# Navigating the Digital Seas: Free Movement of Services in the Digital Single Market

Assoc. prof. PhD **Ovidiu Ioan DUMITRU**
Faculty of Law, Bucharest University of Economic Studies
Student **Iulia-Alexandra DIDU**
Faculty of Law, Bucharest University of Economic Studies

**Abstract:** *The harmonisation of the European Union's Digital Services Law epitomises a joint collaboration in the making of a legal framework where innovation and economic growth may find fertile ground. The convergence of such legal frameworks would not turn out to be an idle bureaucratic practice, but a visionary step toward a digitally integrated Europe. This harmonisation process means evading legal uncertainties and incoherencies deterring the smooth delivery of digital services by bringing national laws into line with overarching EU directives. This study, therefore, seeks to look at the detailed legal and regulatory framework that shapes the notion of a unified Digital Single Market in the European Union. With services crossing borders so easily, this article explains the subtle balance that has to be struck in a bid to nurture innovation while maintaining consumer rights, non-distorted competition, and data privacy. The narrative meanders to the pivotal legislative milestones of the Digital Services Act and the Digital Markets Act as a way to appraise the transformation this will exact on service providers and consumers alike. It contemplates the subtleties of cross-border data flows, dismantling barriers to digital trade, and emphasising harmonisation at the level of national rules in this domain. By providing a comprehensive analysis of current policies and landmark decisions of the European Court of Justice, the article underlines an urgent need for a smooth-acting, responsive legal framework - one that will foster the growth of the digital economy while protecting the fundamental rights of citizens. It further emphasises the ethos of collaboration amongst member states in the EU and stands to uphold a uniform approach in the mastering of the complexities surrounding service provision in the digital market, displaying that the DSM is resilient and inclusive in the whirlwind created by technological evolution.*

**Keywords:** *digital single market, free movement of services, digital services, harmonisation, European Union Law, fundamental rights.*

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## 1. Introduction

### 1.1 Brief Overview of the Transition to a Digital Single Market (DSM)

Developed from the foundational treaties that have guided its evolution since the Treaty of Rome in 1957, the establishment of the European Union's Single Market stands as a major achievement in the history of European integration. The European Economic Community (EEC) was founded by the Treaty of Rome, with the main goal to promote the free movement of capital, labour, products, and services as well as the progressive removal of trade obstacles to promote economic cooperation

among member states. The Single European Act's passage in 1986 was a critical turning point in the process of creating a single market. With the goal of completing the Single Market by 1992, this historic law committed member states to an extensive program of market liberalisation and regulatory convergence. By extending the scope of integration beyond the conventional concentration on commodities to include services and capital, the Act represented a revolutionary turn towards greater economic integration and laid the foundation for a more integrated and competitive European economy.

The foundation of the Single Market was laid out in the Treaty on the Functioning of the European Union (TFEU) that succeeded the original EEC treaty. Articles 26 to 62 of the TFEU delineate the fundamental principles governing the Single Market. As regarding the free movement of services there is Article 56, for instance, which enshrines the principle of freedom to provide services, prohibiting discriminatory practices based on nationality and facilitating cross-border service provision within the EU. Similarly, Article 57 aims to establish a Single Market for services by removing barriers and promoting fair competition among service providers. These legal provisions underscore the commitment to creating a level playing field for economic activities across member states, fostering a dynamic environment conducive to trade and investment.

The development of the Single Market has not only facilitated economic growth and prosperity but has also contributed to the consolidation of a European identity and shared economic destiny. By promoting economic convergence and enhancing opportunities for businesses and consumers alike, the Single Market continues to play a crucial role in shaping the socio-economic landscape of the European Union[1]. Today, the Single Market is still key to driving economic convergence and creating opportunities for every actor – businesses and customers. This has transformed into the traditional Single Market envisioned by Marga Klompe in 1955 to what is known today as EU Digital Single Market (DSM), an ambitious policy initiative launched in 2015, with a vision of achieving total harmonisation and integration among the digital economy across its all member states. The Digital Single Market (DSM) initiative, a flagship of former European Commission President Jean-Claude Juncker's attempt to strengthen the EU digital economy, was launched in May 2015 and is being constructed to bring down barriers that make online selling inconvenient while establishing a single digital marketplace within the EU member states[2]. This strategy was based on the following three pillars: improving access to digital goods and services, creating the right conditions for digital networks and services to flourish, and maximising the growth potential of the digital economy. It attempts to achieve a high level of consumer protection and fair competition through measures such as reducing geo-blocking, streamlining copyright rules across the EU,

[1] Heidebrecht, S. (2024). From market liberalism to public intervention: Digital sovereignty and changing European union digital single market governance. *JCMS: Journal of Common Market Studies*, *62*(1), 205-223.

[2] European Commission, 2015. *A Digital Single Market Strategy for Europe.*

harmonising e-commerce regulations etc[3]. This is an ambitious policy plan of the European Union to become competitive in a global digital economy, by enabling cross-border online activity for citizens and businesses and estimating they will benefit fully from changes without obstacles due to National Laws.

Furthermore, the DSM strategy aims to remove obstacles to online cross-border trade and digital services in order to support innovation, competition and economic growth across Europe, it aims to make it easier for people across Europe to access digital services and goods. This means tackling geo-blocking, which artificially segments online markets along national borders[4]; building a better cross-border parcel delivery system and providing simpler VAT rules to boost e-commerce. Setting the right framework for digital networks and services underpins a large part of DSM[5]. The other priority is the regulatory reform supporting investment in digital broadband and telecommunications, the complementarity with cybersecurity and the further development of trust on usefully available digital services. The free provision of services over high-quality digital infrastructure represents a cornerstone objective embedded in the DSM, as it serves to promote easier cross-border service delivery across EU member states through enhancing connectivity and soap-facilitated online interaction. To provide their services cross-borders, businesses need the enablement of high-speed networks and strong cybersecurity to guarantee digital service delivery. A second goal of the DSM strategy was to maximise the growth potential of the digital economy. It underscores the importance of capitalising on digitalisation for innovation and economic growth by promoting policies that facilitate the development of digital skills, the free flow of data as well as the progress in areas like artificial intelligence (AI) and cloud computing[6]. Additional, underpinning legislative measures for the DSM strategy are GDPR and DSA & DMA[7]. All the regulations aim at a fair competitive platform for all stakeholders as well as the digital innovation to be consumer-friendly. The DSA, to cite only one example, sets clear obligations for online platforms and intermediaries ensuring transparency and

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[3] *Krarup, T., & Horst, M.* (2023). European artificial intelligence policy as digital single market making. *Big Data & Society*, *10*(1), 20539517231153811.

