The Impact of Regulatory Techniques on the Development of the Digital Single Market in the European Union: Selected Issues

Beata Pachuca-Smulska

Summary

This chapter assesses the digital market regulation in the EU in the area of e-government, personal data protection, and online platforms. Technological, IT, and telecommunication innovations are changing the world by creating a new digital economy. However, legal regulations are not always keeping pace with the rapidly changing market for new technologies. The digital market in the EU needs uniform regulation in order to build a Digital Single Market (DSM). Fragmentation of regulatory regimes resulting from the scattering of national market regulations in the EU hampers the digital market. Accordingly, the chapter addresses the question about the proper form of regulation of the single digital market and its organization. Do directives and regulations ensure uniform regulation of the EU market? What regulatory techniques should be used for a digital single market in the EU?

Keywords: e-government, personal data protection, online platforms, regulatory techniques, digital single market.

1. Introduction

The global economy of today is based on technological, IT, and telecommunication innovations. The internet and new technologies have been changing the world for over two decades. By creating a new global economy, they are revolutionising work, private, social and community life, and changing

public administration. However, not all legal regulations are keeping pace with the rapidly changing market for new technologies. Citizens, workers, consumers, businesses, and customers expect the state to protect them, but also to provide for easier, faster and more efficient contact with the administration, and access to services and goods. They wish to make full use of new technologies, but also to have a guarantee of security of both the services provided and the personal data transferred and used. In the area of new technologies, Europe has been trying to catch up with the United States and China for many years, but this has proved to be a highly challenging process. The market for new technologies in the Old Continent must take regulations restricting the freedom of economic activity into account. Barriers are also created by specific investment rules in this market and by the protection of personal data of its weakest participants. Further, the European market is not a single market, which is a fundamental barrier to its dynamic development. Thus it is hampered in its growth by fragmentation of regulation at the EU level resulting from scattering of national market regulations.

The dynamic development of the digital market necessitates rapid changes and its harmonisation across a multi-legal-system Europe. The main objective of this paper is to assess the selected scope of EU digital market regulation. Accordingly, the chapter addresses the question of the proper form of regulation of the single digital market and its organization: Can a single, one-size-fits-all regulatory model be used for the entire digital market in the EU given that the regulatory techniques used by national legislators often have different effects? The research conducted in this study includes dogmatic and legal analysis of selected legal acts due to the limited size of the publication and the broad scope of the issues to be assessed. The assessment of adopted regulatory techniques will focus on following issues: e-government, personal data protection, and online platforms. It also serves as an introduction to the research topics addressed later in the book with particular reference to the latest provisions of Regulation (EU) 2019/1150[1] and Directive 2019/1024.[2]

[1] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance) OJ L No. 186 of 11 July 2019.

[2] Directive (EU) 2019/1024 of 20 June 2019 on open data and the re-use of public sector information, OJ L No. 172 of 26 June 2019.

2. From the single market to the digital market to e-administration

From the very beginning of the construction of a united Europe, priority was given to the internal market, from 1992 onwards to the single market,[3] and from 2015 onwards – to the Digital Single Market.[4] Each stage of the integration of European countries is accompanied by subsequent regulations aimed at harmonizing the legislation of Member States and merging their markets into one economic area. At the beginning of the 1990s, in addition to the traditional market, the foundations of the new market economy were laid.[5] At that time, no one expected that the new economy market would develop so dynamically and its importance would dominate the economy within a few years, but would also change the face of public administration. In the initial stages of the formation of the market for new technologies no one expected how dynamically it would subsequently develop. Over time, its importance and the close relationship between new technologies, data (in various forms), the economy, and public administration has been increasingly recognised. The first regulations were based primarily on soft legislative techniques and pointed to the fundamental role of information and communication technologies for economic development. One of the first significant documents was the publication of the i2010 eGovernment Action Plan.[6] It announced the introduction of electronic public administration services in Europe, enabled sharing of good practices between Member States, and started the implementation of several projects concerning the introduction of cross-border eGovernment services. The i2010 eGovernment Action Plan also launched the first steps towards the re-use of public sector information[7] in the economy. Moreover, it resulted in

[3] Mario Monti, *A New Strategy for the Single Market at The Service of Europe's Economy and Society*, Report to the President of the European Commission José Manuel Barroso, May 2010, pp. 13–17.

