



# The EU Single Market in the Digital Era

From legislative complexity to clarity

2024



# Foreword

This report discusses legislative activity in response to the gradual digitalisation of the EU Single Market.<sup>1</sup> Awareness of the need to adapt the Single Market to an ever more digitalised context has been firmly on the EU's political and legislative agenda over the past thirty years. Already a year after the launch of the Single Market, the European Commission (henceforth the Commission) concluded that:

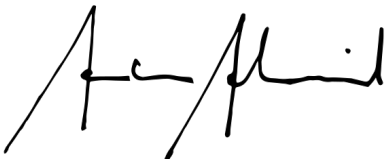
'A digital revolution is triggering structural changes comparable to last century's industrial revolution with the corresponding high economic stakes.'<sup>2</sup>

The National Board of Trade has previously analysed different aspects of digitalisation, the Single Market and international trade. Areas that we have looked at include the development of e-commerce in the Single Market, cloud computing, the use of data and data flows, digital platform regulation, IT security regulation and international trade, the effect of AI and machine learning on established technical regulation and trade and, most recently, the effects of the international 'digital divide' on negotiations of e-commerce rules within the WTO.<sup>3</sup>

The EU has during 2023 celebrated the 30<sup>th</sup> anniversary of the Single Market. This has been a time to mark what has been achieved thus far but also, of course, a natural opportunity to consider what might come next. With this report, we set out to offer an overview of the process of digitalisation of the Single Market to date. Based on the analysis in this report, we also offer our proposals for how the fourth decade of digitalisation of the Single Market could be less about legislative complexity and more about clarity.

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Stockholm, February 2024



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1 The Internal Market of the European Union is a single market (see further EUR-Lex at: Internal market – EUR-Lex (europa.eu)). The 'Internal Market' and the 'Single Market' are often used interchangeably to denominate this market. In this report 'The Single Market' will be used throughout.

2 Commission of the European Communities, *Europe's Way to the Information Society – An Action Plan*, COM(94) 347 final, 1994, page1b.

3 For full titles of these reports, please see the reference list.

## Executive summary

Ensuring that Single Market legislation is fit for the digital economy<sup>4</sup> is one of the EU's priorities. It is seen as a key factor in securing the European capacity to embrace opportunities offered by digital technologies, thus providing opportunities for businesses and consumers, supporting the green transition, and securing the EU's future productivity and competitiveness.<sup>5</sup>

This report looks at some of the challenges that the EU faces in preparing the Single Market for the digital era. These range from overarching conceptual confusion to perceived high levels of complexity in the digital legislative framework.

It has been common in the EU to make a distinction between 'the Single Market' and 'the Digital Single Market'. Designating 'single markets' within the Single Market is common practice in the EU to lend weight to prioritised policy areas. However, given that digitalisation now permeates most areas of the Single Market, it is far from clear which policy and legislative areas of the Single Market are 'digital' and which are to be considered 'non-digital'.

To add to the risk of misconceptions, it seems that the EU's strategy for digital transformation<sup>6</sup> (increasing the population's digital skills, investment in digital infrastructure, encouraging the use of digital technologies in businesses, and ensuring online access to public services) is also sometimes included under the heading 'Digital Single Market'. Whereas digital transformation policy and the development of legislation for a digitalised Single Market are mutually reinforcing, they probably should not be confused as the same and treated under a common heading.<sup>7</sup>

These are examples of conceptual confusion that can contribute to unclear policy discussions about reforms needed to allow the EU to successfully embrace the opportunities offered by digitalisation.

We, therefore, agree with arguments previously put forward at EU level to view digitalisation as a mainstreamed development of the Single Market. This brings more clarity and emphasises that the effect digitalisation has on various policy and legislative areas needs to be an integral part of all analyses and discussions about the future of the Single Market. Importantly, there must not be any doubt that Single Market legislation for the digital economy is precisely Single Market legislation. As such, it needs to be developed and managed according to the established principles for efficient legislation agreed at EU level. As obvious as this may seem, it is worth underlining this point. Especially since a general perception among stakeholders seems to be that EU legislation for the digital economy too often fails to live up to the objectives of the EU Better Regulation Agenda.

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4 As for a definition of the 'digital economy' we look to the broad definition provided by the OECD, which 'incorporates all economic activity reliant on, or enhanced by, the use of digital inputs, including digital technologies, infrastructure, services, and data. It refers to all producers and consumers, including government, that are utilising these digital inputs in their economic activities', [Investment-Insights-Investment-Promotion-Digital-Economy-OECD.pdf](#)

5 Benefits for the EU economy and society from digital transformation and more harmonised rules for the digital economy, it has been estimated, could yield €384 billion yearly. This according to a report from the European Parliamentary Research Service, *Increasing European added value in an age of global challenges – Mapping the cost of non-Europe (2022–2032)*, PE 734.690, 2023, page 17.

6 Including the Digital Decade policy programme 2030, see further [State of the Digital Decade \(europa.eu\)](#)

7 This report focuses on legislative aspects of the Single Market, at EU level. The equally important initiatives to achieve digital transformation gain less attention.

Each legislative act developed for the EU digital economy is receiving much detailed attention. Comprehensive analyses of the legislative framework for the Single Market in the digital era, and the challenges it brings for achieving a well-functioning Single Market, are scarcer. This is why, in this report, we set out to take an overall view.

We have explored and exemplified some of the recurrent and problematic legislative tendencies related to the development of Single Market legislation fit for the digital era, that are currently being discussed in the EU. We have summarised them into five tendencies that are the focus of this report:

- Legislative acts seem to suffer from incomplete evidence bases.
- Legislative acts appear to overlap.
- Variation of definitions of central concepts used in legislative acts.
- Harmonising measures could lead to new divergence.
- Inconsistent application of EU legislation at national level.

Together, these tendencies contribute to a legislative framework that is perceived to be characterised by complexity rather than clarity. It is the opposite of the EU's joint aim for a frictionless Single Market based on approximation of legislation and the Better Regulation Agenda principles: targeted, effective legislation that is easy to comply with and that imposes the least burden and cost possible for stakeholders.

The risk is that if there are high levels of complexity created in the digital legislative framework – whether it is perceived or established – this would hinder rather than support the EU in its efforts to create a Single Market fit for the digital era.

It would, therefore, be important for the EU institutions and the Member States to jointly counteract the worrying legislative tendencies identified. To achieve this, we propose the following:

- **The next Commission needs to show a commitment to attaining a well-functioning Single Market.**  
This must include allowing time for and ensuring that legislation already adopted, or about to be adopted, for the digital economy can come into effect, be applied and its impacts assessed. Emphasis should be placed on supporting and guiding all actors concerned so that they are able to gain an overview and understanding of new requirements and how they will work in practice.
- **The EU institutions, the Commission, the Council, and the European Parliament, must truly deliver on their commitments to the Better Regulation Agenda.**  
Especially in this context, this means ensuring that legislative initiatives have a high-quality evidence base. This includes complete impact assessments – including consideration of the international aspect and ensuring that EU legislation reflects international regulatory co-operation –, as well as stakeholder consultation and input from experts in different digital fields. Furthermore, ex-post evaluation, and especially fitness checks of whole legislative and policy areas must be prioritised. This would be key to establish where there is overlap between legislative acts, as well as where there are grey zones in terms of definitions of central concepts used in legislation. The Commission must take lead in explaining how this is meant to work in practice; which requirements apply in which situations, to which actors and to which products and services?

- **The Commission must support all stakeholders both in government and the business community in grasping how Single Market legislation for the digital economy is meant to work in practice.**

It will be necessary for the Commission and European agencies to provide more extensive and timely guidance for national authorities responsible for application of legislation at national level. Guidance must also take a broader perspective than the traditional focus on separate legislative acts. This could be done by exploring the possibility of mimicking established approaches to mitigating legislative overlap and difficulties in interpreting rules, such as the New Legislative Framework and the Blue Guide for product rules and the Handbook on application of the Services Directive.