[4] Dumitru, O. I. & Stoican, A., The Impact of Geo-blocking Ban on the Development of the European Digital Single Market (August 05, 2020). *Technium Social Sciences Journal*, Vol. 10, 2020, Available at SSRN: https://ssrn.com/abstract=3672767

[5] Stoican, A., & Chirieac, R. (2021). The New Direction of the EU: the Creation of a Digital Europe. In *Resilience and Economic Intelligence Through Digitalization and Big Data Analytics* (pp. 479-491). Sciendo.

[6] Mănescu, D. M. (2021). Personal Data between Individual Protection and the General Interest. *Resilience and Economic Intelligence Through Digitalization and Big Data Analytics*, 465.

[7] Mănescu, D. M. (2024), 'Article: Legislation Comment: Considerations on the Digital Markets Act, the Way to a Fair and Open Digital Environment', 35, *European Business Law Review*, Issue 2, pp. 289-304, https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/35.2/EULR2024019.

accountability while protecting the rights of users[8]. Providing clarity helps service providers identify the legal obligations they need to meet in order to operate them legally across different jurisdictions, creating a better environment for cross border digital services. Through breaking down these barriers, the DSM ensures consumers can use digital services from any EU country and creates a seamless single market for all of them. Shore said this increased access helps consumers, and also "drives the competition" among service providers to innovate and offer better services. As a whole, the DSM has definite benefits in improving regulations and eliminating barriers to trade within Europe which will foster further digital investments across all service-related sectors. The DSM is a strategy intended to increase the benefits of e-commerce and digital opportunities, liberalise activities within European shopping online markets., boost growth, stimulate innovation across all market sectors and improve conditions for both businesses and consumers[9]. The above approach forms a key plank in the EU's overall economic strategy for keeping Europe at the technological forefront and maintaining an open, secure and dynamic digital economy that works to the benefit of all its citizens.

### 1.2 Free Movement of Services - Legal Grounds

Fundamentally, the legal framework for free movement of services is composed of a constellation — treaty provisions, directives, and regulations working together to frame and oversee this essential question in the EU Single Market.

#### *A. Treaty Provisions*

Articles 4(2)(a), 26, 27, 114, and 115 of the Treaty on the Functioning of the European Union are the ones providing the institutions the authority to act in order to fulfil the single market. Although the EU and its member states are attributed with competence under article 4(2)(a), article 26 establishes the fundamental principle of the internal market, emphasising the removal of trade barriers and the promotion of a harmonised economic environment that fosters competition and growth. All facets of economic integration inside the EU, including the free movement of services, are supported by this article.

The main piece of legislation designed to offer the institutions the legal basis for creating a functioning single market (objective provided by article 26 TFEU) is Article 114 of the TFEU, which, in general, constitutes a path for the harmonisation of national laws within the EU. Article 114 TFEU, therefore, aims to achieve the mandates set by Article 26 TFEU, which speaks of the internal market in such a way

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[8] Stănciulescu A., (2023). Digital single market: consumer protection rules in the digital services act. *International Journal of Legal and Social Order*, *3*(1), 400-411.

[9] Neergaard, U., & de Vries, S. A. (2023). The Interaction between Free Movement Law and Fundamental Rights in the (Digital) Internal Market. *Utrecht University School of Law Research Paper Forthcoming, to be published in: A Engel, X Groussot, and G Thor Petursson (eds.), New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights (forthcoming)*.

that it should be an area of freedom, security, and justice, providing for the free movement of goods, services, and capital and the free movement of establishment and persons[10]. This should all be from the perspective of having one single market, frictionless and well-integrated, toward higher economic productivity, competitiveness, and consumer welfare in the Union.

Article 114 also gives the possibility for member states to retain or establish national provisions under certain conditions. If a member state considers that it needs to maintain national measures relating to major needs referred to in Article 36 TFEU or to the protection of the environment or working environment, it shall communicate these to the Commission. Apart from that, for new scientific evidences after harmonisation, member states are allowed to introduce new provisions but with the approval of the Commission. It would allow member states to address certain national concerns of importance in their country without compromising on overall harmonisation[11]. The above flexibility has an implicit provision whereby the European Commission still keeps its critical role regarding justification for the national provisions notified by the member states. The Commission will examine whether such measures result in arbitrary discrimination or disguised restrictions on trade or obstacles to the internal market. This lacuna ensures that national measures are in line with the internal market principles and do not lead to the endangering of its functioning.

Articles 56 to 62 of the TFEU allow expressly for the free movement of services by defining what constitutes a service, what are the rights and obligations for the member states in establishing the appropriate legal framework to guarantee that service providers can operate cross-border on equal footing with domestic providers. These articles preclude any discriminatory practices or unjustified restrictions that may hinder or impede the provision of services within the EU.

Article 56 TFEU also requires an element of extraneity-meaning that a cross-border dimension to the service provision must exist, which differentiates intra-national services from those that come within the free movement provision of the EU. Services provided within the same member state, not having any cross-border element, are not covered under the ambit of Article 56. The requirement for this has made sure that the provision in question aims to enable and assist in making the internal market a reality by breaking down cross-border barriers impeding activities of services. Apart from this, it is mainly about services from a commercial point of view, being essential that the services are provided for consideration. The commercial element ensures that the provision covers economic activities contributing to the functioning of the internal market. Activities considered as services include professional, business, cultural, and entertainment services,

[10] Craig P. & de Burca G., *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, ediția a VI-a, Hamangiu, 2015, p. 915 et ali.