[4] Digital Single Market, further herein as "DSM."

[5] Carl Shapiro, "Exclusivity in Network Industries," *George Mason Law Review* 1999, No. 7: 673.

[6] 25 April 2006, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Opinion of the Committee of the Regions on Bridging the Broadband Gap and i2010 eGovernment Action Plan, OJ C No. 146 of 30 June 2007, available at https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52006AR0272 (accessed on 10 August 2019).

[7] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L No. 345 of 31 December 2003) and 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 (OJ L No. 175 of 27 June 2013).

the establishment of an eProcurement Platform[8] that allows the development of a cross-border public procurement market. During this period, EU electronic identity systems, which enable citizens to access public services electronically across the EU, were developed. The high dynamics of the digital market prompted the European Commission to publish in 2010 the communication on "Digital Agenda for Europe 2020".[9] The strategy adopted in the Digital Agenda for Europe 2020 was to be a continuation of previous actions and also a response to the 2008–2009 crisis which had revealed weaknesses of the European economy. The dynamically developing digital market was to become a stimulus for economic development.[10]

As indicated, the development of new technologies has also opened up new opportunities for the public sector. The increasing availability of technological innovations, in particular social media sites and online platforms, has raised citizens' expectations for services they use over the Internet. This led the Commission to present a further eGovernment Action Plan in 2010. The main objective of the eGovernment Action Plan 2011–2015[11] was to implement the objectives of the "Malmö Declaration."[12] The latter obliged Malmö conference participants to build a new economy based on knowledge. It was expected that by 2015 public administrations in Member States should become open, flexible, and collaborative. In addition, decision-makers representing many governments have committed themselves to using eGovernment to increase efficiency and effectiveness and to continuously improve the quality of public services. The importance of new technologies was particularly recognised by the European Commission in its Communication of 6 May 2015 on "A Digital Single Market Strategy for Europe." The DSM Strategy identifies three key objectives: to improve consumer and business access to goods sold over the Internet; to create the conditions for the development of digital networks and services; and to fully exploit the growth opportunities offered by

[8] Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L No. 94 of 28 March 2014.

[9] The Digital Agenda is the result of extensive consultation, based in particular on the "Europe's Digital Competitiveness Report" (COM(2009) 390). All these documents are available at the website: http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm.

[10] A Digital Agenda for Europe, Brussels, 26 August 2010, COM(2010) 245 final/2.

[11] Brussels, 15.12.2010 COM(2010) 743 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European eGovernment Action Plan 2011–2015 Harnessing ICT to promote smart, sustainable & innovative Government SEC(2010) 1539 final.

[12] In the Declaration concluding the 5th Ministerial eGovernment Conference in Malmö see http://www.egov2009.se/wp-content/uploads/Ministerial-Declaration-on-eGovernment.pdf.

digitisation.[13] The strategy was adopted by the European Parliament in its resolution of 19 January 2016 entitled "Towards a Digital Single Market Act".[14] One of the major initiatives addressing the needs of citizens and businesses in the Member States and adopted in the "Digital Single Market Strategy for Europe" is the creation of a single digital gateway serving as a European one-stop shop (hereinafter referred to as "the Gateway"). The role and importance of the Gateway were also recognised in the communication of the European Commission of 19 April 2016 entitled "EU eGovernment Action Plan 2016–2020 – Accelerating the digital transformation of government," where it was listed amongst the Commission's actions foreseen for 2017.[15] All the initiatives identified in the action plans and communications have been reflected in detail in legislation, in particular in the form of regulations or directives.

