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CHAPTER I

EU LAW GOVERNING THE INFORMATION SOCIETY

Robert Queck and Christian Hocepied

"Joining forces is essential to build a digital future for Europe and we need to act quickly on all fronts, as the demand for good connection, relevant competences and access to the online world is growing rapidly in all sectors. We can achieve a functioning Digital Single Market only by promoting digitisation and tearing down barriers together."[1]

A. OVERVIEW

Introduction There is no encompassing EU Information Society law as such. However, all the building blocks of the Information Society, i.e. the creation, distribution, use, integration and manipulation of digital information, are governed by more or less detailed European and Member State legislations. These include rules on telecommunications,[2] audio-visual media services, e-commerce and online platforms, data protection, security, consumer protection and intellectual property law. Competition law also applies. This introductory chapter provides an overview of the evolution of EU strategies to generate and/or harmonise these national legislations (section B). Those EU and national rules are detailed in the subsequent chapters of this book according to the field concerned. They have been triggered by the rapid development of digital technologies that profoundly changes all aspects of social organisation, including the economy, education, health, government and democracy, blurring the borders between industries and Member States and inviting the European Commission to trigger more EU harmonisation and legislation. The chapter also makes a synthesis of the policy and regulatory techniques used by the EU institutions to build a digital single market in Europe (section C). 1-001

B. EVOLUTION OF EU INFORMATION SOCIETY POLICY

1. The progressive liberalisation and harmonisation of telecommunications infrastructures and services

Regulation based on liberalisation, harmonisation and the application of competition law The development of an EU policy regarding the Information Society began with the underlying transmission networks and services and with the terminal equipment connected to the ends of those networks. Systematic policy and 1-002

1 European Commission Statement, Joint statement by Vice-President Ansip and Commissioners Navracsics, Hogan and Gabriel on ensuring Europe's digital future, STATEMENT/19/2070 (9 April 2019).

2 In this book, we will generally use the broader term "electronic communications" instead of "telecommunications", which are included in the first concept (see para. 1-005).

regulation of electronic communications[3] networks and services at the European level was initiated[4] by the European Commission in 1987, with the adoption of a Green Paper on Telecommunications.[5] The Green Paper followed a three-pronged approach[6] based on: (i) the free movement of goods and services and the *liberalisation* of the supply of most telecommunications services and terminal equipment as in 1987, the telecommunications sector was still under legal public monopoly in Member States; (ii) the *harmonisation* of the national rules on the access conditions to the monopolised telecommunications networks and services for providers of liberalised services; and (iii) the strict application of the *competition rules* to telecommunications operators. This approach served as a point of reference for other network industries like energy[7] and post.[8]

1-003 **First prong—Liberalisation** The free movement of services and terminal equipment was imposed via the rarely used art.106 Treaty on the Functioning of the European Union ("TFEU"), which empowers the Commission to adopt directives ensuring Member States' compliance with the Treaty, regarding public undertakings or undertakings to which they grant special or exclusive rights. This liberalisation[9] and opening up of the European telecommunications markets was a gradual process. It started with telecommunications terminal equipment (1988)[10] and telecommunications competitive (or valued-added) services[11] (i.e., services other than voice telephony)[12] (1990) and it ended on 1 January 1998 with public voice

3 At the time only telecommunications networks and services were concerned. Broadcasting transmission was not included in the concept. As it was provided over specific networks, broadcasting was considered on its own (see paras 1-003 and 1-005).

4 For a review of the historical context and of the different phases of European telecommunications policy, see Queck, de Streel, Hou, Jost, Kosta, "The EU Regulatory Framework applicable to Electronic Communications" in *Telecommunications, Broadcasting and the Internet—EU Competition Law & Regulation*, 3rd edn, by Garzaniti, O'Regan (London, Sweet & Maxwell, 2010), pp.4-26 (this presents the evolution until 2009); see also Savin, *EU Telecommunications Law* (Cheltenham, Edward Elgar, 2018), pp.38-66 (which, in turn, presents the evolution until 2018).

5 Commission Communication, Towards a dynamic European economy—Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290 (30 July 1987) ("1987 Green Paper"). On occasional initiatives prior to the 1987 Green Paper, e.g. regarding the development of new technologies, standardisation and public procurement, see Pelkmans, Young, Telecoms-98 (Brussels, CEPS, 1998), pp.52–54.

6 See Savin, *EU Telecommunications Law* (Cheltenham, Edward Elgar, 2018), pp.38–60.

7 See Eising, "Reshuffling power: the liberalisation of the EU electricity markets and its impact on the German governance system", in *The Transformation of Governance in the European Union* by Kohler-Koch, Eising (London, Routledge, 2003), pp.214–215.

8 See Geradin, Humpe "*The Liberalisation of Postal Services in the European Union*: An Analysis of Directive 97/67", in *The Liberalisation of Postal Services in the European Union*, by Geradin (Alphen-aan-den-Rijn, Kluwer Law International, 2002), pp.91–109.

9 On the liberalisation process (including an analysis of the development of the institutional structure) see Melody, "*View point: the closing of the liberalization era in European Telecommunications*", CRNI 13(3), 2012, pp.218–235.

10 Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73 ("Telecommunications Terminal Equipment Directive") art.2. The Directive has been amended by Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications [1994] OJ L268/15 ("Satellite Directive").

11 See 1987 Green Paper, Positions B and C, Fig.13, p.185.

12 See Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1990] OJ L192/10 ("Telecommunications Services Directive"). The Directive has been amended several times. Its art.1 defined voice telephony as "the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point". Initially, the Telecommunications Services Directive did not cover telex, mobile radiotelephony, paging or satellite services. Its art.3 liberalised public data services as of 31 December 1992.

telephony services and public networks used for the provision of voice telephony.[13] By then, the European telecommunications sector was fully open to competition. In 2002, the Competition Directive[14] repealed and replaced the Telecommunications Services Directive. It confirmed the principle of market liberalisation and extended its scope to the transmission of broadcasting signals,[15] in line with the earlier adopted 2002 harmonisation directives. Due to technological progress and the convergence of the telecommunications, broadcasting and information technology sectors, it was now possible to transmit radio and television signals using the same networks as other standard telecommunications services such as voice telephony. The regulatory framework therefore also addressed broadcasting transmission and more generally applied to any network or service transmitting signals, regardless of the content conveyed. In addition, it dealt with markets and not with only technologies, as far as was possible and appropriate. In order to underline that all transmission networks and services using electromagnetic means were brought under a single legal concept, the Competition Directive replaces the definitions of telecommunications networks and services by electronic communications networks and services.[16] The reform leading in 2018 to the adoption of the European Electronic Communications Code ("EECC")[17] did not cover the Competition Directive. The latter stays thus unchanged.

Second prong—Harmonisation Harmonisation of national rules moves together with—and complements—liberalisation. Harmonisation aims to ensure equivalent regulatory systems and consistent application of the European rules across all Member States, so that undertakings can compete on equal terms in the single market and undertakings and consumers can fully reap the fruits of the liberalisation of the markets. Harmonisation is based on art.114 TFEU. From 1990 onwards, a series of Open Network Provision ("ONP") Directives were adopted to provide harmonised conditions for open and efficient access to, and use of, public telecommunications networks and, where applicable, services. The first of those Directives, adopted in 1990 on the same day as the Telecommunications Services Directive, was the ONP Framework Directive,[18] setting the principles. This Directive was progressively complemented by rules on access to leased lines, universal service **1-004**

13 Additional implementation periods were possible for Member States with less developed networks like Portugal (maximum of five years) or with very small networks like Luxembourg (maximum of two years).