[11] *Ibidem.*

provided that they involve an economic transaction between the provider and the recipient.

Articles 56 to 62 of the TFEU address specifically the free movement of services, defining what constitutes a service, the respective rights of the member states, and the obligations of establishing a legal framework that would guarantee service providers equal opportunity to operate cross-border with domestic providers. These articles prohibit discriminatory practices and unjustified restrictions which may affect or obstruct the supply of services within the EU. Moreover, article 57 TFEU defines services as activities normally provided for remuneration, if not already provided for within the sections concerning the free movement of goods, capital, and persons, this offering an indication of the economic nature of services and their distinction from other cross-border activities within the EU[12]. It also encompasses services connected with industrial, commercial, artisanal, and liberal professional activities to ensure, in fact, that a range of economic activities as wide as possible is covered by internal market freedoms. It also indicates that the free movement of services is subsidiary to the free movement of goods, capital, and persons, so that service activities are in principle governed by service provisions unless the activity falls directly within the ambit of the other freedoms. It helps to draw a general line distinguishing between various freedoms and remove their partial overlapping and conflicting cases, in order to have a consistent practice in the internal market.

The famous decision of the CJEU in Case 33/74, Van Binsbergen[13], has constituted a landmark basis for the development of the freedom to provide services within the European Union in so far as it prevents member states from introducing discriminatory restrictions concerning nationality or residence in order to ensure that service providers will suffer no unjustified obstacles to their cross-border activities. The ruling explained that any restriction on the free movement of services needs to be justified by imperative reasons of public interest-such as consumer protection-and must be proportionate. This case also confirmed that Article 56 TFEU has the direct effect to enable individuals to challenge restrictions on their right to provide services before national courts. It is also reinforcing a broad interpretation of services within EU law, covering a wide range of economic activities provided for remuneration. These principles ensure the regulatory balance enables service providers and stimulates a dynamic internal market.

### *B. Secondary Legislation*

✓ EU Directives:

Directive 2006/123/EC, more famously known as the Services Directive, is a landmark legislation that aims at removing legal and administrative barriers to

[12] Craig P. & de Burca G., *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*. Ediția a VI-a, Hamangiu, 2015, p. 915 et ali.

[13] Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid.

establishment and the provision of services across the EU. It makes it possible to have the freedom of establishment and the freedom to provide services through harmonising national regulations and simplifying administrative procedures for service providers.

Among others, Directive 96/71/EC deals with the posting of workers within the framework of the provision of services and guarantees at least minimum employment conditions in respect of a temporary posted employee in another member state along with protection for fair competition for enterprises posting such employees[14].

The E-Commerce Directive - also commonly known as 2000/31/EC - regulates certain legal aspects of information society services, in particular electronic commerce, within the European Union. The directive provides a legal framework for online service providers with the aim of ensuring cross-border trade in digital services. This allows it to promote consumer protection and legal certainty[15].

Directive (EU) 2015/1535 is laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services with the scope to avoid new technical regulations created at national level to create barriers to trade within the Single Market.[16]

✓ EU Regulations:

The EU Regulation 2018/644 on Cross-Border Parcel Delivery Services would be one such regulation, making the market for parcel delivery within the European Union member states more transparent, affordable, and competitive[17]. Since this regulation covers cross-border delivery services, it, therefore, enhances the efficiency and accessibility of the parcel delivery service in such a manner that it would allow e-commerce and trade in goods and services. The Digital Services Act (DSA) epitomises this new regulatory move in placing clear rules on the books regarding digital services, online platforms, and intermediaries. It will increase the level of transparency and accountability while protecting users in the digital space,

[14] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

[15] 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")

[16] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) (Text with EEA relevance)

[17] Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services (Text with EEA relevance.)

foster innovation, and provide competitiveness among the diverse providers of digital services within the Single Market[18].

## 2. Impact of the "Digital Revolution" on the Freedom of Movement of Services. The Transition from the EU Services Directive (2006) to Digital Services Act (2019)

The EU Services Directive, otherwise commonly known as Directive 2006/123/EC[19], marked yet another critical mile in creating an internal market for services within the EU. Adopted in December 2006, the said Directive aimed at removing all barriers that impeded the free movement of services across the EU member states in order to enhance economic integration and competitiveness within the Union. The express purpose of the Directive - from a legal point of view - was to make the freedom of establishment and the freedom to provide services within EU territory seamless. The freedom of establishment allowed enterprises to establish themselves in any member state under conditions no less favourable than those applied to domestic firms. At the same time, the freedom to provide services granted service providers the right to provide services across borders or temporarily on a territory other than their own without suffering discriminatory obstacles to their nationality or residence.

The Directive's approach was centred around the principle of non-discrimination: equal treatment of service providers from other member states had to be given by the member states as that given to their own nationals. This was the key principle that created a level playing field and thereby promoted competition across borders. The Directive also set up provisions aimed at simplifying administrative formalities, like points of single contact, through which, by using one contact point, service providers would be able to meet the required administrative obligations and obtain all the information needed easily. Another important feature of the Directive was that there should be mutual recognition of qualifications and certifications obtained in one member state for assured access to regulated professions and services throughout the Union territory. This had been included to overcome regulatory impediments that often came in the way of ensuring mobility of professionals and providing some kinds of services across jurisdictions [20].

The EU Services Directive has given birth to an abiding legacy in the legal shape of services within the EU. It facilitated the incremental market integration of nation states by stimulating economic growth and the creation of jobs by allowing business opportunities to expand across borders. However, the Directive still faces considerable difficulties in application, since full market integration is hindered by

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[18] Popescu A., *Viitorul cuvintelor noastre. Digital Services Act. Reguli explicate, studii de caz și exemple practice*, pe *înțelesul tuturor*, Universul Juridic, 2023, p. 33 et ali.

