 Refer e.g. CJEU, case C-131/12, *Google Spain*, ECLI:EU:C:2014:317 (strengthening the right on privacy in an innovative way) or CJEU, joined cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238 (the whole legislative act was questioned due to fundamental breaches).