14 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L249/21 ("Competition Directive").

15 Until 2002, only the provision of satellite network services for the conveyance of radio and television programmes was considered to be a telecommunications service and thus fell under the provisions of the Telecommunications Services Directive (see Satellite Directive, recital 17).

16 Competition Directive recital 7. See also art.1(1) and (3) defining respectively "electronic communications network" and "electronic communications service".

17 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L321/36 ("EECC").

18 Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L192/1, corr. [1993] OJ L85/28. The Directive has been amended in 1997 in order to be adapted to a fully liberalised environment. The term "1990 ONP Framework Directive" refers to the original

and interconnection, as well as to voice telephony and universal service. In the preparation of full liberalisation, significant market power, i.e. having a share of more than 25% of a particular telecommunications market,[19] replaced special or exclusive rights (thus basically a monopoly)[20] as a trigger for the application of ONP obligations. Furthermore, the ONP Directives were supplemented by the Licensing Directive[21] to regulate the entry to the fully liberalised market.

1-005 *The 2002 Regulatory Framework* The 2002 Regulatory Framework for Electronic Communications replaced the so-called 1998 telecommunications regulatory framework.[22] This framework adopted a technology neutral, horizontal approach and covered all types of transmission networks and services: traditional telecommunications networks and services as well as those used for the transmission of broadcasting signals such as cable-TV networks or electricity cable systems when used for the transmission of signals.[23] The 2002 framework was composed of a series of complementary directives which were amended in 2009: (i) the Framework Directive setting the objectives and principles and organising national regulatory authorities ("NRAs") as well as the procedure regarding undertakings with significant market power considered as equivalent to a dominant position under Competition Law;[24] (ii) the Authorisation Directive[25] organising market entry; (iii) the Access Directive[26] regulating the wholesale markets, i.e. access to, and interconnection of, electronic communications networks and associated facilities, which

1990 version of the text.

19 See art.4(3) and recital 6 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/32. The market share of 25% constitutes a rebuttable presumption. Other factors like the control of means of access to end-users or access to financial resources are also taken into account.

20 See 1990 ONP Framework Directive, arts 1 and 2(1), (2), (3), (4) and (10).

21 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [1997] OJ L117/15 ("Licensing Directive").

22 See Commission Staff Working Document, Evaluation of the regulatory framework for electronic communications, SWD (2016) 313 (14 September 2016), pp.7–9.

23 See arts 1(1) and 2(a) and (c), as well as recital 5 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33. The Framework Directive has been amended by Regulation (EC) No.717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L171/32 ("2007 Roaming Regulation"); by Regulation (EC) No.544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No.717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2009] OJ L167/12 ("2009 Roaming Amendment Regulation") and by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37, corr. [2013] OJ L241/8 ("Better Regulation Directive").

24 See Framework Directive art.14(2). See also para.1-027.

25 Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services [2002] OJ L108/21 ("Authorisation Directive"). The Authorisation Directive has been amended by the Better Regulation Directive.

26 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ

mean physical infrastructures such as ducts, conduits or masts; (iv) the Universal Service Directive[27] establishing at the EU level a universal minimum service of affordable electronic communications services, regulating the retail markets and strengthening the protection of end-users, i.e. consumers (natural persons using or requesting services for purposes outside trade, business or profession) and other end-users;[28] and (v) the e-Privacy Directive[29] applying data protection rules to the electronic communications sector. This package was supplemented in 2002 by the Radio Spectrum Decision[30] establishing the basis for Commission decisions coordinating the availability and the technical conditions for the efficient use of specific radio frequencies, the Competition Directive (explained above) and, since 2009, the BEREC Regulation[31] organising the Body of European Regulators for Electronic Communications ("BEREC"), the network of the NRAs in order to foster a consistent application of the rules across the EU. The package was subsequently complemented with: (i) the Roaming Regulation[32] (2012) allowing end-users to communicate (calls, SMS, data communications) at tariffs equivalent to those at home while being abroad in the EU; (ii) the *Broadband Cost Reduction Directive (2014)*[33] aiming at reducing the cost of rolling out new broadband infrastructures or upgrading existing connections by streamlining procedures for granting of permits for civil works and by giving operators of public communications networks access to physical infrastructure (e.g. masts, ducts, entries to buildings, cabinets, etc.) of other operators (including those of gas, electricity and railway networks);

L108/7 ("Access Directive"). The Access Directive has been amended by the Better Regulation Directive.

27 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 ("Universal Service Directive"). The Universal Service Directive has been amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No.2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11, corr. [2013] OJ L241/9 ("Citizens' Rights Directive") and by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No.531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1 ("Open Internet Regulation").

28 Framework Directive art.2(h), (i) and (n).

29 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("Directive on privacy and electronic communications") [2002] OJ L201/37 ("E-Privacy Directive"). The E-Privacy Directive has been amended by the Citizens' Rights Directive.

30 Decision No.676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community ("Radio Spectrum Decision") [2002] OJ L108/1.

31 Regulation (EC) No.1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1 ("2009 BEREC Regulation").

32 Regulation (EU) No.531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast) [2012] OJ L172/10. The Regulation has been amended by the Open Internet Regulation and by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No.531/2012 as regards rules for wholesale roaming markets [2017] OJ L147/1.

33 Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks [2014] OJ L155/1.

and (iii) the Open Internet Regulation[34] (2015) ensuring that end-users have the ability to access and distribute information or run applications and services of their choice over the internet. In addition, many implementing instruments, guidelines and communications were adopted.

1-006 *The European Electronic Communications Code ("EECC") of 2018* The EECC, adopted in 2018, repeals[35] and replaces the 2002 Framework, Authorisation, Access and Universal Service Directives. It further extends the scope of the regulatory framework to some over-the-top (OTT) services[36] like messaging services, Voice over IP[37] and web-based email services. According to the EECC, the services used for communications purposes, and the technical means for their delivery have evolved to include these new, internet-based applications. Therefore, going beyond an approach based purely on technical parameters i.e. the conveyance of signals by electromagnetic means, the EECC now adopts a functional approach, also covering services providing end-users with functionalities equivalent to those offered by undertakings responsible vis-à-vis the end-users for the conveyance of the signal.[38] The EECC carries over the three main objectives of the 2002 regulatory framework—promotion of competition, contribution to the internal market and promoting the interests of EU citizens—and adds a fourth objective, the promotion of investment to ensure connectivity to new very high capacity networks. The EECC also adapts and, sometimes, increases the regulatory obligations. In this context, the concept of "Significant Market Power" is maintained as the trigger for specific regulatory obligations regarding the provision of access to networks and resources. The content of the concept remains unchanged. A new BEREC Regulation was also adopted in 2018.[39] It replaces the 2009 BEREC Regulation and reflects BEREC's new, additional tasks under the EECC, the Roaming Regulation and the Open Internet Regulation,[40] and its reformed structure. The main objective of BEREC remains to contribute to the consistent implementation of the rules applicable to electronic communications networks and services throughout Europe.[41] In parallel, the Open Internet Regulation has been amended by the 2018 BEREC Regulation to introduce a cap on retail charges for intra-EU communications, intra-EU calls and SMS.