3. Selection of a regulatory technique for the Digital Single Market

3.1. Regulations

In the digital market, the most frequently used legislative techniques are regulations.[16] They constitute the largest group of legislative acts in this area compared to other EU policies. Several recommendations and guidelines have also been adopted to ensure their common interpretation. Harmonised EU rules in this area are necessary but insufficient to create a single market. Further, the application of regulations is not enough to achieve full harmonisation of

[13] See: 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 Brussels, 6 May 2015 COM(2015) 192 final.

Marcus Scott e al., *Contribution to growth: The European Digital Single Market. Delivering economic benefits to citizens and businesses, Study for the Committee on the Internal Market and Consumer Protection*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2018; Beata Pachuca-Smulska, "Konsument na jednolitym rynku cyfrowym," in *Ochrona prawna konsumenta na rynku mediów elektronicznych*, eds. Maria Królikowska-Olczak, Beata Pachuca-Smulska (Warszawa: CH Beck 2015), 7.

[14] Towards a Digital Single Market Act European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI))(2018/C 011/06).

[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} Brussels, 6 May 2015 SWD(2015) 100 final Commission Staff working document, *A Digital Single Market Strategy for Europe – Analysis and Evidence*.

[16] Regulation in accordance with Article 288 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C No. 326 of 26 October 2012.

national legislation. Not all provisions of regulation are directly applicable and some require further implementing measures or interpretation. For instance, Article 8 of the General Data Protection Regulation (GDPR)[17] sets the age of 16 as appropriate for the consent of minors to use social media but allows Member States to reduce the age to 13. Even in the case of this specific provision, it is difficult to achieve uniformity across the Member States: Poland adopted the age of 16, Italy – 14 years, while in the UK, Lithuania or Portugal it is only 13 years.[18] Although the GDPR provisions empower the European Data Protection Board (EDPB) to adopt interpretative guidelines, they stress at the same time that, despite common principles, national practices may (unfortunately) remain heterogeneous. Another example of full freedom to regulate is Article 80 of the GDPR on the representation of data subjects.

Digital market participants expect that digital technology will also be widely used by the public sector. Citizens and businesses prefer online procedures and access to information in both domestic and cross-border processes. The European Commission has met these expectations and in April 2016 presented its eGovernment Action Plan 2016–2020.[19] One of the most important solutions adopted is Regulation 2018/1724 of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services, and amending Regulation (EU) No 1024/2012.[20] This regulation does not leave Member States the freedom to choose the method of implementation, as it is fundamental to ensure access to information and procedures, but also to services and assistance in resolving problems. The gateway facilitates, above all, access to information, administrative procedures and assistance services for citizens who want to live, conduct business, study, in a Member State of the EU other than their country of residence to-date. This will make it easier for each party to benefit from the Single Market. The gateway is supposed to provide information in at least two languages: the national language of the Member State and at least one other

[17] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L No. 119 of 4 May 2016.

[18] See: *The GDPR child's age of consent for data processing across the EU – one year later* (July 2019), available at https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=3017751.

[19] Communication from the Commission of 19 April 2016, *EU e-Government Action Plan 2016–2020. Accelerating the digital transformation of government*, COM (2016) 179.

[20] Regulation 2018/1724 of 2 October 2018 the European Parliament and the Council establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation 1024/2012, OJ L No. 295 of 21 November 2018.

official language of the European Union. It is worth noting that Member States must ensure full online access to the most important procedures by 2023.