- **The Commission, the European Agencies and Member States and their authorities should continue to expand and institutionalise co-operation and co-ordination between themselves, at EU and national level.**

Digitalisation transcends traditional established divisions between policy areas and national boundaries. Government structures and approaches to enforcement of legislation need to reflect this. The Commission must take lead in facilitating co-operation between Member States, for example by strengthening existing networks. This will be especially important with a view to avoid diverging application of legislation.

- **Existing processes and tools for handling Single Market legislation could be complemented and enhanced by new ones enabled by digital technologies.**

Digital technology could likely, with appropriate safeguards in place, provide support for the development of legislation and on both the compliance and enforcement side. Ongoing initiatives to explore this area should be continued.

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# 1 Introduction

Digitalisation is affecting an ever-increasing number of areas of EU law relating to the Single Market. The National Board of Trade has a mission to promote a well-functioning Single Market. We consider it an integral part of this mission to analyse the effects of legislation, adopted in response to digitalisation, on the development of the Single Market.

The joint overall ambition of the EU – its institutions and Member States – for the Single Market is the continuous and gradual approximation, and harmonisation<sup>8</sup>, of legislation to enable free movement of goods, services, capital, and persons. Persons and businesses should be able to access the whole Single Market while taking account of a single set of rules instead of the 27 (or 30) national legislative frameworks.<sup>9</sup>

Digitalisation has required the revision of existing Single Market legislation to make it fit for the demands of a digitalised society. It has also meant the creation of new legislation to regulate phenomena that have emerged with the use of digital technology. With so much legislative activity in different parts of the EU system, it is difficult for all actors involved to gain and maintain a clear overview of existing and upcoming legislation. There are factors that make achieving such clarity particularly challenging, and that also counteract approximation and harmonisation of legislation.

Firstly, there is some degree of conceptual confusion. The concept of the ‘Digital Single Market’ has often been used to describe the process of digitalisation of the Single Market and all the different strands of work related to this process. It has, however, become a catch-all concept for such a wide array of EU legislation and other aspects of digitalisation (increasing the population’s digital skills, investment in digital infrastructure, encouraging the use of digital technologies in businesses, and ensuring online access to public services) that it is unclear what the concept entails. The EU’s ability to adopt and take advantage of the possibilities offered by digital technology is too important for its future competitiveness to be compromised by confusion over vague concepts.

Additionally, stakeholders, from business and government, academia and think tanks, report on that the sheer amount and complexity of legislation in the digital domain is a challenge. There is a perception that rules overlap or apply to similar areas, and that there are difficulties determining where different legislative acts<sup>10</sup> start and end. This confusion spills over into the processes of applying legislation at national level. This makes it challenging for national authorities to apply the rules in a consistent way. It is also difficult for business, especially small and medium-sized enterprises (SME), to determine what they need to do to be compliant with legislation.

Given the aim for approximation of legislation in the Single Market, this type of legislative tangle is the opposite of the original ambition of creating joint EU legislation that guarantees a well-functioning Single Market and free movement.

This situation is also contrary to the Better Regulation commitments at EU level to create legislation that is ‘as simple and clear as possible, avoids overregulation and

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8 ‘Harmonisation of legislation’ is not a term formally used in the Treaty of the Functioning of the European Union, which only uses the concept of ‘approximation’ of laws. Whether they are synonymous or not has not been conclusively established. It could be argued that harmonisation is the process by which Member States adapt their national laws in accordance with EU legislation to achieve approximation. This is how it is viewed in this report.

9 The Single Market is made up of the 27 EU Member States. Iceland, Norway, and Liechtenstein also participate through the Agreement on the European Economic Area (EEA). (Switzerland is not formally a part of the Single Market but is closely integrated to it via an array of bilateral agreements.)

10 EU legal acts are regulations, directives, decisions, recommendations, and opinions (Article 288, Treaty on the Functioning of the European Union).

administrative burdens for citizens, administrations and businesses<sup>11</sup> and is ‘designed with a view to facilitating its transposition and practical application’.<sup>12</sup> It is concerning if these commitments do not materialise in a digitalised Single Market, as this could hinder trade and innovation and, in the longer term, economic growth and competitiveness<sup>13</sup> in the EU.

After 30 years of digitalisation of the Single Market, it is beneficial to study and gain an overall perspective on this process. Furthermore, there is a need to explore tendencies in the legislative process that seem to hinder the creation of coherent rules for the Single Market in the digital era.

## 1.1 Purpose and outline of the study

This report zooms out of the details of individual policy and legislative initiatives to offer an overall view of the process of digitalisation of the Single Market to date, the challenges it has presented for achieving the aim of approximation of legislation, as well as proposals for how these challenges could be addressed.

Quite often, political statements are made at both EU and national level, about the importance of strengthening the ‘Digital Single Market’. However, it is unclear which policy and legislative areas are now included under this heading and there is, therefore, a risk that such statements will be difficult to translate into concrete action.

To gain more clarity about all the legislative areas that could arguably fall under the epithet ‘digital’ and be included in the concept Digital Single Market, this report will give a brief historic overview of the digitalisation of the Single Market (chapter two). As digitalisation now permeates most aspects of society and of trade, we question if there is still a need to differentiate between the Digital Single Market and the rest of the Single Market, which would then supposedly be non-digital.

Secondly, this report maps out and discusses legislative tendencies that we have observed in the EU’s journey towards creating legislation for the digitalised Single Market and, which seem to counteract achievement of legislative coherence (chapter three).

Thirdly, the EU has been grappling with problems connected to creating common EU legislation since the launch of the Single Market. After 30 years of integration in the Single Market, the number one overall root cause of complaints from business is still regulatory choices at EU and national level.<sup>14</sup> Therefore, it is also interesting to explore if and how digital is different (chapter four). Are challenges reported in connection to the digitalisation process of the Single Market different from the ‘traditional’ problems that create barriers to trade in the Single Market? A yes or a no answer to that question matters in terms of what actions could be taken to deal with identified challenges.

Given the overview and analysis in chapters two to four, consideration will be given to how greater clarity and coherence of legislation for the digitalised Single Market could be achieved. This discussion will also lead to our conclusions and recommendations (chapter five).

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11 Interinstitutional Agreements, *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-making*, 2016, page 1.

12 Ibid.

13 Competitiveness is a concept widely used but it is not always clear what different actors mean by it. We subscribe to the definition given in EUR-Lex: ‘A competitive economy is an economy whose sustained rate of productivity is able to drive growth and, consequently, income and welfare.’

14 European Commission, *Long term action plan for better implementation and enforcement of single market rules*, COM(2020) 94 final, 2020.



## 1.2 Method and limitations

This report is primarily based on desk research and analysis of various reports, strategy documents and communications from the EU institutions, EU Member States, academia, business organisations and think tanks, as well as analysis of legislative proposals, impact assessments, and legislation already in force.

This report analyses legislation as it is written. It does not comment on the potential merits or flaws of individual legislative acts or question the political objectives of legislation. We have also refrained from analysing how and why policies have been shaped the way that they have as they, naturally, tend to reflect the times in which they were developed, as well as the political preferences of the people in charge of steering the development of the EU and the Single Market.<sup>15</sup>

We have also mainly focused on challenges in the Single Market, not on potential barriers to international trade caused by the complexity and/or the extraterritoriality of EU legislation. This being said, the impact of EU digital legislation on international trade, as well as its effects on international regulatory co-operation and compatibility with agreements within the WTO framework, are important aspects that also deserve attention, and that have been analysed by the National Board of Trade in other reports.<sup>16</sup>

In its EU-centred work, the National Board of Trade deals mainly with legislative aspects of the Single Market and this report shares that focus. We have also chosen to look at issues related to legislative initiatives at EU level only. The broader efforts at EU and national level within the area of digitalisation policy/digital transformation, which cover equally important aspects such as digital infrastructure, skills and uptake and use of digital technology in business and government are thus given less attention in this report; except in the context of how digital transformation and digital capacity may impact on Member States' capacity to manage application of EU legislation for the digital economy (chapter three).