1-007 **Third prong—Application of competition law** From the very beginning of the

[34] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No.531/2012 [2015] OJ L310/1. This regulation is reviewed at paras 2-228 to 2-232 of Chapter II.

[35] With effect from 21 December 2020: see art.125 and recital 321 of the EECC.

[36] See para.2-009 in Chapter II.

[37] In this context, Voice-over-IP services which do not offer the possibility to make calls to and/or from the public telephone network are taken into consideration.

[38] EECC recital 15. See paras 2-009-2010 in Chapter II. See also UPC DHT v NMHHE (C-475/12) EU:C:2014:285, para.43; Skype Communications v Institut Belge des services Postaux et des Télécommunications (IBPT) (C-142/18) EU:C:2019:460, para.29; Google v Bundesrepublik Deutschland (C-193/18) EU:C:2019:498, para.32.

[39] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office).

[40] BEREC Regulation art.3(1). These tasks include those added to the Open Internet Regulation by its amendment by the 2018 BEREC Regulation, which also changed the former's title.

[41] BEREC Regulation art.3(2).

European telecommunications policy, effective application of competition rules was essential to ensure that the liberalisation process and the development of competitive markets is not undermined by unilateral or coordinated market conduct and concentrations that limit, or protect market players from, competition. In addition, sector-specific regulation itself relies on competition law concepts and methods. Interestingly, the mere application of competition law is the end goal of asymmetric regulation as the EECC:

> "...aims to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law."[42]

1-008 **The rules on telecommunications terminal equipment** Terminal equipment such as fixed and mobile telephone sets, computers or TV sets are classified in two categories. Those connected to the network by wire or optical fibre (fixed-line terminal equipment) and those connected via radio waves (radio equipment).[43] In principle, the making available and the use of terminal equipment do not fall under the Electronic Communications Regulatory Framework but is subject to specific liberalisation and harmonisation directives. Regarding liberalisation, the Terminal Equipment Competition Directive of 2008 consolidated and replaced the Telecommunications Terminal Equipment Directive of 1988. The 2008 Directive maintains the principle of market liberalisation and confirms that monopolies for the import, marketing, connecting, bringing into service and maintaining of terminal equipment may not be granted.[44] Regarding harmonisation, the rules covering terminal equipment aim primarily to deal with the risk of interference between terminal equipment and to define EU-wide essential health and safety requirements. The Radio Equipment Directive (RED)[45] regulates the making available on the market as well as the putting into service and use of radio equipment. Radio equipment refers to electrical or electronic products, which intentionally emit and/or receive radio waves for the purpose of radio communication and/or radio-determination.[46] Therefore, fixed-line terminal equipment are no longer subject to specific EU rules on terminal equipment but merely to general EU rules on product safety such as the directive regarding electromagnetic compatibility. This directive aims at reducing interference between electrical and electronic devices and ensuring the ability of equipment to function satisfactorily in its electromagnetic environment without introducing unacceptable electromagnetic disturbances to other equipment.[47] For regulatory purposes, the network termination point constitutes the boundary

[42] EECC recital 29.

[43] See Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment (Codified version) [2008] OJ L162/20 ("Terminal Equipment Competition Directive"), art.1(1) and EECC art.2(41).

[44] Terminal Equipment Competition Directive arts 2 and 3.

[45] Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC [2014] OJ L153/62 (RED) art.3, as amended.

[46] RED art.2(1) (1) and (3). The equipment can emit or receive radio waves directly itself or by using an accessory such as an antenna. See also Commission Delegated Regulation (EU) 2019/320 of 12 December 2018 supplementing of Directive 2014/53/EU of the European Parliament and of the Council with regard to the application of the essential requirements referred to in art.3(3)(g) of that Directive in order to ensure caller location in emergency communications from mobile devices [2019] OJ L55/1.

[47] Directive 2014/30/EU of the European Parliament and of the Council of 26 February 2014 on the

between the regulatory framework for electronic communications networks and services and the regulation of telecommunications terminal equipment.[48] Defining the location of the network termination point in individual cases is the responsibility of the NRAs, in cooperation with BEREC.[49]

1-009 *Links between rules applicable to electronic communications networks and services and rules applicable to terminal equipment* The EECC imposes additional requirements on some terminals. For instance, the EECC contains provisions aiming at interoperability of car radios and consumer radio receivers as well as consumer digital televisions.[50] As bundles comprising communications services and terminals have become widespread in consumer retail markets, the EECC extends its end-user protection rules to the terminal equipment concerned. Providers of public electronic communications services have to give information on the terms of use of terminal equipment in the context of the service offered (e.g. fees due on early termination of the contract, including information on unlocking the terminal equipment and any cost recovery with respect to terminal equipment, restrictions on use, etc.).[51] Also, the EECC covers the facilitating of access for end-users with disabilities to emergency services (including the 112 number) through the use of specific terminal devices[52] and requires Member States to ensure that, in the context of universal service, specific terminal equipment like text telephones, is available and affordable to consumers with disabilities.[53]

2. From the Lisbon Strategy to the Digital Single Market

(a) First steps: From 2000 Lisbon Strategy and eEurope Action Plan to Renewed Lisbon Strategy 2005 and i2010 Strategy

1-010 **The Lisbon Strategy and the eEurope Action Plan** To bring consistent EU answers to the challenges raised by the rapid growth of digital technologies, the March 2000 Lisbon Strategy aimed to "strengthen employment, economic reform and social cohesion as part of a knowledge-based economy".[54] This led to the adoption of a comprehensive eEurope Action Plan aimed to make the most out of the opportunities of an Information Society for all becoming a powerful engine for growth, competitiveness, jobs and improvement of citizens' quality of life and of the environment.[55] The eEurope Action Plan[56] had three main objectives:

"(i) bringing every citizen, home and school, every business and administration, into the

harmonisation of the laws of the Member States relating to electromagnetic compatibility (recast) [2014] OJ L96/79, as amended. See also the Low Voltage Directive ruling equipment functioning at low voltage (Directive 2014/35/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits [2014] OJ L96/357).

48 See EECC art.2(9).

49 Recital 19 of the EECC. See also art.4(1)(d)(iv) of the BEREC Regulation and art.61(7) of the EECC.

50 EECC art.113 and recitals 303 to 306, reviewed at para.2-066 and 2-215 in Chapter II.

51 EECC art.107 in conjunction with, respectively, art.102(1) and annex VIII (B)(3)(iv), and art.103(1) and annex IX (2.1).

52 EECC art.109(5) and recital 288.

53 EECC art.85(3), reviewed at para.2-226 of Chapter II.

54 European Council Presidency Conclusions, Lisbon European Council 23 and 24 March 2000, SN 100/00 (24 March 2000) (Lisbon Strategy EU Council Conclusions): see preamble.