However, a still unregulated area which occupies a key place in the digital market are online platforms.[21] Online intermediation services are increasingly used by both the private and public sectors.[22] This topic was addressed by the EU legislator in 2016, when the European Parliament used soft tools and adopted the resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)). However, the EU legislator, noting the importance of dynamically developing platforms, chose the form of a regulation to regulate this area. Detailed provisions were published three years later in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services,[23] which set out the transparency standards governing the relationship between online business users (entrepreneurs) and platforms. Online platforms, particularly those providing online intermediation services such as Amazon, Airbnb, Facebook, Skyscanner and search engines such as Google or Yahoo! are key players in the digital market.[24] On the one hand, they enable entrepreneurs, *inter alia,* to implement innovative ideas for business and development and to establish contact with consumers. On the other hand, they lean heavily on their market position in their relations with other market participants. Many EU businesses cooperating with online platforms are critical of their market behaviour due to unilateral and unfair commercial practices.[25] Therefore, Regulation 2019/1150 aims to address the problem of asymmetric bargaining power between online platforms and business users by promoting higher standards of transparency and legal certainty in a digital market economy.

The selection of the form of a regulation for this area intends to ensure uniformity of law across the EU Member States, which would allow to treat operators according to common, clearly defined rules. Under the new

[21] See: Dariusz Adamski, "Lost on the digital platform: Europe's legal travails with the Digital Single Market," 55 *Common Market Law Review* 2018, Issue 3: 719–751.

[22] Rec. 1 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[23] OJ L No. 186 of 11 July 2019.

[24] See more in the following chapters of this book: Laura Ammannati, Regulating Digital Platforms, p. 107, Enguerrand Marique, Yseult Marique, *Conceptualizing Powers on Platforms Beyond the Public / Private Divide*, p. 125, Valentina Giomi, *Markets with Administrative Barriers to entry and Challengers Operating through Platforms: the System's Resistance Protecting the General Interest*, p. 149, Elena Signorini, *Platforms as Custodians and Guarantors of the Rights of the Weak Party, in the Prism of Digital Labour Law*, p. 167, Gina Rosamarì Simoncini, *Worker protection in the platform economy*, p. 179 and literature indicated there.

[25] Rec. 2 Regulation (EU) 2019/1150.

Regulation, platforms should apply clear and widely known conditions for the provision of platform intermediation services in the EU. Non-compliance with the rules laid down in the Regulation will result in the voiding of non-compliant contract terms and consequently may create uncertainty in relations with users. The introduction of the strong sanction of nullity is a solution aimed at ensuring equal treatment of businesses in the EU. Online payment services and online advertising are excluded from the scope of Regulation 2019/1150. However, the legislator decided to cover these services under Regulation 2019/1150 if they facilitate direct transactions and contractual relations with own consumers. In turn, Article 4 of Regulation (EU) 2019/1150 obliges platforms to disclose and substantiate their reasons when they "restrict, suspend or terminate" their cooperation with business users. The Regulation also introduces a termination period of at least 30 days. Articles 5 and 7 of Regulation (EU) 2019/1150 address a key issue for business users, namely the positioning of their website in the search engine ranking and the differentiated treatment of operators in this process. The new rules oblige the platform to provide transparent rules for the services it provides. According to Article 5 of Regulation (EU) 2019/1150, platforms are required to set out the main parameters determining the position in the search ranking and the reasons for this position. Online search engines should provide this information in the form of "an easily and publicly available description, drafted in plain and intelligible language." For both types of services, businesses must clearly indicate whether the remuneration received by the platform influences the ranking of the entity in the platform's search engine. However, the Regulation does not impose on the platform the obligation to disclose an algorithm or information that would allow manipulation of the results.[26]

It is worth pointing out the regulations on differentiated treatment of business users, which aim at eliminating this problem, were introduced in Article 7 of Regulation (EU) 2019/1150. However, the wording of the new provision does not address this issue since it is not clear and gives rise to a number of questions, unlike the unambiguous solution adopted in Article 5. For the sake of order, the solutions adopted in Article 9 of Regulation (EU) 2019/1150 relating to the principle of data collection should also be noted. This provision obliges platforms and search engines to define, in their relations with business users, the principles of data collection and use in the course of their business. In turn, Article 10 of Regulation (EU) 2019/1150 introduces the obligation on the platform to provide grounds for any restrictions and requirements for business users to offer the same goods or services under different conditions

[26] Rec. 27 Regulation (EU) 2019/1150.