Digitalisation and development of digital technology is ongoing. Consequently, much of the legislation in the Single Market created to meet the demands and challenges of digitalisation are either still being negotiated or are in the process of being applied at national level. This means that in this report, we are mostly dealing with 'a moving target' and the challenge of not having an ex-post perspective. Since we are considering ongoing developments, conclusions drawn may thus need to be reconsidered in the not-too-distant future.<sup>17</sup> However, if problems are identified in the current legislative processes, it is still possible to correct them. This is the reason we think it worthwhile, despite the uncertainties, to carry out this analysis now.

Rather than covering every possible angle of the development of legislation fit for a digitalised Single Market, our ambition is that this report may serve as inspiration for further and more in-depth analytical studies on this broad and important topic.

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15 For an analysis including these types of aspects see, for example, Claudio Feijóo, José Luis Gómez-Barroso, and Edvins Karnitis, *More than twenty years of European policy for the development of the information society, Netcom Networks and Communication Studies*, 21-1/2 2007, pp. 9–24.

16 Including in: *Innovation, AI, Technical Regulation and Trade – questioning the invisible hand in the digital economy, 2023*, and *The E-Commerce Negotiations in the WTO: Understanding non-participation, 2023*.

17 The cut-off date for this report is 12 December 2023. Developments and decisions made in the EU legislative process after this date are, therefore, not reflected in the analysis.

## Sustainability aspects

In its instruction from the Swedish Government, the National Board of Trade is tasked with incorporating the aspect of sustainable development in all its work. This report does not explicitly deal with sustainable development issues. However, parallel to the development of a digitalised Single Market, the twin green and digital transitions are at the top of the EU's political agenda and seen as mutually reinforcing. Digital technologies and solutions could help create a climate neutral resource-efficient economy and society by, for example, enabling more efficient use of energy, resources, materials, and transport.

However, a legislative environment characterised by complexity would likely not be conducive to such a development. This is another important aspect demonstrating why more clarity is needed in digital legislation. As such, the reasoning in this report could be linked to UN Sustainable Development Goals (SDG) 8, 9, and 16.<sup>18</sup>

The Commission has argued that the twinning of green and digital transitions will depend, among other things, on regulatory factors such as a better regulatory framework with incentives for innovation.<sup>19</sup>

The Commission's 2022 Strategic Foresight report underlined the need to accelerate the green and digital transitions in tandem. The Commission further emphasises that digital solutions will make our economy more efficient and less resource intensive, while helping to minimise the environmental, resource and climate footprint of digitalisation itself. However, there are challenges related to the digital economy, including the impact on energy consumption, the increase in packaging waste and problems related to re-cycling (especially problematic for goods purchased online).<sup>20</sup>

Another important sustainability aspect of digitalisation concerns e-inclusion and e-accessibility, which also largely depend on the adoption and application of clear rules supporting these areas. Here, aspects on the EU political and legislative agenda include efforts to expand the geographical coverage of internet access, enhance digital skills among the European population and ensure that a range of digital products and services (for example, public transport, banking services, online shops etc.) live up to EU-wide minimum accessibility requirements.<sup>21</sup>

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18 SDG 8: Decent work and economic growth. SDG 9: Industry, innovation, and infrastructure. SDG 16: Peace, justice, and strong institutions. See more at [THE 17 GOALS | Sustainable Development \(un.org\)](#)

19 European Commission, *2022 Strategic Foresight Report – Twinning the green and digital transitions in the new geopolitical context*, Communication COM(2022) 289 final, 2022.

20 For an interesting discussion about the contribution, and under which conditions, of digital technology to green and sustainable development see a report from the Swedish Agency for Digital Government, *Perspektiv på digitalisering – Digitaliseringens klimat- och miljöeffekter*, 2023 (only available in Swedish).

21 The European Accessibility Act (Directive (EU) 2019/882 on the accessibility requirements for products and services) must be enforced in Member States from June 2025.

## 2 More than one single market in Europe?

The EU has the world's largest single market.<sup>22</sup> The EU Single Market numbers 447 million consumers and 23 million companies and covers a wide array of policy areas.<sup>23</sup> The Single Market has contributed to a six to eight per cent expansion in EU GDP that would not have been achieved in its absence.<sup>24</sup>

The EU Single Market is an area without internal frontiers in which the free movement of goods, services, capital, and persons<sup>25</sup> is ensured as agreed under the Single European Act.<sup>26</sup> The Single Market finds its legal basis in articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU).

Within the EU Single Market, it is common to give particular weight to prioritised policy or legislative areas by defining them as separate 'single markets'. For example, there is 'the single market for services', 'the single market for goods', and the 'single market for green products'.<sup>27</sup>

Relating to digital developments, the Commission<sup>28</sup> is aiming, inter alia, to create 'a single market for data'.<sup>29</sup> Further, the Regulation known as the Digital Services Act<sup>30</sup>, aims to establish 'a single market for digital services'.

Even if it is common practice within the EU to refer to certain prioritised policy areas as single markets within the Single Market, from a legislative point of view it can be difficult to define which domains and rules are related to each of the various single markets.

### 2.1 Dividing a digital from a non-digital Single Market?

It seems that the concept of a 'Digital Single Market' has become the catch-all concept for a variety of EU legislation and policy initiatives pertaining to the digitalisation of the Single Market. As with other 'single markets' within the Single Market, this concept describes a wider policy direction; a direction that the EU wishes to pursue to remain at the forefront of digitalisation and use its potential for growth, productivity, and employment creation.

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22 A single market can be defined as a formal arrangement between sovereign nations to allow members free access to each other's markets (see, for example, [EconomicsOnline, A single Market, 2020](#)). Free access entails movement of goods and services, as well as the free movement of labour and real and intellectual capital. It is thus a step further than a customs union. The EU Single Market is broader in the sense that it includes free movement of all persons, not just economically active persons i.e. 'labour', as defined in article 26 of the TFEU [EUR-Lex – 12016E026 – EN – EUR-Lex \(europa.eu\)](#). According to the latest report of the Single Market Scoreboard (2022), as of December 2021 there were 1,018 directives and 6,224 regulations in force to ensure the functioning of the Single Market.

23 Guillaume Ragonnaud, *The single market at 30 (1993–2023)*, Briefing for Members' Research Service, European Parliamentary Research Service, PE 749.771, 2023.

24 Lauro Panella ed., *Increasing European added value in an age of global challenges – Mapping the cost of non-Europe (2022–2032)*, Study of the European Added Value Unit, European Parliamentary Research Service, 2023.

25 The free movement from one EU Member State to another of goods, services, capital, and persons is referred to as the "four freedoms".

26 The Single European Act (SEA) was the first major revision of the 1957 [Treaty of Rome](#). The Act included the objective for the European Community of establishing a Single Market by 31 December 1992.

27 The Single Market for Green Products, SMGP, initiative referred to the methodologies needed to identify the optimum resource consumption and environmental footprint of manufacturing from the perspective of a product's life cycle.

28 Institutional mandate period 2019–2024.

29 European Commission, *A European Strategy for data*, Communication COM(2020) 66 final, 2020.

30 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). The Regulation came into force on 16 November 2022.

As digitalisation has come to permeate an ever-increasing number of legislative areas, it has, however, become less clear what the ‘Digital Single Market’ describes, and which areas of the Single Market are to be regarded as non-digital.<sup>31</sup>

High-level political statements often go no further than stating that the Digital Single Market must be strengthened and completed to secure the EU’s future competitiveness and the twin green and digital transition. But what should be done and how? And which policy and legislative areas are included? And what is digital and non-digital?