55 Lisbon Strategy EU Council Conclusions Pt 8.

56 eEurope has been updated in 2002 (Commission Communication to the Spring European Council

digital age and online; (ii) creating a digitally literate Europe, supported by an entrepreneurial culture ready to finance and develop new ideas; and (iii) ensuring that the whole process is socially inclusive, builds consumer trust and strengthens social cohesion."[57]

The Action Plan covered 10 lines of action, including ensuring cheaper internet access through increased competition, accelerating e-commerce by implementing the legal framework[58] and expanding the use of e-procurement, which contained an invitation to the Member States to support further EU involvement and coordination.[59]

1-011 **The renewed Lisbon Strategy 2005 and the i2010 Strategy** In 2005, the Commission observed the "general consensus that Europe is far from achieving the potential for change that the Lisbon strategy offers"[60] and launched the i2010 Strategy to succeed the eEurope Action Plan[61] with the same goals, the establishment of a European Information Society for growth and employment and the completion of the single market for ICT products and services to benefit European consumers, businesses and administrations.[62] The Strategy called upon Member States to support legislative actions such as the review of the regulatory framework for electronic communications. This review led in 2009 to the adoption of the Better Regulation and Citizen's Rights Directives as well as to the BEREC Regulation. Moreover, to promote the development of high quality and innovative information society and media services, a Directive on audio-visual media services (covering classical TV programmes but also new on-demand services) was adopted.[63]

in Stockholm, 23–24 March 2001—eEurope 2002—Impact and Priorities, COM (2001 140 (13 March 2001) ("eEurope 2002 Communication") and 2005 (Commission Communication, An Action Plan to be presented in view of the Sevilla European Council, 21–22 June 2002—eEurope 2005: An Information Society for all, COM(2002) 263 (28 May 2002) ("eEurope 2005 Communication"). Commission Communications and Staff Working Documents are available at *https://eur-lex.europa.eu/homepage.html* [Accessed 9 September 2019].

57 Commission Communication on an Initiative for the Special European Council of Lisbon, 23 and 24 March 2000—eEurope—An Information Society for all, COM(1999) 687 (8 December 1999) ("1999 eEurope Communication"), p.2, available at *http://aei.pitt.edu/3532/1/3532.pdf* [Accessed 9 September 2019].

58 See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") [2000] OJ L178/1.

59 1999 eEurope Communication, pp.3–16 and Commission Press Release, *eEurope—Prodi launches "eEurope" initiative to accelerate Europe's transformation into an Information Society*, IP/99/953 (8 December 1999). Commission Press Releases are available at *http://europa.eu/rapid/search.htm* [Accessed 9 September 2019].

60 Commission Communication to the Spring European Council—Working together for growth and jobs—A new start for the Lisbon Strategy, COM (2005) 24 (2 February 2005), p.7.

61 See Commission Staff Working Paper, Communication from the Commission "i2010—A European Information Society for growth and employment"—Extended impact assessment, SEC (2005) 717 (1 June 2005), pp.20–22.

62 Commission Communication, i2010—A European Information Society for growth and employment, COM (2005) 229 (1 June 2005).

63 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 ("2007 Television Without Frontiers Amendment Directive"). This directive introduced the concept of "audiovisual media service". In 2010 it was replaced by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordina-

(b) 2010: The Europe 2020 Strategy and the Digital Agenda for Europe

1-012 **The launching of Europe 2020 and of the 2010 Digital Agenda for Europe** In March 2010 the Commission adopted its Europe 2020 Agenda[64] for a smart, sustainable and inclusive growth in Europe and launched seven flagship initiatives in order to channel progress under priority issues. One of the flagships was the Digital Agenda for Europe,[65] an action plan for making the best use of ICT in order to speed up economic recovery and lay the foundations for a sustainable digital future.[66] The Agenda aimed to launch the virtuous cycle of the digital economy: the availability of attractive content and services in an interoperable and borderless internet environment would stimulate demand for higher speeds and capacity. This, in turn, would create the business case for investments in faster networks. The deployment and take-up of faster networks would, in turn, open the way for innovative services exploiting higher speeds.[67] The Digital Agenda for Europe identified priority areas for action, in particular, the creation of a true digital single market for online content and services, for e-commerce, for consumers and businesses as well as the swift and consistent implementation of the 2009 electronic communications directives[68] and the guarantee of an open and neutral internet.[69] The Digital Agenda Communication moreover stressed the need to speed up the roll-out of high-speed internet through substantial investment in fibre networks and wireless broadband[70] so that all citizens would have access to basic broadband[71] by 2013, while by 2020 access for all citizens to fast broadband (30 Mbps or above) should be reached and with 50% or more of European households subscribing to ultrafast broadband internet connections above 100 Mbps.[72]

1-013 ***Mid-term review of the Digital Agenda for Europe*** In 2012, the Commission

tion of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ("Audiovisual Media Services Directive/AVMS Directive") [2010] OJ L95/1, amended by the Audiovisual Media Services Amendment Directive. See infra, para.1-016 and fn.81. The Audiovisual Media Services Directive is reviewed in Chapter IV of this book.

64 Commission Communication, EUROPE 2020—A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 (3 March 2010) ("Europe 2020 Communication"). See also, Commission Press Release, *Europe 2020: Commission proposes new economic strategy in Europe*, IP/10/225 (3 March 2010). The European Council agreed in March 2010 upon the main elements and the headline targets of the EUROPE 2020 strategy (see European Council Conclusions, European Council 25/26 March 2010, ST 7 2010 INIT (26 March 2010).

65 Commission Communication, A Digital Agenda for Europe, COM (2010) 245/2 (26 August 2010) ("Digital Agenda Communication").

66 Commission Press release, *Digital Agenda for Europe: key initiatives*, MEMO/10/200 (19 May 2010), p.1.

67 Digital Agenda Communication, pp.4–7.

68 Digital Agenda Communication, pp.7–14.

69 Digital Agenda Communication, pp.18–21.

70 Digital Agenda Communication, p.3.

71 The Digital Agenda Communication does not define the speed of "basic broadband'. In 2016, the Commission considered that "basic broadband' equals a speed of at least 2 Mbps and that such "basic broadband is available to every European, mainly enabled by legacy infrastructures…" (Commission Communication, Connectivity for a Competitive Digital Single Market—Towards a European Gigabit Society, COM (2016) 587 (14 September 2016) ("Gigabit Society Communication"), p.3 and fn.8). Other sources locate basic broadband from "144 Kbps up to 30 Mbps": European Court of Auditors, *"Broadband in the EU Member States: despite progress, not all the Europe 2020 targets will be met"*, Special Report, 2018, no.12, p.4.

72 Respectively Europe 2020 Communication, p.14 and Digital Agenda Communication, pp.19 and 40.

updated the Digital Agenda priorities[73] with the promotion of investments in high-speed fixed and mobile broadband networks. Such investments were stimulated, on the one hand, with regulatory intervention such as the Broadband Cost Reduction Directive, and, on the other hand, with financial instruments such as the Connecting Europe Facility, launched in 2013,[74] which is supporting the financing of digital and other infrastructures for the 2014–2020 period. Such funding took the form of equity, guarantees, debt instruments and grants.

(c) 2015: the Digital Single Market Strategy for Europe

1-014 **The Digital Single Market ("DSM") Strategy** The DSM Strategy[75] was launched as a comprehensive programme for reform of the Information Society and its regulation in Europe covering telecommunications, broadcasting, online platforms, privacy and data protection, network and information security, consumer protection on the digital markets, intellectual property and artificial intelligence. The Strategy is based on three pillars: (i) better access for consumers and businesses to online goods and services across Europe; (ii) creating the right conditions for digital networks and services to flourish; and (iii) maximising the growth potential of the European Digital Economy.