and through other means. Those grounds shall include the main economic, commercial or legal considerations for such restrictions. In practice, this problem arose, *inter alia*, in a case against Amazon, which introduced in its contracts with e-book suppliers some regulations that "were capable of, or likely to reduce, the competitiveness of e-book retailers by limiting their ability and incentive to develop and differentiate their e-book offerings, thereby reducing barriers to entry and expansion in the relevant markets" (Case AT.40153 of 4 May 2017[27]). In turn, the EU legislator in Art. 11 of Regulation (EU) 2019/1150 obliged the suppliers of online intermediation services to set up an internal complaint-handling system. The system must be easily accessible and free of charge for business users. The suppliers shall also identify mediators in accordance with Article 12 of Regulation 2019/1150 who will be ready to engage in dispute resolution. In addition, a business user may take legal action directly against the infringing platform. Although legislation in this area is quite new, some of the solutions it has introduced are already in place. Moreover, the dynamically developing platforms have been subject to political and antitrust control for some time now. For example, solutions introduced by the Regulation, including search ranking and data access, are already in place. However, in the current approach, the scope of the changes introduced by the Regulation in relation to platforms is not clear yet, and many online platforms already apply some of the solutions adopted in Regulation (EU) 2019/1150.

3.2. Directives

The legislative technique often used in addition to regulations are directives. They are legislative acts that set a common goal for the legislation of all EU Member States[28] in a given area. However, individual Member States must develop their own rules on how to achieve the objectives set out in directives what may, consequently, encourage regulatory fragmentation. Directives are binding on Member States at one of two levels: that of maximum or minimum harmonisation. Importantly, national measures transposing directives must be binding and not merely administrative in nature. However, some directives

[27] Summary of Commission Decision of 4 May 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40153 — E-Book MFNS and related matters) (notified under document C(2017) 2876) OJ C No. 264 of 11 August 2017.

[28] Directive from Article 288 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C No. 326 of 26 October 2012.

go beyond just setting goals.[29] They may require Member States to establish national regulatory authorities and grant them extensive powers. This is the case for the telecommunications, postal, and broadcasting sectors as well as data protection.

For the development of a well-functioning e-government, it is necessary to strengthen cooperation between Member States in other areas as well. Member States are therefore cooperating in the following areas: eIDAS services, including eID and e-signature; the European e-Justice Portal as a one-stop-shop for information on European justice issues; electronic interconnection of insolvency registers; the Business Registers Interconnection System (BRIS). The evolution of the economically and administratively consolidated European Union should aim at creating an integrated e-government system linking business registers in all EU Member States.[30] In the current approach, "since the objective of Directive 2012/17/EU of the European Parliament and of the Council was not to harmonise national systems of central, commercial and companies registers, that Directive did not impose any obligation on Member States to change their internal systems of registers, in particular as regards the management and storage of data, fees, and the use and disclosure of information for national purposes".[31] Companies and their subsidiaries established in other Member States should have a unique identifier that allows them to be unequivocally identified in the European Union. The identifier is intended to be used for communication between registers through a system of interconnected registers. The Directive allows the use of domestic registration numbers for intra-country communication purposes.[32]

The main objective of Directive (EU) 2017/1132 is to allow a search for information on companies registered not only in any EU country, but also in Iceland, Liechtenstein and Norway. The system also facilitates an exchange of information on foreign subsidiaries and cross-border mergers. The Business Registers Interconnection System (BRIS) is the result of joint efforts by the governments of EU Member States and the European Commission. BRIS links

[29] See: Francesco Duina, "Explaining legal implementation in the European Union," *International Journal of the Sociology of Law* 1997 (25): 155–179.

[30] Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law OJ L No. 169 of 30 June 2017; Commission Implementing Regulation (EU) 2015/884 of 8 June 2015 establishing technical specifications and procedures required for the system of interconnection of registers established by Directive 2009/101/EC of the European Parliament and of the Council OJ L No. 144 of 10 June 2015.