To illustrate this, one example is the European Parliament Resolution adopted on the 30<sup>th</sup> anniversary of the Single Market. The Resolution expresses that the ‘Digital Single Market’ needs to be well-functioning, and actions should be taken to ensure this. At the same time, the Resolution also underlines that legislative actions are needed to underpin the digital transition in the Single Market.<sup>32</sup>

This type of conceptual confusion is not conducive to clear policy discussions that lead to concrete actions. The ‘Digital Single Market’ may initially have been coined as a concept to indicate a priority policy area. However, now that digitalisation affects most legislative areas of the Single Market because most transactions in the Single Market have digital elements connected to them, this division adds to a general perception of complexity and opacity related to EU legislation for the digital economy. It is our view that it would be more useful to consider digitalisation as mainstreamed in the Single Market. This way there can be no doubt that there is no separate decision-making process or principles for legislation pertaining to things ‘digital’ and that all Single Market legislation needs meet the objectives and principles for effective legislation established at EU level.

A discussion on this theme has been ongoing at EU level, aiming to determine whether it is indeed practical to keep distinguishing between a digital and non-digital Single Market, considering the ubiquity of digitalisation and widespread use of digital technologies.

Already at the 25<sup>th</sup> anniversary of the Single Market, the usefulness of the concept ‘Digital Single Market’ was a topic for discussion in the Council of the European Union (Competitiveness Council). A Council Presidency discussion paper on the future of the Single Market highlights precisely that most policy areas are now digital, or digitalised, and that there is therefore no need to continue talking specifically about the ‘Digital Single Market’.<sup>33</sup> Individual Member States have also made this point (for example, Finland in a 2020 non-paper).<sup>34</sup>

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31 J. Scott Marcus et al., *Contribution to growth: The European Digital Single Market – delivering economic benefits for citizens and businesses*, 2019. Study for the Committee on the Internal Market and Consumer protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2018.

32 European Parliament resolution of 18 January 2023 on the 30<sup>th</sup> anniversary of the single market: celebrating achievement and looking toward future developments (2022/3015(RSP)).

33 Council of the European Union, *Presidency discussion paper – Future of the Single Market, in preparation of the Competitiveness Council on 29 November 2018*, 14003/18.

34 Ministry of Economic Affairs and Employment Finland, *Non-Paper – Finland’s views on strengthening the single market*, 2020.

## Digital concepts

**Information society** reflects the expansion and use of information. It is the predecessor to the term 'digital society'. The most common definition is to highlight an increase in information and communications technologies (ICTs) as signalling the emergence of an information society.<sup>35</sup>

**Information and communication technologies (ICT)** are defined as a diverse set of technological tools and resources used to transmit, store, create, share, or exchange information. These technological tools and resources include computers, the internet (websites, blogs, and emails), live broadcasting technologies (radio, television, and webcasting), recorded broadcasting technologies (podcasting, audio and video players, and storage devices) and telephony (fixed or mobile, satellite, vision/video-conferencing).<sup>36</sup>

**Digitalisation** often refers to the establishment and spread of digital infrastructure, which is a precondition for society reaping the benefits and possibilities for development offered by digital technology. It can also mean the take up and use of digital technology/tools by companies and government to increase efficiency and innovation and develop new products and ways of supplying them to customers and citizens.

**Digital and electronic** are often used interchangeably but are derived from different concepts. Digital is often used generally to indicate use of computers and internet.<sup>37</sup> Digital technology means electronic devices, software systems and resources used to create, store, and manage data.<sup>38</sup> Electronic technology usually means electronic devices that can transmit communication including a telephone, mobile phones, and computers.<sup>39</sup>

**E-commerce and digital trade** are also often used interchangeably. Some would argue that a distinction should be made between e-commerce that is digitally enabled trade (where what is traded does not change only how it is traded) and digital trade, which would imply the exchange of purely digital assets.<sup>40</sup> However, the OECD, for example, does not make this distinction and describes digital trade as all forms of trade enabled by digital technology even if it involves physically delivered goods or services.<sup>41</sup> This latter definition seems to be the most internationally recognised definition.

**Online** is a term used to indicate an activity or service available on or performed using the internet or other computer network.<sup>42</sup>

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35 [Information society – Oxford Reference](#)

36 [UNESCO IIEP Learning Portal Glossary Information and communication technologies \(ICT\) | Unesco IIEP Learning Portal](#)

37 <https://www.termado.com/DatatermSearch/?ss=digital> Svenska datatermgruppen/ Joint Group for Swedish Computer Terminology.

38 [What Is Digital Technology? \(digital-adoption.com\)](#)

39 [Electronic technology Definition | Law Insider](#)

40 [E-Commerce or Digital Trade? Why the Difference Should Matter To Trade Lawyers by Wolfgang Alschner :: SSRN](#)

41 [Digital trade – OECD](#)

42 [ONLINE | English meaning – Cambridge Dictionary](#)

## 2.2 Thirty years of digitalisation of the Single Market

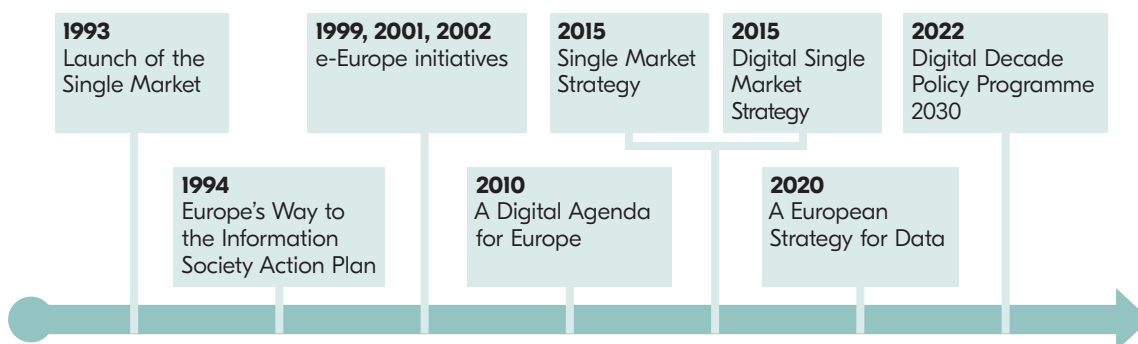
The work to adapt the Single Market and the legislation that supports and underpins its ‘four freedoms’<sup>43</sup> to digitalisation and the developing digital economy has been ongoing since the launch of the Single Market 30 years ago. A brief historical overview of this work and steps taken towards the digitalisation of the Single Market, helps to gain an understanding of these developments and joint EU priorities.<sup>44</sup>

Since the launch of the Single Market in 1993, there has been a series of action plans and strategies agreed by the Commission, European Parliament, and the Council with the aim of creating the appropriate regulatory environment to meet the demands of the ‘digital revolution’, and to establish the infrastructure and skills base needed for the digital transformation of the Single Market.<sup>45</sup>

**“The information society is on its way. A ‘digital revolution’ is triggering structural changes comparable to last century’s industrial revolution with the corresponding high economic stakes. The process cannot be stopped and will lead eventually to a knowledge-based economy.”<sup>46</sup>**

Initially, the focus was on developing information and communication technologies and related services, as well as on liberalising sectors that had not previously been opened to competition (for example, telecommunications).<sup>47</sup> This reflects the key role of information and communications technologies as an enabler for the EU’s transition to an information society. Legislation for the telecom sector has remained on the political agenda of the EU until the present day.<sup>48</sup>

### Timeline showing some main initiatives at EU level



43 The free movement of goods, services, capital, and persons.

44 This section covers only a selection of main developments at EU level and does not account for every initiative taken between the years 1993–2023.

45 European Commission, *Growth, competitiveness, Employment – the challenges and ways forward into the 21st century*, 1993, White Paper COM(1993) 700 final.

46 Commission of the European Communities, *Europe’s Way to the Information Society. An Action Plan*, COM(94) 347 final, 1994, page 1b.

47 European Commission, *Europe and the Global Information society – Recommendations to the European Council (the Bangemann Report)*, 1994. The report was requested by the European Council for its meeting on 24–25 June 1994. It was drafted by the High-Level Group on the Information Society led by Martin Bangemann.

48 The latest in a line of legislative initiatives is the European Electronic Communications Code (EECC – Directive (EU) 2018/1972) that was published and entered into force in December 2018.