[19] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[20] Hatzopoulos, V. (2008). Assessing the services directive (2006/123/EC). *Cambridge yearbook of European legal studies*, *10*, 215-261.

regulatory divergences and national preferences, above all in those fields that were exempt from its scope, like healthcare and social services[21]. Yet, the Directive on Services was that impulse to liberalise and harmonise a single market for services in order to favour growth and employment. Its legacy opened the path for successive legislative developments, among which the Digital Services Act addressed the challenges brought on by the digital economy and updated the regulatory framework in that regard.

The DSA[22] extends the basic principles of the Services Directive to the complexities and challenges specific to digital services. It aspires to provide a safer, more transparent digital space for the protection of users' rights. The main goal is to harmonise rules related to digital services among EU member states, thus mitigating regulatory fragmentation and increasing coherent legal certainty for service providers operating in more than one member state. This harmonisation is essential in the context of the single digital market, the reduction of administrative burdens, and guaranteeing a competitive environment enabling service providers to establish themselves and offer services without barriers across borders.

This Directive aimed to facilitate the free establishment as well as the free provision of services within the territory of the EU by removing obstacles, simplifying, and adapting the administrative procedures. It was meant to realise a more integrated and competitive internal market in services, which would be essentially reached through the removal of discriminatory treatments, better mutual recognition of diplomas, and the use of Points of Single Contact (PSCs) with a view to reduce red tape linked to regulatory procedures[23]. However, traditional service sectors were the real target of the Directive, and at that time, full consideration was not given to the fast development and modernisation brought by digital technologies and to the increasing emergence of online platforms.

First, these aforementioned PSCs work as central bodies that facilitate direct contact between the service providers and national regulatory authorities. Their prime purpose, among others, is to rationalise administrative procedures, promote regulatory clarity, and contribute to the broader aim of fostering free movement of digital services within the EU. From a legal perspective, the establishment of PSCs under the DSA draws its legal framework from the EU's Treaty on the Functioning of the European Union, whose Article 56 underscores the elimination of hindrances

[21] *Ibidem.*

[22] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[23] Pollak, D. G. Chapter III. The European Union Digital Strategy: GDPR, DSA, DMA and AI Act. *Artificial Intelligence and Digital Transformation Law*, 47.

for the free performance of services across frontiers[24]. Based on this, the PSC is supposed to ensure full information for service providers on the relevant regulatory requirements applicable in the member states. This includes licencing, compliance procedures, and any other legal requirements that are in place to operate within the EU's Internal Market. In real life, PSCs make it easier for the regulatory environment within which digital service providers work. They represent a one-stop shop for simplifying and reducing the costs of dealing with diverse national regulatory frameworks. Particularly, this is very helpful for SMEs and start-ups to extend their digital activities in several EU countries.

Whereas the DSA internal market clause, under Article 3, lays a basis for the legislation to ensure the smooth provision of digital services across the European Union. In substance, this clause precludes member states from laying down requirements other than those provided at the EU level for the control of digital services within the scope of the DSA. The internal market clause is instrumental to the achievement of a harmonised regulatory framework that is, in turn, crucial to establishing a single digital single market. From a legal perspective, it addresses several fundamental issues that have evolved over time and formed obstacles to the free movement of services within the EU. The possibility of regulatory fragmentation is at a minimum because of the fact that the clause prevents member states from implementing divergent national regulations, which, in turn, pose an entry barrier for service providers or raise their compliance costs.

Harmonisation is all the more important in the digital economy because very often a service may concern several member states at once, while fragmented regulatory requirements may hold back innovation and competitiveness. The internal market clause captures the wider underlying principles of EU law, above all the commitment to free movement of services as laid down in the Treaty on the Functioning of the European Union. It complements the basic tenets underlying the EU Services Directive of 2006, targeted at eliminating cross-border barriers inhibiting service provision. The DSA, however, extends the internal market provisions further because it clearly addresses characteristics and challenges peculiar to the sector. This sector-specific focus plays a critical role in addressing those challenges connected with rapid technological change, the proliferation of online platforms, and the need for effective consumer protection in the digital environment[25]. The practical effect of the internal market clause is numerous: for service providers, this will contribute to a more predictable and stable regulatory environment, as compliance requirements would be standardised under EU law. This cuts red tape and legal uncertainty created

[24] Turillazzi, A., Taddeo, M., Floridi, L., & Casolari, F. (2023). The digital services act: an analysis of its ethical, legal, and social implications. *Law, Innovation and Technology*, *15*(1), 83-106.

[25] Pollak, D. G. Chapter III. The European Union Digital Strategy: GDPR, DSA, DMA and AI Act. *Artificial Intelligence and Digital Transformation Law*, 47.

by having to navigate through a patchwork of national regulations[26]. For consumers, the clause guarantees access to digital services from providers established in any member state, benefiting from a wider choice at probably lower costs thanks to increased competition. Not less important is the role of the internal market clause in fostering innovation. It also prevents inconsistent national regulations from standing in the way of digital service providers, hence stimulating investment to develop new services and technologies. That is certainly important for startups and SMEs due to a general lack of resources to comply with multiple regulatory regimes. With the DSA, this harmonised framework also enables these smaller players more easily to scale their operations across the EU, something which would lead to a more dynamic and competitive digital market. Just as much, however, the internal market clause entrenches important questions about the proper balance between EU-wide regulation and national sovereignty. While harmonisation is essential to make the internal market work, it indeed requires member states to cede part of their regulatory sovereignty to the EU. This is often hard to do, particularly when national governments have strong policy preferences or there are substantial differences in their regulatory cultures and practices.

Partly to address these problems, the DSA provides some solutions that may allow flexibility in certain circumstances. These would be such requirements as member states may impose on digital services insofar as necessary to satisfy particular needs related to important public interest objectives, such as public health, public security, or consumer protection, inasmuch as such requirements are proportionate to such needs[27]. This guarantees that the fulfilment of the internal market cannot be invoked in ways that undermine important national policies, while at the same time promoting the overarching goal of a harmonised digital market. What is more, the DSA also makes it compulsory for service providers not established within the EU but offering services within the EU to name a legal representative in one of the member states in which they offer services.