[31] Rec. 27 Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law.

[32] Rec. 30 Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law, see: Paweł Lewandowski in this book.

the central business register to enable full access to legal and tax information[33] in a cross-border context. The important role of BRIS is to ensure that citizens, businesses and public administration bodies have a wide access to information about businesses and their subsidiaries opened in other Member States through the European e-Justice portal. The once-only principle (OOP) is at the heart of public sector digitisation. Under this principle, citizens and businesses provide multiple data only once in their dealings with public administration, while public administrations bodies take steps to make these data available and reused internally – even across borders. However, any data sharing is always in compliance with data protection rules and other EU restrictions. At the current level of integration, cross-border implementation of the system is unfortunately still fragmented and limited to very few services.

Another important digitised area is public procurement.[34] In this respect, new technologies have also been used by Member States to move towards full e-procurement and the use of contract registers.[35] So far, the achievements have mainly concerned aspects such as prequalification of economic operators (ESPD – Single European Procurement Document and eCertis – information system to identify the various certificates and attestations required most frequently in procurement procedures) and electronic invoicing. An important step is preparation of the EU Catalogue of ICT standards for public procurement.[36] Digitisation has provided EU institutions with tools and opened up new opportunities for competition in the Single Market for all businesses interested in participating in tenders for public contracts.

As previously indicated, the digital economy is based on new information, communication technologies, and data. It is the processing and deployment of data that is becoming one of the main factors in rapid economic development. Due to a wide spectrum of data collected by the public administration, it is becoming one of the most information-intensive areas in the digital market. The EU policy makers have recognised that this rich data set can be reused. Companies that have at their disposal a huge amount of data, a technical capacity to process and analyse it, and qualified staff to administer the process clearly stand to gain a competitive advantage[37] which may have a positive impact on the economic development of the European Union. This prompted the EU legislator to regulate the issue of open data and public sector information

[33] See: Emmanuele Comi's chapter in this book.

[34] See: Maciej Bendorf-Bundorf's chapter in this book.

[35] Rec. 2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[36] https://joinup.ec.europa.eu/

[37] OECD, *Data-driven innovation. Big Data for Growth and Well-being*, 2015.

in Directive 2019/1024.[38] Issues of open data are thus regulated already for the third time[39] in the form of a directive.

Public sector information is a unique source of data that can improve the functioning of the internal market.[40] For this reason, the Open Data and Public Sector Information (PSI) Directive 2019/1024 introduces new developments, first by reducing barriers to market entry by limiting exceptions that allow public authorities to charge for the re-use of their data beyond marginal costs. Secondly, it increases data availability by extending the scope of the Directive to new types of data, such as data held by public undertakings in the infrastructure and transport sectors and research data resulting from public funding.[41] New solutions (which ensure equal access to public date for all entities) also minimize the risk of obtaining a competitive advantage by one of them. The Directive introduced the principle of minimum harmonisation for the re-use of public sector documents.[42] According to the EU legislator, the application of minimum harmonisation aims to protect the European Union's legal system against fragmentation of regulation.[43] The EU legislator has claimed that this model of harmonisation of the rules and practices related to the use of public sector information will foster construction of the internal market and ensure undistorted competition.[44]

4. Regulatory techniques towards a single digital market

The EU institutions have used different legislative techniques to build a digital single market, remove barriers to trade, and facilitate administrative relations among the Member States. The selection of regulatory method depends on the objective set by the EU legislator. There are three main regulatory objectives for the EU digital market. The first two are based on regulatory

[38] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information OJ L No. 172 of 26 June 2019.

[39] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L No. 345 of 31 December 2003). (4) 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 (OJ L No. 175 of 27 June 2013).

[40] Rec. 9 Directive 2003/98.

[41] Rec. 4 Directive 2003/98.

[42] Rec. 15 Directive 2003/98.

[43] Rec. 17 Directive 2003/98.