Gradually, the list of joint measures needed to respond to the challenges of the ‘digital revolution’ at EU level has come to include more and more policy and legislative areas. Not least intellectual property rights and databases, as well as privacy and the protection of personal data and legislation concerning the content of audiovisual services to allow the free movement of such services.<sup>49</sup>

### **Blurring of division between digital and non-digital**

Around the turn of the century, the line between initiatives to promote digital developments and those focusing on the Single Market increasingly became blurred. For example, the so-called e-Europe initiatives<sup>50</sup> were part of the Lisbon strategy, which was targeted at turning the EU into the ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’ by 2010.<sup>51</sup> There is still a focus on technological aspects but there is also a particular focus on developing the wider regulatory framework for the information society. Initiatives were also proposed to improve digital skills, and digital literacy among the European population and to make internet access available to more European consumers.

With the increasing use of the internet came the expansion of e-commerce. This development brought a need for a legal framework for e-commerce with the E-commerce Directive,<sup>52</sup> which aimed to revise and update legislation related to trade that was now taking place online. The increasing use of the internet brought new opportunities in terms of productivity and growth and the development of new business models and services. Which, in turn, brought a new focus on the deployment of secure technologies, such as digital signatures, digital certificates, and secure electronic payments mechanisms.

### **A ‘Digital Single Market’ and increasing legislative complexity**

By the 2000s, the Commission started highlighting the need to ‘eliminate regulatory distinctions between the on and off-line world and for future legislation to be created in such a way that it neither becomes redundant or stifles innovation, and new technology.’<sup>53</sup>

The concept of a ‘Digital Single Market’ first appears in 2010. It describes a policy framework aimed at delivering ‘sustainable economic and social benefits from a digital single market based on fast and ultra-fast internet and interoperable applications.’<sup>54</sup>

Regulatory fragmentation is, however, becoming a cause for concern and is seen as hindering the growth of the European digital economy. It was also concluded that digital legislation that had been adopted thus far was too complex and suffered from inconsistent implementation across Member States.<sup>55</sup>

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49 See further *Europe’s Way to the Information Society. An Action Plan*, COM(94) 347 final, 1994.

50 The e-Europe Initiatives would eventually amount to three consecutive initiatives and action plans: the first in 1999, the second launched in 2001 and the third in 2002.

51 Lisbon European Council 23 and 24 March 2000, *Presidency Conclusions*, and European Commission, *Communication eEurope – An information society for all*, COM(1999) 687 final.

52 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. It established standard rules in the EU on various issues related to electronic commerce. Notably, it established the country-of-origin principle, which means that companies providing ‘information society services’ are bound by the rules in force in the EU Member State where they are based, rather than in all where their products are delivered to the customer.

53 European Commission, *The eEurope 2005 Action Plan: an information society for everyone*, Communication COM(2002) 263 final, page 14.

54 European Commission, *A Digital Agenda for Europe*, (COM(2010) 245 final, page 3. This agenda was one of seven flagship initiatives of the Commission’s EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020. This strategy was launched by the Commission to face the economic crisis with the aim of exiting it and bringing the European economy successfully into the new decade.

55 *Ibid*, page 7.

## All areas of the economy are becoming digital

In 2015, the Commission stated that all areas of the economy and society are becoming digital.<sup>56</sup> However, the same year, it launched a specific Digital Single Market Strategy (DSM).<sup>57</sup> Its aim was to create a digital Single Market in which:

**‘The free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence’.**<sup>58</sup>

The DSM covers reforms of the ‘original’ legislative areas of the European information society: the telecom rules, consumer protection cooperation, the copyright regime, the audiovisual media rules, and protection of privacy (e-privacy). Additional initiatives include cybersecurity concerns, questions related to data ownership and free flow of data, tackling unjustified geo-blocking, e-government initiatives, and interoperability framework for public services as well as further efforts to reduce administrative burdens stemming from different value-added tax (VAT) regimes.

In this context, it is important to note that the General Data Protection Regulation (GDPR)<sup>59</sup> was adopted in 2016. It was not a DSM initiative but is without question one of the cornerstone legislative acts in the digitalisation of the Single Market and the development of the digital economy.<sup>60</sup>

In parallel with the launch of the DSM, the Commission introduced a strategy for the Single Market (which was given the acronym SMS for Single Market Strategy).<sup>61</sup> Interestingly, both strategies feature some of the same or similar initiatives. For example, steps to prevent unjustified geo-blocking, actions on VAT, and a review of the intellectual property rights framework. Additionally, parts of the SMS are indeed ‘digital’, including a company law initiative to facilitate the use of digital technologies throughout a company’s lifecycle and cross-border mergers and divisions and the proposal for a Single Digital Gateway.<sup>62</sup>

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56 European Commission, *Work Programme 2015 – A New Start*, COM(2014) 910 final, page 6. Every year, the European Commission adopts a plan of action for the next twelve months: the Commission Work Programme.

57 European Commission, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final.

58 *Ibid*, page 3.

59 Regulation (EU) 2016/679 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.

60 Worth noting is that the proposal for the review of the e-Privacy Directive (proposal for a Regulation on Privacy and Electronic Communication COM/2017/010 final) was in the DSM, and was meant to complement the GDPR and provide protection for the right to private life as enshrined in Article 7 of the EU Charter of fundamental Rights, which is not specifically covered by the scope of the GDPR (it will regulate use of electronic communications and introduce new rules on e.g. cookies and direct marketing). The proposed Regulation is, however, still in the trilogue negotiations between the Council and European Parliament.

61 European Commission, *Upgrading the Single Market: more opportunities for people and business*, COM(2015)0550 final, 2015.

62 Regulation (EU) 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending regulation (EU) No 1024/2012. The regulation requires the Commission and Member States to develop a network of national digital portals to provide a one-stop-shop for information for citizens and businesses on how EU rules are applied in each country.



## Focus on developing a data economy and regulating artificial intelligence

During the current Commission mandate (2019–2024), the pace at which legislative proposals are adopted in certain digital policy areas has arguably increased, reflecting the fast pace of technological development and the perceived need to regulate new phenomena associated with this.

In the political guidelines for this Commission,<sup>63</sup> two areas are particularly highlighted as the axes of the new European digital agenda: Artificial Intelligence (AI) and the use of data and legislative framework for the use of data. The Commission concludes that these two aspects are:

**‘the ingredients for innovation that can help us to find solutions to societal challenges, from health to farming, from security to manufacturing.’<sup>64</sup>**

The Commission has also adopted a specific Strategy for Data.<sup>65</sup> This reflects the strong emphasis on legislative frameworks for the use and mobility of data and to accelerate the building of a data-driven society. This was complemented by a White Paper on Artificial Intelligence.<sup>66</sup> In terms of individual legislative proposals, the ‘digital’ agenda has been primarily dominated by what is often referred to in EU jargon as ‘the big five’:

- Proposal for legislation on a co-ordinated European approach on the human and ethical implications of Artificial Intelligence (the AI Act).<sup>67</sup>
- Proposal for a Digital Services Act aimed at upgrading liability and safety rules for digital platforms, services, and products (the DSA).<sup>68</sup>
- Proposal for a Digital Markets Act with the aim of ensuring fair and open digital markets (the DMA).<sup>69</sup>
- Proposal for a Data Governance Act that should increase trust in data sharing, strengthen mechanisms to increase data availability and overcome obstacles to the reuse of data.<sup>70</sup>
- Proposal for a Data Act with rules on who can use, and access, data generated in the EU for a fair and innovative data economy.<sup>71</sup>

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63 Candidate for President of the European Commission, Ursula von der Leyen, *A Union that Strives for More – My agenda for Europe, Political Guidelines for the Next European Commission, 2019–2024*, 2019.

64 *Ibid.*, page 13.

65 European Commission, *A European strategy for data*, Communication COM(2020) 66 final.

66 European Commission, *White Paper on Artificial Intelligence: a European approach to excellence and trust*, COM(2020) 65 final, 2020.