According to Article 12 of the DSA, this will ensure that non-EU-based service providers are under the same regulatory scrutiny and obligations as EU-based entities, hence a level playing field in the protection of user rights and interests in the Union[28]. The designation of a legal representative legally is an important mechanism in ensuring accountability on the part of non-EU service providers. The effect of compelling such providers to have a local representative ensures that, by operation of the DSA, there exists some kind of tangible contact point within that jurisdiction, which can be held responsible for the compliance with the various

[26] Frosio, G., & Geiger, C. (2023). Taking fundamental rights seriously in the Digital Services Act's platform liability regime. *European Law Journal*, *29*(1-2), 31-77.

[27] Turillazzi, A., Taddeo, M., Floridi, L., & Casolari, F. (2023). The digital services act: an analysis of its ethical, legal, and social implications. *Law, Innovation and Technology*, *15*(1), 83-106.

[28] Cauffman C., Goanta C., A New Order: The Digital Services Act and Consumer Protection, European Journal of Risk Regulation, Cambridge University Press, no. 12 (2021), pp. 758-774.

provisions contained in the DSA. This includes obligations regarding transparency reporting, content moderation, cooperation with authorities, and protection of users' rights. The legal representative is to facilitate the relationship between a given service provider and EU regulatory bodies for smoother communication and enforcement of the DSA's demands. This requirement closes possible loopholes that otherwise might have been used by service providers established outside the Union to circumvent regulatory control, simply because they do not have a physical presence in the Union. In this way, all digital service providers will be treated as operating under the same standards and will be subject to the same rules for the protection of users under Union law, regardless of their geographical location. The need for a legal representative also contributes to effective cross-border cooperation between regulatory authorities.

Where the service provider operates in more than one member state, it acts as a point of contact, ensuring that regulatory formalities are administered in a centralised way, as well as facilitating coordination among national authorities. This is very important for addressing cross-border issues such as the spread of illegal content and cyber threats. It also means that the interactions among regulators and their cooperation go smoothly, while promoting a consistent and coherent approach to regulating digital services in the EU, reaching the ambition of the DSA for one harmonised digital market where the regulatory standards would be uniformly applied and enforced.

Last but not least, the DSA addresses the serious impacts very large online platforms (VLOPs) have on the digital market by imposing additional duties on them with respect to managing the risk assessments, mitigation measures, and independent audits required by systemic risks. The basic conditions of the DSA provide that the operation of VLOPs should conduct full-scale risk assessments in order to identify systemic risks arising from their operations and take mitigation measures. These risks run from illegal content being made available to the protection of minors, to the protection of fundamental freedoms such as the freedom of expression[29]. The DSA thus strives to prevent the spread of injurious content by making VLOPs take proactive steps toward risk assessments, allowing a safer digital environment for users throughout the EU. Also, VLOPs have the responsibility of instituting transparent and effective content moderation practices.

This means that the platforms should provide users with easy and accessible means of reporting illegal content without delay. What is more, such platforms are supposed to publish detailed transparency reports describing their work on content moderation annually[30]. This kind of transparency not only aids in better accountability but also helps the regulatory authorities as well as the general public to scrutinise the way a VLOP complies with the regulatory requirements. It further reinforces the regulatory oversight in terms of prescribing independent audits for VLOPs by accredited

[29] Frosio, G., & Geiger, C. (2023). Taking fundamental rights seriously in the Digital Services Act's platform liability regime. *European Law Journal*, *29*(1-2), 31-77.

[30] *Ibidem.*

auditors. Audits would also help confirm whether internal processes and systems are working effectively to meet those expectations. By this, DSA positions VLOPs for independent scrutiny with a view to increasing confidence in their operations, while encouraging a digital competitive environment where conformity to EU standards is respected. In addition, the DSA grants enforcement authorities broader powers to enforce the regulatory requirements imposed on VLOPs. It includes heavy fines and other penalties for non-compliance, thereby incentivising the compliance with EU rules, preventing anticompetitive conduct, and abuses of market power by VLOPs. By addressing for the first time challenges that exist only because of the existence of a VLOP, the DSA is designed to make the digital marketplace a fair one, in which these systems sometimes hold extraordinary power on how and what information is distributed to users. The proposed DSA regulatory framework represents a balance between fostering innovation and protecting user rights in order to achieve a fair, transparent, and competitive digital environment within the European Union[31]. Put differently, the EU Services Directive's successor in the DSA is a conceptual jump forward in the European Union's regulatory approach to services - a need created by the transformative effect of digital technologies on the economy. The DSA extends the basic principles of the Services Directive into the digital era and into an environment offering challenges unlike any others brought about by the digital economy. In other words, it would be fair to note that the DSA encourages harmonisation, transparency, and accountability with the protection of fundamental rights, thus making sure that the digital economy is fair, competitive, and inclusive from the point of view of the interests of businesses, consumers, and society as a whole.

Another essential directive in the digital landscape is the E-Commerce Directive[32]. This directive does have legal certainty as part of its core. Because it has already harmonised one set of rules throughout the EU member states, a stable environment for online businesses is ensured. Such uniformity will reduce regulatory burdens on the service providers to operate across borders because of disparate legal requirements[33]. For instance, the Directive covers two major issues: liability of service providers in respect of content provided by users, requirements for transparency of commercial communication, and control of unsolicited commercial communications - spam. Other salient features of the Directive concern its approach to consumer protection. It establishes standards that ensure that consumers are duly informed of the services they use and imposes duties on the service providers to give

[31] Turillazzi, A., Taddeo, M., Floridi, L., & Casolari, F. (2023). The digital services act: an analysis of its ethical, legal, and social implications. *Law, Innovation and Technology*, *15*(1), 83-106.

[32] 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").

[33] Frosio, G. (2024). From the E-Commerce Directive to the Digital Services Act. *Digital Services Act Commentary (Edward Elgar, forthcoming 2025)*.

information on their identity, contact details, and the main characteristics of the goods or services provided. These will be helpful in fostering confidence in online transactions, which is an integral element in the motivation of consumers to engage in the digital economy. More importantly, the e-Commerce Directive does create a proper balance between intellectual property protection and innovation. In this respect, the limitation of liability by the directive for service providers under certain conditions also targets the promotion of novel online services and technologies without unnecessary liabilities for copyright violations. The topic then takes on a special meaning in the light of recent case law, such as decisions in C-484/14 - McFadden and in C-18/18 - Glawischnig-Piesczek, which allow further specification of the relationship between copyright enforcement and operational realities in the digital environment.