1-015 **The first pillar: Better access for consumers and businesses to online goods and services across Europe** The first pillar of the DSM strategy aimed to improve cross-border access to online goods and services[76] and to reduce barriers to cross-border online activities. The pillar aimed to facilitate cross-border e-commerce by harmonising the rules on contracts and consumer protection; to better enforce consumer protection rules; to make cross-border parcel delivery, which is a foundation for online selling, more efficient and affordable; and to end unjustified geo-blocking.[77] Other actions were the launch under competition law of a sector inquiry into the e-commerce sector; the review of EU copyright rules to allow wider online

73 See Commission Communication, The Digital Agenda for Europe—Driving European growth digitally, COM (2012) 748 (18 December 2012). See also Commission Press Release, *Digital "to-do" list: new digital priorities for 2013-2014*, IP/12/1389 (18 December 2012).

74 See Regulation (EU) No.1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No.913/2010 and repealing Regulations (EC) No.680/2007 and (EC) No.67/2010 [2013] OJ L348/129. The Regulation has been amended several times, notably by Regulation (EU) 2017/1953 of the European Parliament and of the Council of 25 October 2017 amending Regulations (EU) No.1316/2013 and (EU) No.283/2014 as regards the promotion of internet connectivity in local communities. See also Commission Press Release, *Connecting Europe Facility: Commission adopts plan for €50 billion boost to European networks*, IP/11/1200 (19 October 2011).

75 See Commission Communication, A Digital Single Market Strategy for Europe, COM (2015) 192 (5 May 2015) ("DSM Strategy Communication"). See also Commission Press Release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, IP/15/4919 (6 May 2015) and Commission Fact Sheet, Questions and answers—Digital Single Market Strategy, MEMO/15/4920 (6 May 2015). On the DSM Strategy, see also Renda, "Will the DSM Strategy spur innovation?" Intereconomics, 2017, Vol.52, Nr.4, pp.197–201.

76 See DSM Strategy Communication, pp.3–9 and 20. See also Commission Press Release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, IP/15/4919 (6 May 2015), p.2.

77 Geo-blocking is a discriminatory practice denying consumers access to a website based on their location, or re-routing them to a local store with different (higher) prices. See also Commission Press Release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, IP/15/4919 (6 May 2015), p.2.

access to works across the EU, while protecting and opening new opportunities for creators and the content industry; the increased cross-border access to broadcasting services in Europe and the reduction of the administrative burden businesses face from different VAT regimes while selling online.

1-016 **The second pillar: creating the right conditions for digital networks and services to flourish** The second pillar of the DSM Strategy aimed to stimulate the development of high-speed, secure and trustworthy infrastructures and content services.[78] This objective called for the appropriate regulatory conditions for innovation, investment, fair competition and a level playing field,[79] e.g. between telecommunications operators and OTT providers offering services which are increasingly used by end-users as substitutes for traditional electronic communications services like voice telephony. This pillar led to: (i) a reform of the rules applicable to electronic communications to increase consistency and predictability across the EU, particularly for radio spectrum and to stimulate investment in particular in rural areas;[80] (ii) a reform of the rules applicable to audio-visual media services to adapt regulation to the development of new business models and changing viewing patterns (e.g. through user-generated content on internet platforms); [81] and (iii) a comprehensive analysis of the role of online platforms (e.g. search engines, social media, e-commerce platforms, app stores),[82] notably in controlling access to online markets or exercising significant influence on the remuneration of players in the market. Other issues to be addressed under the second pillar were the establishment of a partnership with industry in the field of cybersecurity and the need to reinforce trust and security in digital services.

1-017 *Revised broadband connectivity targets* A key element of the reform of the telecommunications rules was the promotion of access to high-performance fixed and wireless broadband infrastructure.[83] Even though the 2010 connectivity objectives were considered sufficient until 2020, in order to match the time horizon for infrastructure investments, as well as the technological developments and future needs identified, complementary longer-term objectives were defined[84]:

1. all main socio-economic drivers, such as schools, universities, research centres, transport hubs and main providers of public services such as hospitals and administrations, as well as enterprises relying on digital technologies, should, by 2025, have access to gigabit connectivity (allowing users to download/upload 1 gigabit of data per second);

[78] See DSM Strategy Communication, pp.9–13 and 20. See also Commission Press Release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, IP/15/4919 (6 May 2015), p.2.

[79] DSM Strategy Communication, pp.3–4, 10.

[80] DSM Strategy Communication, p.9.

[81] In the context of the actions launched under the DSM Strategy, the AVMS Directive has been amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 ("Audiovisual Media Services Directive") in view of changing market realities [2018] OJ L303/69 ("Audiovisual Media Services Amendment Directive").

[82] See Commission Communication, Online Platforms and the Digital Single Market—Opportunities and Challenges for Europe, COM (2016) 288 (25 May 2016).

[83] DSM Strategy Communication, p.9.

[84] Gigabit Society Communication, p.5.

2. all European households, rural or urban, should, by 2025, have access to connectivity offering a download speed of at least 100 Mbps, which can be upgraded to gigabit speed; and
3. all urban areas as well as all major terrestrial transport paths (roads and railways) should, by 2025 have uninterrupted 5G coverage. As an interim target, 5G connectivity should be commercially available in at least one major city in each EU Member State by 2020 (building on commercial introduction in 2018).[85]

1-018 **The third pillar: maximising the growth potential of the European digital Economy and Society** The third pillar of the DSM Strategy aimed to stimulate investments in ICT infrastructures and technologies, such as cloud computing and Big Data, research and innovation-boosting industrial competitiveness and to improve the public services, inclusiveness and skills, all of which have the potential to maximise growth of the EU digital economy. Those objectives led to the following actions: building a data economy based on the free flow of non-personal data, on access to public data and on a European cloud initiative; boosting competitiveness of the EU economy through standardisation and interoperability in critical areas such as e-health, transport planning or energy (smart metering); and supporting an inclusive e-society in which citizens have the right skills to seize opportunities and ensuring an efficient e-government with a reduction of the administrative steps to be taken by businesses and citizens.[86]

1-019 **The mid-term review of the DSM Strategy** The 2017 DSM-Strategy mid-term review provided an opportunity for the Commission to outline further actions, in particular regarding: (i) the data economy, including the need for accessibility and reuse of public and publicly funded data; (ii) the increased cybersecurity; and (iii) the need to ensure that online platforms are responsible players within a fair internet ecosystem, in particular the need to address unfair contractual clauses and trading practices as well as the removal of illegal content.[87] The Commission also developed complementary non-legislative initiatives. These include suggestions for a coordinated approach to make the most of the opportunities offered by artificial intelligence and to address the new challenges that it brings.[88]

1-020 **The EU Information Society Policy: assessment of results** The EU Informa-

[85] See Gigabit Society Communication, pp.5–8 and Commission Press Release, *State of the Union 2016: Commission paves the way for more and better internet connectivity for all citizens and businesses*, IP/16/3008 (14 September 2016), p.1. See also Commission Communication, 5G for Europe: An Action Plan, COM (2016) 588 (14 September 2016) ("Commission 5G Action Plan"), p.4. According to the Commission, 5G should offer data connections well above 10 gigabit per second, latency (i.e. reaction time) below 5 milliseconds and the capability to exploit any available wireless resources (from wi-fi to 4G) and to handle millions of connected devices simultaneously.