67 COM (2021) 206 final. A provisional agreement on the AI Act was reached in trilogue on 8 December 2023.

68 The DSA (Regulation (EU) 2022/2065) came into force on 16 November 2022 and will apply, in full, from 17 February 2024.

69 The DMA (Regulation (EU) 2022/1925) came into force on 1 November 2022 and will apply, in full, from 2 May 2024. The DSA and DMA were proposed as a package and meant to complement each other to create a digital space where the rights of users are protected and a level playing field for businesses of all sizes is ensured.

70 The Data Governance Act (Regulation (EU) 2022/868) applies from 24 September 2023.

71 The Data Act (Regulation (EU) 2023/2854) was published in the Official Journal on 22 December 2023.



With this, the Commission wants to ensure better conditions for the development and use of Artificial Intelligence technology and establish a ‘single market for data’ within the EU while protecting personal as well as non-personal data, including sensitive business data, and ensure businesses have access to high-quality industrial data, boosting growth and creating value.<sup>72</sup> These proposals are also designed to support the EU’s digital and green twin transition. There is also a strong focus on preventing unfair trading practices (especially with the DMA targeting the largest companies – named gatekeepers – that provide core platform services).<sup>73</sup>

Future-oriented policy areas, such as the development of quantum computing, a block-chain strategy and a trade policy based on blockchain, semiconductors (European Chips Act<sup>74</sup>), digital sovereignty, cybersecurity, gigabit connectivity, European data spaces and infrastructure, as well as setting global technology standards are also priorities for the current Commission.

### **A Single Market that is digitalised**

Over the past 30 years, the EU has taken extensive legislative action to meet the requirements, reap the benefits of and prepare the Single Market for an ever more digital reality. An illustration of this legislative activity is found in the following table/dataset developed by the Brussels think-tank Bruegel.<sup>75</sup>

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72 In addition to the Big Five, the key legal instruments relating to the data economy comprise the GDPR (Regulation (EU) 2016/679), the ePrivacy Directive (Directive 2002/58/EC), the Regulation on a framework for the free flow of non-personal Data (Regulation (EU) 2018/1807), the Open Data Directive (Directive (EU) 2019/1024), and the Payment Services Directive 2 (Directive (EU) 2015/2366). See further analysis of this by Sitra – the Finnish Innovation Fund – at [EU regulation builds a fairer data economy \(sitra.fi\)](https://www.sitra.fi/en/ai-regulation-builds-a-fairer-data-economy/)

73 Core platform services include search engines, operating systems, social networking services, number independent interpersonal communications services, cloud services inter alia.

74 Regulation (EU) 2023/1781 establishing a framework of measures for strengthening Europe’s semiconductor ecosystem and amending Regulation (EU) 2021/694 entered into force on 21 September 2023.

75 Authors at Bruegel are Kai Zenner, J. Scott Marcus and Kamil Sekut. The dataset provides an overview of legislative measures linked to various aspects of digitalisation enacted during the 2009–2014 and 2014–2019 European Parliament terms or enacted or expected during the legislative session 2019–2024 (it includes new initiatives as well as revisions of existing legislation).

**Table I. Overview of EU Legislations in the Digital Sector** (continued on next page).

Research & Innovation	Industrial Policy	Connectivity	Data & Privacy	IPR	Cybersecurity
Digital Europe Programme Regulation, (EU) 2021/694	Recovery and Resilience Facility Regulation, (EU) 2021/241	Frequency Bands Directive, (EEC) 1987/372	European Statistics, (EC) 2009/223, 2023/0237(COD)	Database Directive, (EC) 1996/9	Regulation for a Cybersecurity Act, (EU) 2019/881 2023/0108(COD)
Horizon Europe Regulation, (EU) 2021/695, (EU) 2021/764	InvestEU Programme Regulation, (EU) 2021/523	Radio Spectrum Decision, (EC) 2002/676	General Data Protection Regulation (GDPR), (EU) 2016/679	Community Design Directive, (EC) 2002/6, 2022/0391(COD)	Regulation to establish a European Cybersecurity Competence Centre, (EU) 2021/887
Regulation on a pilot regime distributed ledger tech. market, (EU) 2022/858	Connecting Europe Facility Regulation, (EU) 2021/1153	Broadband Cost Reduction Directive, (EU) 2014/61, 2023/0046(COD)	Regulation to protect personal data processed by EU institutions, bodies, offices and agencies, (EU) 2018/1725	Enforcement Directive (IPR), (EC) 2004/48	NIS 2 Directive, (EU) 2022/2555
	Regulation on High Performance Computing Joint Undertaking, (EU) 2021/1173	Open Internet Access Regulation, (EU) 2015/2120	Regulation on the free flow of non-personal data, (EU) 2018/1807	Directive on the protection of trade secrets, (EU) 2016/943	Information Security Regulation, 2022/0084(COD)
	Regulation on Joint Undertakings under Horizon Europe, (EU) 2021/2085, 2022/0033(NLE)	European Electronic Communications Code Directive (EECC), (EU) 2018/1972	Open Data Directive (PSI), (EU) 2019/1024	Design Directive, 2022/0392(COD)	Cybersecurity Regulation, 2022/0085(COD)
	Decision on a path to the Digital Decade, (EU) 2022/2481	.eu top-level domain Regulation, (EU) 2019/517	Data Governance Act (DGA Regulation), (EU) 2022/868	Compulsory licensing of patents, 2023/0129(COD)	Cyber Resilience Act, 2022/0272(COD)
	European Chips Act (Regulation), (EU) 2023/1781	Roaming Regulation, (EU) 2022/612	ePrivacy Regulation, 2017/0003(COD)	Standard essential patents, 2023/0133(COD)	Cyber Solidarity Act (Regulation), 2023/0109(COD)
	European critical raw materials act (Regulation), 2023/0079(COD)	Regulation on the Union Secure Connectivity Programme, (EU) 2023/588	European Data Act (Regulation), 2022/0047(COD)		
	Net Zero Industry Act, 2023/0081(COD)	New radio spectrum policy programme (RSPP 2.0)	European Health Data Space (Regulation), 2022/0140(COD)		
	Establishing the Strategic Technologies for Europe Platform (STEP), 2023/0199(COD)	Digital Networks Act	Regulation on data collection for short-term rental, 2022/0358(COD)		
	EU Space Law		Interoperable Europe Act, 2022/0379(COD)		
	Initiative to open up European super-computer capacity to AI start-ups		Harmonization of GDPR enforcement 2023/0202(COD)		
			Access to vehicle data, functions and resources		
			GreenData4all		

Applicable law	Published in the Official Journal of the European Union
In negotiation	Proposal by the European Commission entered the legislative process
Planned initiative	Mentioned by the European Commission as potential legislative initiative

Source: Zenner, K., Marcus, J.S., and Sekut, K. (2023).

A dataset on EU legislation for the digital world ([bruegel.org](https://bruegel.org)) 16 November 2023, Bruegel.