## 3. Landmark Decisions of the CJEU regarding the Free Movement of Digital Services

### 3.1 Case C-18/18 Eva Glawischnig -Piesczek v Facebook Ireland Limited

The dispute in Case C-18/18 Eva Glawischnig -Piesczek v Facebook Ireland Limited[34] centred essentially on the question of the liability of Facebook to remove defamatory content and on the worldwide scope of such a removal.

Ms. Glawischnig-Piesczek is a well-reputed Austrian politician. In connection with the publication of an article on oe24.at entitled "Greens: Minimum income for refugees should stay," a user published a posting on Facebook, inter alia, with the following defamatory comment: "Lousy traitor of the people, corrupt oaf, member of a fascist party." This posting could be accessed by any user of the social network. Following the notification made by Ms. Glawischnig-Piesczek on 7 July 2016, because Facebook Ireland had not removed the post, Ms. Glawischnig-Piesczek applied to the Handelsgericht Wien (Commercial Court, Vienna) for an injunction prohibiting Facebook both from keeping the statements accessible in their original form and from continuing to make them accessible in equivalent form. That court granted an interim order on 7 December 2016 against Facebook ordering it to remove the content. However, Facebook only restricted access to the content from within Austria; both parties, therefore, appealed the outcome. The Oberlandesgericht Wien reconfirmed the injunction in terms of the removal of identical statements but dismissed the request of Facebook for geographical limitation of the order. It also made a declaration that such an obligation on Facebook to remove equivalent content arose only when the content came to its knowledge through Ms. Glawischnig-Piesczek, third parties, or other means. Thus, the courts, referring to Austrian law-Paragraph 78 UrhG and Paragraph 1330 ABGB-, justified that the remarks in question seriously harmed Ms. Glawischnig-Piesczek's reputation and were defamatory. They explained that such value judgments could not be protected by the right to freedom of expression, as they did not relate to public or political debate at

[34] Case C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited.

all. The matter went before the Oberster Gerichtshof, which referred for a preliminary ruling by the CJEU whether the injunction given could be extended globally so as to cover not only the identical defamatory content but also equivalent content. The court also asked whether such an extension would not be in breach of EU law, having in particular in mind the territorial scope of orders for content removal on global platforms like Facebook.

That case raised some very interesting questions concerning the reach of content moderation and removal obligations for online platforms, in particular with regard to their cross-border effects. The subsequent judgment by the CJEU would decide to what extent national courts could issue orders against platforms such as Facebook to remove harmful content across borders, and whether this would also apply to equivalent content.

The Austrian Supreme Court has requested a preliminary ruling from the CJEU on whether Article 15(1) of Directive 2000/31/EC, better known as the E-Commerce Directive, prevents the national courts from ordering a host provider like Facebook Ireland to remove information that has been posted on the internet. Concretely, the court had three main questions in front of it: whether illegal information and its identical copies must be removed globally and locally; whether the injunction can include "equivalent" content; and whether such an order can require the removal of equivalent content as soon as the host becomes aware of it.

The CJEU then explained that, in this respect, Art 15(1) does not prohibit the national court from ordering a host provider to remove information identical to what has previously been declared illegal. In the case at hand, this kind of injunction is not a general monitoring obligation prohibited by the cited provision because it is referred to a specific case and, in particular, it tends to avoid further harm caused by the communication of illegal information by removing or blocking access to the information worldwide. This demonstrates an acknowledgment of online platforms' global reach and a need for measures that can be effective across borders. The CJEU also made clear that injunctions may cover information which is "equivalent in substance" because that carries the same defamatory kernel as the information originally notified. This is an important way to deal with minor rewordings or changes in detail that would otherwise circumvent a court order. However, the CJEU then went to great pains to clarify that such obligations must remain proportionate- the host provider should not be tasked independently with determining whether content is illegal. Instead, an injunction should clearly specify the elements that help identify equivalent content, and automated detection mechanisms can be used on the platforms to detect such material without placing an excessive burden on them. Finally, the CJEU held that Directive 2000/31/EC does not impose any limits on the geographic scope of injunctions. National courts are free to grant orders with global scope, provided that the latter comply with international law and do not create conflict with foreign jurisdictions. The judgment poignantly stresses the necessity of tempering EU law by the global legal regime, at least in relation to online content distribution, which by its very nature shows cross-border characteristics.

The ruling of the CJEU in the case of Directive 2000/31/EC, and its interpretation in the light of host providers like Facebook, raises crucial arguments in respect of the free movement of services in the European Union. The said directive, regulating electronic commerce, is closely related to guaranteeing cross-border service provision in the internal market, provided for in Article 56 TFEU.

The CJEU decision does not interfere with the free movement of services, as it allows national courts to require the removal of identical or equivalent illegal content crossing borders, while maintaining that there would not be a disproportionate or general monitoring obligation on host providers in order for them to provide services freely in all member states. The CJEU does not want excessive restrictions or obligations against host providers that could impede their capability of efficient provision of services within the member states and thus result in a fragmented digital market. At the same time, the judgment balances the freedom of services with consumer protection and the enforcement of national laws related to defamation, illegal content, and data protection. It enables national courts to order targeted and proportionate injunctions aimed at ensuring the removal or blocking of illegal content while still allowing service providers to operate under a uniform system of regulation within the EU in order to preserve the digital single market. It was, moreover, fundamentally important to the fact that global service provision in the digital age made the Court address such a reality under international law by ruling that global injunctions may be issued under that regime. This ensures that while the free movement of services remains a key priority, it does not undermine efforts to curb illegal activities online and thus aligns the enforcement of EU laws with international legal principles.