[86] See DSM Strategy Communication, pp.13–18 and 20. See also Commission Press Release, *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, IP/15/4919 (6 May 2015), p.2.

[87] Commission Press Release, *Digital Single Market: Commission calls for swift adoption of key proposals and maps out challenges ahead*, IP/17/1232 (10 May 2017), p.1. See also Commission Communication on the Mid-Term Review on the implementation of the Digital Single Market Strategy—A Connected Digital Single Market for All (including Annex—Implementation of the Digital Single Market Strategy), COM (2017) 228 (10 May 2017) ("DSM Mid-Term Review Communication").

[88] Commission Communication, Artificial Intelligence for Europe, COM (2018) 237 (24 April 2018); Commission Communication, Building Trust in Human-Centric Artificial Intelligence, COM (2019)

tion Society Policy in its successive formats, proved very effective in gathering the support of the European Parliament, Member States and the public at large for the Commission's legislative and non-legislative actions. If we limit ourselves to the DSM-Strategy and thus to the time period since 2015, 28 out of 30 legislative proposals were adopted or politically agreed between Parliament and Council by April 2019.[89] However, it is not enough to have good rules. They also need to be effectively enforced. All adopted legislative measures also require transposition and/or, in the case of Regulations, implementation by all Member States, including local authorities and other competent authorities. Therefore, their practical results still mostly remain to be seen. If application is effective, these measures could bring overall annual benefits of €176.6 billion.[90] In the absence of a comprehensive European Information Society Code integrating the different rules and of genuine EU regulator(s), the future will show whether Member States and competent national authorities (notably in the context of different networks established at European level, such as BEREC, ERGA, EDPB, CCP, and the ECN) will succeed in forging a coherent framework going beyond the current juxtaposition of different national legislations and their implementations.[91] Operators and investors will also be instrumental in the success of the European Information Society Policy. Public private partnerships, test projects and other research networks transcending national borders are essential for the development of applications that will build the Digital Single Market and ensure that it is a success.

C. POLICY AND REGULATORY TECHNIQUES FOR THE EU INFORMATION SOCIETY POLICY[92]

1. Unification or Harmonisation of National Rules—EU Instruments available

(a) EU Legal Instruments

1-021 **Legislative instruments: Regulations, Directives and Decisions** The EU institutions have three main hard-law instruments at their disposal: (i) *Regulations* are legislative acts that can directly be enforced in the EU by national courts[93] although some provisions of regulations require further implementation measures or

(8 April 2019).

89 See Commission Fact Sheet, A digital Single Market for the benefit of all Europeans—Towards a more united, stronger and more democratic Union (26 July 2019); Commission Roadmap, Roadmap for completing the Digital Single Market (18 March 2019). For an overview of the legislation adopted under the Digital Single Market Strategy, see de Streel, Hocepied, *Contribution to Growth: European Digital Single Market, Delivering improved rights for European citizens and businesses* (Study for the European Parliament, 2019).

90 Note that this ex ante prediction is expressed in current euro, with no adjustment for inflation: Marcus, Petropoulos, Yeung, *Contribution to Growth: The European Digital Single Market, Delivering economic benefits to citizens and businesses* (Study for the European Parliament, 2019).

91 Possible initiatives to realise more of the potential of the Digital Single Market are presented by Marcus, Petropoulos, Yeung, *Contribution to Growth: European Digital Single Market, Delivering improved rights for European citizens and businesses* (study for the EP's Committee on the Internal Market and Consumer Protection, Luxembourg, European Parliament, 2019), pp.57–76.

92 This section builds upon de Streel, Hocepied, *Contribution to Growth: European Digital Single Market, Delivering improved rights for European citizens and businesses* (Study for the European Parliament, 2019), pp.13–18.

93 art.288 TFEU.

interpretations.[94] (ii) *Directives* are legislative acts that set goals that all EU countries must achieve; hence they are binding for the Member States but normally not for citizens and undertakings. Each Member State must adopt its own laws on how to reach these goals and those national transposition measures must be binding and not merely administrative practices. Some Directives do however go further and require Member States to establish national regulatory authorities with far-reaching powers to enforce EU rules. This is the case for electronic communications or audio-visual media services or for the implementation of EU data protection, consumer protection or competition protection rules. (iii) *Decisions* are binding on those to whom they are addressed (e.g. an EU country or an individual company) and are directly applicable. While Regulations are increasingly used in the digital sector, Decisions are more rarely used.[95]

1-022 **Instruments with no binding force: Recommendations, Guidelines and Communications** Next to hard-law, the EU institutions rely more and more on soft-law instruments such as recommendations or guidelines. They have no binding force, hence can, in principle, not be enforced by national courts. A recommendation allows the EU institutions to make their views known and suggest a line of action without imposing—in a strict sense—any legal obligation upon those to whom it is addressed. However, national courts consider that national authorities have not complied with obligations under national law to give reasons for their decisions when these decisions diverged from the line of action recommended by the Commission if the national authority does not provide adequate justifications for its own line of action. Also, the Court of Justice has found that even if recommendations are not intended to produce binding effects, the national courts are bound to take them into account when adjudicating cases. As a consequence, a national court may depart from a recommendation only where it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.[96] Recommendations go beyond peer pressure and naming-and-shaming exercises, such as the Digital Economy and Society Index ("DESI"). Recommendations play an essential role in ensuring that national policies—though autonomous—are designed with the better functioning of the EU economy in mind. For example, the Commission sets out principles and guidance on business to business (B2B) data sharing

94 See, for example, art.8 of 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 [2016] OJ L119/1 ("General Data Protection Regulation" (GDPR)), which determines the age of 16 as the relevant age of consent for minors when using information society services, but allows Member States to lower the age to 13 years. Many Member States have done so. In addition, the GDPR does not encroach on the principle of procedural autonomy, and Member States have legislated on the organisation of their national DPA(s) and the rules of procedure to be followed by the latter. On the other hand, the GDPR empowers the European Data Protection Board (EDPB) to adopt interpretative guidelines, stressing that, despite common rules, national practices are susceptible to remaining different.

95 An example is the 700 MHz Frequency Band Decision (see Decision (EU) 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470-790 MHz frequency band in the Union [2017] OJ L138/131). Its art.5 requires that Member States adopt and make public their national plan and schedule ("national roadmap") no later than 30 June 2018, to make this frequency band available for wireless broadband electronic communications services under harmonised technical conditions.

96 *Koninklijke KPN v Autoriteit Consument en Markt (ACM)* (C–28/15) EU:C:2016:692, paras 41 to 42.

agreements, as well as on business to government (B2G) data sharing agreements, promoting voluntary harmonisation of practices across the EU. Regarding electronic communications, art.38 of the EECC foresees that the Commission may adopt recommendations where it finds that divergences in national implementation could create a barrier to the internal market.[97]

(b) Objectives of and Principles for Legal Instruments

1-023 **Negative and positive integration** European integration studies distinguish between negative and positive integration. Negative integration refers to provisions in EU law or case-law requiring Member States to remove certain national measures, no matter how the obstacles disappear. An example of such provision is art.92 of the EECC, which prohibits any discrimination on the basis of residence or nationality by providers of electronic communications networks or services, unless such different treatment is objectively justified. Positive integration addresses the fragmentation resulting from national rules with the adoption of common rules and regulatory standards across the EU, i.e. requires the Member States to adopt specific rules or principles and not only to prohibit Member States from enacting measures restricting trade.