**Table I. Overview of EU Legislations in the Digital Sector** (continued from previous page).

Law Enforcement	Trust & Safety	E-commerce & Consumer Protection	Competition	Media	Finance
Law Enforcement Directive, (EU) 2016/680	Product Liability Directive (PLD), (EEC) 1985/374, 2022/0302(COD)	Unfair Contract Terms Directive (UCTD), (EEC) 1993/13	EC Merger regulation, (EC) 2004/139, update soon	Satellite and Cable I Directive, (EEC) 1993/83	Common VAT system, (EC) 2006/112, 2022/0407(CNS)
Directive on combating fraud and counterfeiting of non-cash means of payment, (EU) 2019/713	Toys Regulation, (EC) 2009/48, 2023/0290(COD)	Price Indication Directive; (EC) 1998/6	Technology Transfer Block Exemption, (EC) 2014/316	Information Society Directive, (EC) 2001/29	Administrative cooperation in the field of taxation, (EU) 2011/16
Regulation on interoperability between EU information systems in the field of borders and visa, (EU) 2019/817	European Standardization Regulation, (EU) 2012/1025	E-commerce Directive, (EC) 2000/31	Company Law Directive, (EU) 2017/1132, 2023/0089(COD)	Audio-visual Media Services Directive (AVMSD), (EU) 2010/13	Payment Service Directive 2 (PSD2), (EU) 2015/2366 2023/0209(COD)
Regulation on terrorist content online, (EU) 2021/784	eIDAS Regulation, (EU) 2014/910, 2021/0136(COD)	Unfair Commercial Practices Directive (UCPD), (EC) 2005/29	Market Surveillance Regulation, (EU) 2019/1020	Portability Regulation, (EU) 2017/1128	Digital Operational Resilience Act (DORA Regulation), (EU) 2022/2554
Temporary CSAM Regulation, (EU) 2021/1232, 2022/0155(COD)	Radio Equipment Directive (RED), (EU) 2014/53	Directive on Consumer Rights (CRD), (EU) 2011/83, 2022/0147(COD)	P2B Regulation, (EU) 2019/1150	Satellite and Cable II Directive, (EU) 2019/789	Crypto-assets Regulation (MICA), (EU) 2023/1114
E-evidence Regulation, (EU) 2023/1543	Regulation for a Single Digital Gateway, (EU) 2018/1724	e-invoicing Directive, (EU) 2014/55	Single Market Programme, (EU) 2021/690	Copyright Directive, (EU) 2019/790	Financial Data Access Regulation, 2023/0205 (COD)
Directive on combating violence against women, 2022/0066(COD)	General Product Safety Regulation, (EU) 2023/988	Geo-Blocking Regulation, (EU) 2018/302	Vertical Block Exemption Regulation (VBER), (EU) 2022/720	European Media Freedom Act, 2022/0277(COD)	Payment Services Regulation, 2023/0210(COD)
Digitalization of travel documents	Machinery Regulation, (EU) 2023/1230	Regulation on cooperation for the enforcement of consumer protection laws, (EU) 2017/2394	Digital Market Act (DMA Regulation), (EU) 2022/1925	Remuneration of musicians from third countries for recorded music played in the EU	Digital euro, 2023/0212 (COD)
	AI Act (Regulation), 2021/0106(COD)	Digital content Directive, (EU) 2019/770	Regulation on distortive foreign subsidies, (EU) 2022/2560		Regulation on combating late payment, 2023/0323(COD)
	Eco-design Regulation, 2022/0095(COD)	Directive on certain aspects concerning contracts for the sale of goods, (EU) 2019/771	Horizontal Block Exemption Regulations (HBER), (EU) 2023/1066, (EU) 2023/1067		
	AI Liability Directive, 2022/0303(COD)	Digital Services Act (DSA Regulation), (EU) 2022/2065	Platform Work Directive, 2021/0414(COD)		
		Political Advertising Regulation, 2021/0381(COD)	Single Market Emergency Instrument (SMEI), 022/0278(COD)		
		Right to repair Directive, 2023/0083(COD)			
		Multimodal digital mobility services (MDMS)			
		Consumer protection: strengthened enforcement cooperation			
Applicable law	Published in the Official Journal of the European Union				
In negotiation	Proposal by the European Commission entered the legislative process				
Planned initiative	Mentioned by the European Commission as potential legislative initiative				

Source: Zenner, K., Marcus, J.S., and Sekut, K. (2023).

A dataset on EU legislation for the digital world ([bruegel.org](http://bruegel.org)) 16 November 2023, Bruegel.

## EU digital transition policy

A central part of the Commission's digital policy work is its Communication: '2030 Digital Compass: The European Way for the Digital Decade'.<sup>76</sup> This policy programme complements efforts to establish the appropriate regulatory frameworks in the Single Market by supporting Europe's ability to achieve digital transition by 2030. Initiatives centre around four areas: skills, secure and sustainable digital infrastructures, digital transformation of businesses and digitalisation of public services.

Building on the Commission's initiative, the European Parliament and the Member States adopted a Decision establishing the Digital Decade Policy Programme 2030.<sup>77</sup> It includes agreements on the structures for and areas in which Member States, the European Parliament and the Commission will co-operate to translate the Digital Compass into practical actions.

Each Member State will, for example, develop a national roadmap on how it will contribute to achieving the jointly agreed general objectives and digital targets set out in the Decision. The first roadmaps were to be submitted to the Commission by 9 October 2023.<sup>78</sup> Overall progress towards the objectives and targets of the programme will be measured and presented using the Digital Economy and Society Index (DESI).<sup>79</sup> It has been estimated that if the EU succeeds in achieving a DESI score of 90 by 2027 (the end of the EU's budget cycle), GDP per capita across the EU would be 7.2 per cent higher by the end of the period.<sup>80</sup>

The Digital Europe Programme a European funding programme for digital technology with a planned overall budget of EUR 7.5 billion for the 2021–2027 period, will provide strategic funding to support projects in five areas: supercomputing, AI, cybersecurity, advanced digital skills and ensuring a wide use of digital technologies across the economy and society.<sup>81</sup>

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76 European Commission, *2030 Digital Compass : the European way for the Digital Decade*, Communication COM(2021) 118 final.

77 Decision (EU) 2022/2481 establishing the Digital Decade Policy Programme 2030, 14 December 2022. The Decision is the result of a proposal for a Decision put forward by the Commission in 2021. This proposal was called the 'Path to the Digital Decade', but the heading was changed by the legislative institutions in the adopted Decision.

78 The Swedish roadmap is available at: [Svensk nationell färdplan för EU:s digitala decennium – Regeringen.se](https://www.regeringen.se/pressmeddelanden/2022/12/svensk-nationell-fardplan-for-eus-digitala-decennium)

79 DESI is the index that the Commission has used since 2014 to monitor Member States' digital progress. From 2023 onwards, DESI is integrated into the 'State of the Digital Decade report' and will be used to monitor progress towards the digital targets.

80 Deloitte, *Digitalisation: an opportunity for Europe*, 2021.

81 European Parliament, *Digital Agenda for Europe, Fact Sheets on the European Union – 2023*.

### 3 A digital legislative tangle

After three decades of adapting the Single Market to the digital era, the ‘digital’ legislative framework of the Single Market consists of at least over a hundred individual legislative acts (as illustrated in the table above). This makes it challenging to gain an overview of how all of these acts relate to and affect each other.

This legislation must reflect the intricacies of the digital economy and the technology that enables its development. The digital economy is by its very nature fast changing, and it presents challenges to the legislative decision-making process in that it gives rise to new phenomena in the form of new ways of doing business and new products and services. Legislation must respond to a range of demands, such as the need to counter-act fragmentation when Member States adopt national legislation in the absence of EU legislation. Legislation also needs to protect society (at large, but also the ‘weaker’ parties in any given situation, including consumers, data subjects, rights holders, and platform users) against risk and safeguard fundamental rights (including privacy, freedom of speech *inter alia*). Given these challenges, it is almost inevitable that legislation will be complex.

But is it unnecessarily complex? There is no absolute answer to this question. However, it is problematic that due to this complexity, the EU finds itself in a situation where the legislative framework developed for the digitalised Single Market is perceived by stakeholders as burdensome. This also seems to spill over into the process of applying legislation in practice, resulting in divergent application of legislation at national level.<sup>82</sup>

Business representatives often point out that it is usually not one particular rule that is burdensome but that it is rather a case of the cumulative regulatory burden that is demanding to deal with.<sup>83</sup> This is illustrated, for example, by the fact that the European business community has encouraged the Commission to create regulatory breathing space for business.<sup>84</sup>

This is worrying for the prospects of achieving a well-functioning Single Market. Given that the joint ambition for the Single Market is approximation of legislation, the EU needs to move in a direction that ensures more legislative coherence. Fragmentation, complexity, and the inconsistent application of legislation across Member States have long been a concern (as mentioned in chapter two). These factors can hinder the development of the European digital economy and stifle rather than support business innovation and trade.