Concluded, by so interpreting Directive 2000/31/EC, the CJEU allows for the free movement across borders of information society services while permitting the courts to enforce compliance with national and international law in a proportionate and targeted manner to support the interests both of service providers and of the wider public.

### 3.2 Case C- 484/14 - Tobias Mc Fadden v Sony Music Entertainment Germany GmbH

In the case of Mc Fadden[35], a German entrepreneur offering a free-over-the-air Wi-Fi hotspot to the passing people, a controversy was filed after a copyright infringement of a phonogram had been committed with his Hotspot and without permission of its owner, Sony Music. Mc Fadden denied being personally responsible, but could not exclude that one of the users of his open WLAN had committed such an act. This accordingly gave rise to an important question of law as to whether Mc Fadden might be liable from the third parties using his network, in light of the E-Commerce Directive, Directive 2000/31/EC, in particular Art. 12(1), providing immunity from liability for the mentioned service providers.

[35] Case C-484/12 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH.

The referring court was faced with a number of questions concerning the question of Mc Fadden's liability, namely whether Mc Fadden may be held directly liable for the infringement or alternatively for indirect liability based on the German doctrine of Störerhaftung-Interferer Liability-due to his failure to take measures to secure his network whereby he enabled third party infringement. Sony Music sought to hold Mc Fadden liable in damages, injunctions, and legal costs, contending that he should have taken reasonable measures to prevent unauthorised use of his network. The court of first instance entered a default judgment against Mc Fadden granting the counterclaims of Sony Music. Mc Fadden appealed the order, arguing that he was immune from liability under the German statute implementing Article 12(1) of the E-Commerce Directive, exempting service providers from liability for information transmitted over their networks if they did not initiate the transmission, select the receiver, or modify the information. Thus, the CJEU had to decide whether such an exemption of liability would apply in Mc Fadden's case, as he provided an open WLAN without protection, making access to the infringement easy. The referring court had requested a preliminary ruling whether such an exemption would prevent even partial liability, direct or indirect, from falling upon Mc Fadden. This raised broader implications with regard to the responsibilities of open network operators and limits of liability under EU law, particularly with respect to providing free Internet access, promoting connectivity, and the protection of intellectual property rights.

The Landgericht München I (Regional Court, Munich I, Germany) has decided to stay the proceedings and to refer a number of important questions concerning the interpretation of Article 12(1) of Directive 2000/31 and related provisions to the Court of Justice for a preliminary ruling.

Central is what should be understood by the phrase “normally provided for remuneration.” The court is eager to understand how one could determine whether a provider normally provides a service for remuneration. The question involves an individual provider, whether he is paid or not; there are other providers in the market where they provide services for remuneration, while the greater part of the services is remunerated. The Court is, moreover, interested in the meaning of “provision of access to a communication network”, respectively whether the Directive requires that the sole condition for such access, for example, to the internet, is its eventual creation. The national court also has some concerns regarding the meaning of the word “anbieten” of Article 2(b): The Court asks whether the mere fact that an information society service is available constitutes compliance with the directive, or whether some form of advertising is required in addition. Another major concern here is the liability with regard to the information transmitted. The court questions whether the phrase “not liable for the information transmitted” at all prohibits claims for injunctive relief, damages, or costs that a person affected by copyright infringement could seek against the access provider.

Another issue is the extent to which it may be left to national courts to issue prohibitory orders. The Court wants to be guided on whether the member states may

allow their national courts to order an access provider to prevent third parties from making copyright-protected works available through a given Internet connection. There is also an issue as to whether Article 14(1)(b) applies to applications for prohibitory injunctions in respect of access providers and whether conditions on service providers are limited to their being any natural or legal person providing an Information Society service. If the answer to the question above were to be in the negative, the court also asks what further conditions must be placed on service providers for the purposes of Article 2(b).

Finally, it considers whether Article 12(1), read in light of existing intellectual property protections, allows national courts to order access providers to take discrete technical steps so as to ensure compliance with injunctions in respect of copyright infringements, yet leaves the choice regarding the exact measures taken to those providers. The judgment of the Court was, therefore, as follows:

Article 12(1) of 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"), must be interpreted as covering the services provided by an operator of a communication network who provides access free of charge to such networks. This is so because such services are presumably capable of being used for an economic end, particularly, to advertise the goods or services of that same operator. The Court further clarified that the provision of access to a communication network should remain within the framework of a technical, automatic, and passive process for information transmission. No additional conditions, such as the requirement of a contractual relationship or advertising obligations, must be fulfilled for the service to be deemed to be covered under Article 12(1). Furthermore, the Court clarified that the exceptions in Article 14(1)(b) of the Directive do not apply mutatis mutandis to Article 12(1), meaning that the liability of access providers is more complicated. Indeed, the Court stated that a person who suffered damage because of infringement of a copyright cannot seek compensation from an access provider simply on the ground of third-party use of the network for illegal activities. However, they retained the right to seek injunctive relief as regards continued infringements, a delicate balance of intellectual property protection, and freedom to provide services within the European Union[36].

In the light of these interpretations, the judgment reinforces the free movement of services within the internal market and lays down a clear framework for the liability of service providers while at the same time preserving access to communication networks open and accessible to the public. In its judgment, the Court tries to balance the rights of content holders against the operational realities facing service providers, and to create an appropriate legal environment that advances innovation and consumer access.

[36] Asensio, P. D. M. (2024). Digital services, internal market and content liability. In *Conflict of Laws and the Internet* (pp. 52-119). Edward Elgar Publishing.

### 3.3 The Practical Relevance of the Cases

The cases C-484/14 - McFadden and C-18/18 - Glawischnig-Piesczek, being multifaceted and implying more areas of law, well represent the general balance that is needed between IP rights and DSM principles within the European Union context. Both judgments explain how EU law must be adapted for the real essentials of digital service provision, in particular, relating to copyright and user rights. This is an efficient way to encourage the work of creators by protecting their rights from unscrupulous persons, but applying them in the digital world presents several unique challenges. In McFadden, the court confirmed service providers-like Wi-Fi network providers offering their services for free-will usually not be held liable for infringing content transmitted over their networks when meeting the criteria set out in Article 12 of the E-Commerce Directive. This is a salutary decision that decreases the risk of liability for service providers and so creates an environment where innovative services can flourish.