[44] Rec. 7 Directive 2003/98.

approaches aiming to standardise or harmonise essential rules across the EU and their enforcement. The third group consists of non-regulatory techniques based on action plans, benchmarking of policies or financial support. In this latter area, the Commission issues a number of communications reflecting the lack of implementing powers at the EU level. However, the latter group is not discussed here in more detail.

In line with the DSM Strategy, these rules must be applied throughout the EU. The standardisation and harmonisation of substantive rules in the EU can be achieved primarily through regulations with direct applicability or directives to be transposed into national law. However, a problem in the building of the single market is the fragmentation of regulation: Rules are implemented by domestic authorities in a heterogenous manner across the Member States. For this reason, a number of institutional and procedural rules have been introduced to standardise or harmonise the enforcement mechanisms of common regulations across the EU. The regulations introduced should, above all, respect autonomy of the Member States. Non-regulatory action is also important for the creation of the single market, in particular in areas where the adoption of legislation is difficult or inappropriate. The EU Commission, similarly to the US institutions, strives to build the digital single market via cooperation of public and private actors, as reflected in the Digital Europe Programme 2021–2027.[45] However, it has not given private operators in the EU as much freedom as that enjoyed by entrepreneurs in the US, which is undoubtedly a barrier to rapid growth.

The DSM legislation is quite extensive and will require many years to achieve full implementation. At the same time, the fragmentation of regulation in the EU due to heterogeneous national rules is not conducive to harmonisation. The solution to the single economic market is positive integration,[46] which aims to adapt the existing and establish new policies and institutions across the EU and requires Member States to adopt detailed rules. It should be noted that the Member States' unwillingness to accept the country-of-origin principle is also problematic. This means, therefore, that the country-of-destination principle is at the heart of most EU rules governing the digital single market, reinforcing the fragmentation of regulation. Moreover, the Member States frequently impose more detailed and more burdensome obligations than those envisioned by EU legislation, thereby creating another barrier to the digital single market. In

[45] Brussels, 6 June 2018 COM(2018) 434 final 2018/0227 (COD), *Proposal for a Regulation of the European Parliament and of the Council Establishing the Digital Europe Programme for the period 2021–2027* {SEC(2018)289final} -{SWD(2018)305final} -{SWD(2018)306final}.

[46] See: Fritz Scharpf, "Negative and Positive Integration in the Political Economy of European Welfare States," in *The Future of European Welfare*, eds. Martin Rhodes, Yves Mény (London: Palgrave Macmillan, 1998).

order to deal with the unintended consequences of implementation, maximum harmonisation is becoming increasingly common. This does not mean that EU law would simply replace national law and constitute a uniform law applicable throughout the EU. The aim is for Member States to be able to continue to regulate specific sectors or activities, but prevent them from imposing stricter rules in matters explicitly covered by EU instruments.

Maximum harmonisation is undoubtedly a goal worth pursuing; however, it is not the solution to all problems arising in the single market. Even in the case of maximum harmonisation there is no guaranty that the rules will be enforced identically in each Member State. Indeed new legislation, although well prepared, cannot avoid regulatory gaps and implementation failures, so there is still a need for more detailed regulation and coordination at the supranational level.

5. Conclusion

Building a digital single market is a dynamic and long-term process. This analysis of selected EU legal acts does not yield a universal and optimal regulatory technique to facilitate this process. In the initial period, several political action plans were adopted, followed later by regulations and directives. Many of them were subsequently amended in recent years. These developments result from a high dynamics of the digital market itself and the consequent rapid devaluation of regulations. Nevertheless, with respect to both regulatory techniques, the EU legislator chose not to apply full implementation of the regulations or adopt the method of maximum harmonisation. Instead, the EU legislator has adopted a model of combining national regulations with EU solutions. There are a number of concerns that this model may not work as expected due to legislative differences among the Member States and growing regulatory uncertainty, which in turn may be a barrier to further development of the information society. Therefore, the appropriate solution for the DSM market appears to be to strive for full harmonisation in those areas where this is crucial and possible.

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