1-024 **Country of origin and country of destination** Another distinction is between, on the one hand, the home state control or country of origin principle (mutual recognition) and, on the other hand, the country of destination principle.[98] The country of origin principle is the cornerstone of the Services Directive,[99] but the Directive excludes several services from its scope, in particular financial services, transport, telecommunications network services, gambling, health and certain social services. In the electronic communications sector, the Commission proposed in 2013 to introduce the country-of-origin principle for the provision of electronic communications networks and services.[100] The aim was to remove unnecessary obstacles in the authorisation regime and in the rules applying to service provision so that an authorisation obtained in one Member State would be valid in all Member States, and that operators can provide services on the basis of consistent and stable application of regulatory obligations. However, the proposal was not adopted. Besides the fear of some Member States of losing their control over operators active in their jurisdictions, the main reason seems to have been that every Member State would depend on the others for market surveillance. Consequently, weaknesses in the organisation of market surveillance in one Member State could seriously undermine the efforts taken by others and creates a weak link in the chain.

[97] See e.g. Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment [2013] OJ L251/13, adopted under art.19 of the Framework Directive.

[98] This distinction originates from the Court of Justice, when specifying the underlying principles of the free movement of goods enshrined in the TFEU (at the time the EEC Treaty) in respectively *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* (120/78) EU:C:1979:42 and *Criminal proceedings against Bernard Keck and Daniel Mithouard* (Joined cases C-267/91 and C-268/91), EU:C:1993:905.

[99] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 ("Services Directive").

[100] Proposal of 11 September 2013 for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, COM (2013) 627 art.3.

The reluctance of Member States to accept the country of origin principle implies that the country of destination principle underlies most of the EU legislation governing the Digital Single Market. The AVMS Directive, the Directive on electronic commerce and some copyright rules constitute exceptions. This fact explains largely why the voluminous "acquis" could not yet tackle the fragmentation of national markets that remains in the EU.

1-025 **Maximum and minimum harmonisation** The country-of-destination principle is thus one of the causes of the regulatory fragmentation of the single market because Member States impose more detailed and often more onerous obligations than those listed in the EU rules (regulatory gold-plating). To deal with this unintended consequence of harmonisation legislation, maximum harmonisation is becoming more common. This does not mean that EU law replaces national law and constitutes a uniform law applicable to the whole EU, as the Member States can still regulate the sector or activity insofar as they do not impose more stringent obligations as regards the issues covered explicitly by the EU instruments. However, the success of measures aimed at maximum harmonisation may be undermined by national legislation circumventing the scheme laid down in European rules.[101] In addition, given the preference of some Member States for a high level of protection, maximum harmonisation risks to be set at a level that dissuades commercial offers and investment, resulting in the contrary of the aim pursued of boosting the offer of digital services and investment in digital networks.[102] Maximum harmonisation is a goal worth pursuing, but is not the silver bullet that creates the single market. Even in the case of maximum harmonisation, there is no guarantee that the rules are enforced identically in each Member State. Indeed, new legislation, however well-designed, cannot avoid all regulatory gaps and implementation difficulties. The enforcement of EU harmonisation legislation largely remains the Member States' competence. The Court of Justice recognises the principle of procedural autonomy of the Member States, meaning that the actions necessary to achieve the objectives set forward by regulations or directives continue to be carried out by Member States' civil servants, except in the areas where the EU legislation gives specified implementation powers to an EU body. However, until now the EU legislator has been reluctant to give implementation powers to EU bodies.[103] A recent example of maximum harmonisation in the field of consumer protection is electronic communications regulation. Reversing the previous position under the Universal Service Directive, art.101 of the EECC states the principle that Member States shall not maintain or introduce end-user protection provisions foreseeing more, or less, stringent protection.

1-026 **Economic and social regulation** Requirements under EU law can be subdivided

[101] An example is provided by the Electronic Communications Authorisation Directive, which regulates the fees that Member States can ask of telecommunications operators to deploy their electronic communications networks. Local authorities in the Member States are however not precluded from imposing annual taxes on network installations, such as antennas, as long as the "triggering" factor of the taxes is not related to the authorisation to deploy a network. In practice, it might be difficult to establish what the precise "triggering" factor should be.

[102] And deregulation by the EU is legally not straightforward to pursue in the case of shared competencies. art.2(2) TFEU implies indeed that the Member States may maintain (or further expand) regulation in all domains where the EU would decide to abolish regulation.

[103] In addition, the case law of the EU Court of Justice does not accept the granting of a wide margin of discretion to EU regulatory bodies. See *United Kingdom v Parliament and Council* (C-270/12) EU:C:2014:18.

into rules with economic objectives and rules with social and other public interest objectives.[104] Economic regulation aims at the maximisation of economic efficiency by creating the conditions for competition to emerge and to persist and, in the absence of competitive markets, by regulating companies with market power. Economic regulation therefore organises market entry and the management of necessary resources (e.g.frequencies and numbers). It also controls the anti-competitive exercise of market power on wholesale and retail markets by undertakings, in particular regarding access and interconnection.[105] Economic regulation also increasingly organises access to operators' resources in absence of market power.[106] Social regulation is based on a desire to avoid an undesirable distribution of wealth or opportunity[107] and to ensure wide access to essential services. Examples include ensuring the provision of services of general economic interest through universal service obligations,[108] or protecting the non-economic interests of consumers by reinforcing their rights and protecting their privacy. Consumer protection in the digital world can also be considered as social regulation. This kind of regulation "does not have overt economic objectives but does have economic effects, costs and benefits".[109] This is one of the reasons for the EU legislator to define the universal service requirement in order to ensure the availability of adequate broadband internet access to a minimum set of service providers, so that it can be delivered evenly, including in rural areas.

1-027 **Symmetric and asymmetric regulation** The starting point of the regulation of the telecommunications industry at EU level was to ensure that all Member States guarantee fair access to, and interconnection with, the networks and services of the incumbent operators in order to promote competition and ensure new entrants the freedom of establishment in the sector. For this purpose, operators with significant market power (SMP),[110] were specifically regulated. Operators with no (or very little) possibility of influencing market competition were not subject to access regulation.[111] Such regulatory intervention is known as "asymmetric regulation". Most obligations of the EECC are nonetheless imposed regardless of the size and

[104] Prosser, *Law and the Regulators* (Oxford, Clarendon Press, 1997), pp.4–6 and 10–15.

[105] Hou, *Competition Law and Regulation of the EU Electronic Communications Sector* (Alphen aan den Rijn, Kluwer Law International, 2012), p.20.

[106] See e.g. the Broadband Cost Reduction Directive. On powers and responsibilities of the NRAs concerning access and interconnection regardless of the presence of significant market power, see art.61 of the EECC and paras 2-135 to 2-138 in Chapter II.

[107] Prosser, *Law and the Regulators* (Oxford, Clarendon Press, 1997), p.13.

[108] See e.g. recital 212 of the EECC stating that "universal service is a safety net to ensure that a set of at least the minimum services is available to all end-users and at an affordable price to consumers, where a risk of social exclusion arising from the lack of such access prevents citizens from full social and economic participation in society".