On the other hand, Glawischnig-Piesczek reinforces the view that, although service providers cannot be burdened with excessive liability, they nevertheless have certain reasonable obligations regarding copyright infringement. The position is thus nuanced and underlines the need for an appropriate legal framework that would balance both the rights of content creators and the operational realities facing any given digital service provider. The courts further understand that strict liability may have the inadvertent consequence of deterring service providers from operating in the market, an outcome which stifles innovation and limits the diversity of services available to consumers.

Both cases demonstrate the need for a clear and coherent set of rules that allows the free movement of services within the DSM while protecting the rights of creators. This, again, underlines the fact that a harmonised legal framework across the EU member states is fundamental to avoid such fragmentation, which would hamper cross-border services. In this regard, the case of McFadden presents a good precedent in arguing that free access to a network does not determine liability for user content - a fact that could be instrumental in ensuring service providers operate without continuous fear of litigation. This is further complemented by the Glawischnig-Piesczek decision, which established that service providers have to be proactive in preventing copyright infringement and, therefore, that enforcement is balanced and does not burden the capacity of the service providers unduly. That balance will be important for the DSM, for which services across borders are the very essence of the internal market.

These decisions form a legal framework that will support both innovation and user rights, which are what constitutes a healthy digital economy. Since the digital economy is continuously evolving, there has been a growing demand for creating an environment that could help stimulate investment in new technologies and services. This McFadden judgment would promote innovation by ensuring that service providers focus on the development of their services with lesser legal concerns. This

Glawischnig-Piesczek judgment also recognises the centrality of freedom to expression in the digital era. In so doing, the court demands service providers take due care in ensuring that their measures against copyright infringement have no excessive effect on the limitation of user rights; users should not lose their rights to free self-expression in contributing to digital content.

In the final analysis, therefore, the importance of McFadden and Glawischnig-Piesczek is the contribution they can make to the development of the legal framework for the free movement of services in the Digital Single Market. They manifestly reinforce the notion of having a harmonised approach to IP rights in a way that will balance protection of creators against needs for innovation and the free movement of services. These cases provide the necessary guidelines that policymakers and other stakeholders require for the continuous growth of the digital economy and its struggle to deliver digital services within the EU. It is through continuous dialogue that shapes a robust and competitive digital market in Europe that IP protection, innovation, and user rights will depend.

## 4. Conclusions and Future Perspectives

This study intended to show the importance of harmonisation of EU law with regard to digital services, represented by the development of a Digital Single Market, and how this would play a crucial role in shaping a future where innovation could coexist with strong legal protection for both consumers and service providers. While this paper has endeavoured to demonstrate, the DSM represents a strategic effort of the EU to balance free movement of services with consumer rights and competition law, and data privacy underpinned by an advanced legal framework; these are important legislative milestones in changing landscapes such as the DSA and DMA. These rules would, therefore, try to curb some of the challenges brought about by online platforms, content moderation, and unfair competition while intensifying digital governance across member states.

The DSM has thus been shaped by foundational EU principles, including Article 56 TFEU, which guarantees the free movement of services. First, the e-Commerce Directive 2000/31/EC created a multilayered regulatory architecture, supplemented by the General Data Protection Regulation and now by the Digital Services Act, through which fragmentation is reduced and digital services can be allowed to operate cross-border with reduced regulatory burdens. The ensemble of these frameworks ensures appropriate legal certainty to enable businesses to both innovate and scale in the digital economy, while users' rights and safety are protected.

In the case law field, the critical choices of the CJEU have given further elaboration on the boundary of digital service within the DSM. For instance, the McFadden case (C-484/14) set an interesting precedent with regard to the liability of services providing Internet access. Indeed, the judgment ruled that services providing internet access may not be held automatically liable for copyright infringements committed by third parties under the e-Commerce Directive, provided certain requirements are satisfied. Similarly, in Glawischnig-Piesczek (C-18/18), the CJEU has given a

judgment with regard to the obligations of online platforms for the takedown of illegal content and provided an interpretation that shaped the future of content moderation in a manner that would allow a proper balance between the freedom of expression on one hand and the obligation to take action against illegal content on the other.

In this connection, the importance of these legal and judicial developments bears implications for the innovative capability of the DSM while ensuring a high level of protection for users' fundamental rights. Whereas the Digital Services Act aspires, in particular, to a safer online space by imposing clear obligations on the platforms to take up the challenge of harmful content and by increasing trust in digital services, the Digital Markets Act tries to ensure a fair and contestable market by targeting so-called gatekeeper platforms, in order for smaller businesses to be able to compete fairly in the digital environment.

Eventually, this will not be limited to the continuous removal of barriers to cross-border digital trade but to the building of a truly resilient and inclusive DSM able to sustain rapid technological evolution. With the digital economy continuing to expand, these regulations will be essential in keeping Europe as a competitive and dynamic player at the global level, simultaneously giving legal certainty to service providers and protecting the rights of consumers. The convergence of national laws in line with EU directives will enable a single market where the free movement of services is unhindered by any legal uncertainty and fragmentation of rules and regulations - a real basis for sustainable growth in the digital era. Moreover, this is evidenced in how future prospects for the free movement of services within the DSM, in particular with the introduction of the DSA, rely very much on maintaining a balance between regulatory oversight and a need for an open competitive digital environment. The DSA introduces an overarching framework to help regularise how online platforms interact with users, businesses and other service providers.

Ultimately, the free movement of services in the DSM under the regulatory framework of DSA will be underpinned even more by increased regulatory clarity, more confidence by consumers, and more choices for consumers due to a more competitive market. The DSA balanced approach with regard to content moderation, transparency, and platform accountability will be the turning point that facilitates frictionless cross-border supplies of digital services and thus helps make the DSM resilient, innovative, and user-centred. However, this will only succeed if the provisions within the DSA are executed properly, and the EU proves to be capable of adapting to future challenges in the digital field.

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