[109] Veljanovski, "Economic approaches to regulation", in *The Oxford Handbook of Regulation*, by Baldwin, Cave, Lodge (Oxford, Oxford University Press, 2010).

[110] Initially, market power was linked to benefitting from special or exclusive rights for the provision of a public telecommunications network and, where applicable, services (see art.2(1) and (2) of the 1990 ONP Framework Directive). Today, market power is linked to "undertakings with significant market power" i.e. undertakings enjoying, either individually or jointly with others, a position equivalent to dominance (see art.63(2) EECC). However, SMP operators should only be regulated when competition law remedies are not sufficient to address effectively the potential anti-competitive behaviour of the concerned operator, allowing for a progressive "roll back' of the ex-ante sector-specific (economic) regulation.

[111] See Hou, "*Reshaping market, competition and regulation in EU utility liberalization: a perspective from telecom*", *Common Market Law Review*, 2015, 52, p.983.

market power of the operators concerned. Those rules deal for example with the notification of market entry,[112] spectrum management,[113] transparency of contractual clauses and the quality of service,[114] or end-to-end operability of services.[115] Such rules are qualified as "symmetric regulation". Regarding electronic communications, asymmetric regulation is questioned today in light of the need to deploy fibre and 5G wireless quickly and to a large number of users, as operators with significant market power may not invest "to the profit of their competitors" having the right to access the incumbent's network.[116] Conversely, the question now arises whether asymmetric regulation should also be applied—beyond electronic communications—to large big tech platforms which control key resources necessary for other companies to develop their business.[117]

2. EU procedural rules: Unification or harmonisation of enforcement

Uniform enforcement The Court of Justice has stressed in its case law the balance between the autonomy of national systems to enforce EU law and the principle of effective and uniform enforcement of EU law across all Member States.[118] However, the concept of effectiveness remains open. National patterns of regulation and governance differ, notably, with respect to the power, autonomy and resources allocated to the bodies entrusted with the enforcement of the EU rules in the various domains of the digital sector. For this reason, the EU has, within this two-tiered system, sought, when politically acceptable by the Member States, to regulate the regulators that deal directly with the addressees of regulation. However, any stringent or intrusive procedures allowing the Commission to interfere with the decision-making of national regulators risks being blocked by political vetoes from adversely affected Member States, or those seeking to avoid precedents. 1-028

EU networks of national authorities An alternative route was therefore followed: establishing EU enforcement networks of national authorities entrusted with the implementation of the EU rules concerned.[119] A first example is BEREC. Another example, in the framework of the reform of the Consumer Protection Cooperation ("CPC") Regulation[120] is that the Commission promoted harmonised rules governing the powers of enforcement authorities and the manner in which they 1-029

[112] EECC art.12(3) and (4).

[113] EECC from art.48.

[114] EECC from art.102.

[115] EECC arts 60 and 61.

[116] Savin, *EU Telecommunications Law* (Cheltenham, Edward Elgar, 2018), p.30.

[117] Soriano, *Big Tech Regulation—Empowering the Many by Regulating a Few*, Keynote delivered at SXSW Conference, Austin, 8 March 2018.

[118] Referring to the third paragraph of art.288 TFEU, the Court of Justice held: "Although that provision leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues" (see *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* (14/83) EU:C:1984:153, para.145.

[119] Commission Communication, EU Law: Better results through better application [2017] OJ C18/10, p.12.

[120] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protec-

can cooperate. The GDPR also requires, on the one hand, stronger enforcement powers for the national Data Protection Authorities while, on the other, ensuring that the national authorities coordinate their approaches via the European Data Protection Board ("EDPB"). The EDPB's binding dispute resolution system may lead to harmonised decisions, even in individual cases. Today, this procedure likely presents a model worth following in other domains.

1-030 **Facilitation of out-of-court dispute resolution** Next to public enforcement, out-of-court mechanisms facilitate dispute resolution by reducing its cost and increasing its speed. Those mechanisms also contribute to the single market in two ways: (i) directly, in the case of online resolution mechanisms; the best example is the internet platform created by the European Commission for the settlement of disputes arising from e-commerce, as the dispute resolution takes place on the internet, which means that long and expensive trials are avoided and that the European consumer's trust in cross-border shopping is strengthened; (ii) indirectly, as European legal principles and precedents are more easily used in such procedures than in formal court proceedings, which are often constrained by national judicial traditions and vocabulary, for example, the creation of a uniform European insurance market has been facilitated by the application of out-of-court insurance dispute resolution through European consumer protection regulations.[121]

3. Non regulatory techniques to reduce national divergences

1-031 **Alternative techniques for harmonisation** Because of the limits of harmonising or unifying rules at EU level, alternative approaches have also been used to foster the Digital Single Market. These alternative techniques can be based on EU policy plans to influence and possibly coordinate policy actions at the national level such as the recently adopted coordinated plan for the development of artificial intelligence in Europe.[122]

1-032 **Monitoring and benchmarking national policies and outcomes** These alternative techniques may also be based on monitoring and benchmarking of national policies to stimulate an exchange of best practices among the Member States. The Commission has established several benchmarks and publishes reports on the effectiveness of Member States' measures towards achieving the objectives, in particular the DSM Scoreboard, which includes the Digital Economy and Society Index ("DESI") and the European Digital Progress Report ("EDPR").[123] The DESI is a composite index that summarises more than 100 relevant indicators on Europe's digital performance and tracks the evolution of EU Member States in digital competitiveness. The EDPR monitors the progress made by Member States in

tion laws [2017] OJ L345/1. This regulation has been amended by Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market ("Geo-blocking Regulation") [2018] OJ L60I/1.

121 See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No.2006/2004 and Directive 2009/22/EC ("Directive on consumer ADR") [2013] OJ L165/63.

122 Commission Communication, Coordinated Plan on Artificial Intelligence, COM (2018) 795 (7 December 2018).

123 Available at *https://ec.europa.eu/digital-single-market/en/policies/scoreboard* [Accessed 9 September 2019].

digitisation and details the policy responses by Member States to address the specific challenges that face them and includes reports on electronic communications markets and regulatory developments in this field in the Member States.

1-033 **Financing EU and trans-national initiatives** Alternative techniques can also be based on financing support with EU funds to accelerate cross-border cooperation. For example in the area of standard setting, the Commission proposes speeding up the standard setting process in five priority domains: 5G, cloud computing, internet of things, data technologies and cybersecurity, and to co-finance the testing and experimentation of technologies to accelerate standards setting, including in relevant public-private partnerships. EU funding is foreseen in the Digital Europe programme for the period 2021–2027[124] and with the Connecting Europe Facility, which will continue to fund projects in the areas of transport, digital and energy in a second edition to run from 2021 to 2027.[125]

124 Proposal for a regulation of the European Parliament and of the Council establishing the Digital Europe programme for the period 2021–2027, COM(2018)434, earmarking €9.2 billion for investments in high performance computing, artificial intelligence, cybersecurity advanced digital skills and ensuring the wide use and deployment of digital technologies. See Commission Press release, EU budget: Commission proposes €9.2 billion investment in first ever digital programme, IP/18/4043, 6 June 2018).

125 Proposal for a regulation of the European Parliament and of the Council of establishing the Connecting Europe Facility, COM(2018)438.