In our analysis, we have explored and exemplified some of the recurrent and problematic legislative tendencies related to the development of Single Market legislation fit for the digital era that are currently discussed in the EU. These tendencies in EU decision-making processes that contribute to creating the current challenges reported. We have summarised these tendencies under five headings:

- Legislative acts seem to suffer from incomplete evidence bases.
- Legislative acts appear to overlap.
- Variation of definitions of central concepts used in legislative acts.
- Harmonising measures could lead to new divergence.
- Inconsistent application of EU legislation at national level.

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82 See, for example, DIGITALEUROPE, *A Stronger Digital Europe – our call to action towards 2025*, or E-Commerce Europe, *Main priorities for the European Digital Commerce sector – priority paper*, 2023.

83 European Commission, *Cost of the Cumulative Effects of Compliance with EU Law for SMEs*, final report, 2015.

84 BusinessEurope, *EU should create regulatory breathing space to strengthen competitiveness and respond effectively to IRA*, Press Release, 31 January 2023.

### 3.1 Legislative acts seem to suffer from incomplete evidence bases

Impact assessments (IAs) are one of the main tools at EU level for ensuring a robust evidence base for and ex-ante evaluation of legislative proposals.<sup>85</sup> They serve as a cornerstone of the EU Better Regulation Agenda.

The quality, or flaws, of impact assessments (IAs) at EU level is, and has been, a much-discussed issue among policy stakeholders.<sup>86</sup> The Commission has taken steps to reinforce their use, and usefulness, including greater emphasis on the green and digital aspects of new proposals.<sup>87</sup>

The Better Regulation guidelines<sup>88</sup> and the complementing toolbox<sup>89</sup> contain extensive instructions and guidance for the Commission services on how an IA should be carried out and what information it should contain. Active engagement and consultation with stakeholders are central aspects of this work. Scrutiny of the quality of impact assessments is carried out by the Regulatory Scrutiny Board (RSB). The Board issues an opinion on each impact assessment.<sup>90</sup>

The scope of this report does not allow for a follow-up of each impact assessment produced for all the legislative initiatives taken to adapt the Single Market to digitalisation.

However, examples of where criticism has recently been raised regarding the quality of the IAs accompanying proposals for new legislation include the Digital Markets Act (DMA), the Digital Services Act (DSA), the Artificial Intelligence Act (AI Act) and the Data Act. This criticism centres around the perceived incompleteness of the economic analyses in the IAs, which results in exaggerated expected benefits of the regulations and underestimations of administrative and implementation costs. Furthermore, the view is that the IAs could have reflected the effect of the regulations on trade, investments, and innovation. It is concerning when analysts conclude that:

**'because of inadequate analyses, legislators are flying in the dark about the reasonable economic effects of regulations.'**<sup>91</sup>

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85 'They are carried out for initiatives where policy alternatives are available, where expected impacts can be clearly identified beforehand and where these impacts are significant for society.' From European Commission, *Better Regulation: Joining forces to make better laws*, Communication COM(2021) 219 final, page 13.

86 See for example several policy positions from BusinessEurope [Better regulation | BusinessEurope](#)

87 European Commission, *Better Regulation: Joining forces to make better laws*, Communication COM(2021) 219 final.

88 European Commission, *Better Regulation Guidelines*, Staff Working Document SWD(2021) 305 final, 2021.

89 European Commission, *Better Regulation Toolbox*, July 2023 edition, and *Better Regulation Guidelines*, SWD(2021) 305 final.

90 For more information about the RSB, please see [Regulatory Scrutiny Board \(europa.eu\)](#)

91 Confederation of Swedish Enterprise, *New regulation in Europe's Digital Economy – Design, Structure, Trade and Economic Effects*, 2023. Report authored by Matthias Bauer et al. at ECIPE.



It is interesting to note that in its opinions on the four proposals cited above, the Regulatory Scrutiny Board has documented that the IAs for three of these proposals contain ‘significant shortcomings’ (DMA, DSA, and Data Act) and that, in the fourth, there are ‘aspects where the impact assessments should be further improved’ (AI Act).<sup>92</sup>

These examples are all significant legal acts that will have considerable impacts both in the EU and internationally, and it is problematic if there are flaws in the evidence base as this does not bode well for efficient and effective legislation.

The process of developing a complete and well-balanced IA – in accordance with what is prescribed in the Better Regulation guidelines and toolbox –, of course, requires resources<sup>93</sup> and time. Striking a balance between the pressure to accelerate the adoption of legislation and well-informed and balanced decisions by the co-legislators is, of course, a challenge. However, especially for complex legislative initiatives, it is important that the evidence base is as robust as possible since the consequences of the legislation, once in place, are likely to be wide-ranging.

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92 Regulatory Scrutiny Board opinions: SEC(2020) 437/2 (DMA), SEC(2020) 432 (DSA), SEC(2022) 81 (Data Act), and SEC(2021) 167 (AI Act).

93 European Commission, *Better Regulation: taking stock and sustaining our commitment*, Communication COM(2019) 178 final.



## EU Better Regulation Agenda<sup>94</sup>

At EU level, Better Regulation is a horizontal and circular agenda with the aim of ensuring that EU legislation is developed to target an identified need for legislative action at EU level.

The introduction of Better Regulation principles has its origins in calls for better European governance and more transparency in the European decision-making process in the early 2000s. There is commitment from the Commission, European Parliament and the Council to create legislation that is as efficient and effective as possible in delivering common policy objectives of the EU, as simple and clear as possible, avoids over-regulation and administrative burdens for citizens, administrations and businesses and is designed with a view to facilitating its transposition and practical application.<sup>95</sup> EU legislation also needs to be in accordance with the principles of subsidiarity and proportionality in accordance with Article 5 of the Treaty on the European Union.<sup>96</sup>

The Agenda includes principles and policy tools that should inspire all steps in the legislative decision-making process from ex-ante assessment of potential impacts of a Commission proposal for new legislation – including impact assessments and stakeholder consultation – to transposition, implementation, and application of EU law in the Member States, and ex-post evaluation of the actual outcome of an EU-level legislative intervention. The ex-post evaluations should then inform decisions about possible new initiatives or revisions, and the potential simplification (through the Regulatory Fitness and Performance (REFIT) Programme<sup>97</sup>), of existing legislation.

Figure 1. The policy cycle



Better Regulation Guidelines, EC, 2017.

94 The EU Better Regulation website is available at: [Better regulation \(europa.eu\)](http://Better%20regulation%20(europa.eu))

95 Interinstitutional Agreements, *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-making*, 2016, page 1.

96 [EUR-Lex – 12008M005 – EN \(europa.eu\)](http://EUR-Lex%20-%2012008M005%20-%20EN%20(europa.eu))

97 The [REFIT Programme](http://REFIT%20Programme) is part of the Better Regulation Agenda and establishes the process for the Commission to simplify existing EU legislation and reduce administrative burdens when this is considered possible. REFIT initiatives are published in the Commission Work Programme. Apart from ex-post evaluations, input on potential for simplification is also gathered from citizens and stakeholders.

## 3.2 Legislative acts appear to overlap

A tendency in the decision-making process for digital aspects of the Single Market, is the apparent lack of consideration of overlap, or cross-references, between different legislative acts.

When different legislative acts seem to cover the same or similar issues but are not co-ordinated, it becomes challenging or even impossible to understand how they should be applied in practice.

From a strictly legal perspective, overlap between legislative acts may not necessarily be problematic per se. From this perspective, overlap becomes problematic if it leads to conflicting rules.

### If there are conflicting EU rules

EU law has a range of 'rules' to avoid situations where conflict arises between different legislative acts. One is the 'hierarchy of norms' according to which EU rules of constitutional value (for example the GDPR) prevail if there is a conflict with other EU rules. See further about the EU hierarchy of norms at: [EUR-Lex – norms\\_hierarchy – EN – EUR-Lex \(europa.eu\)](#) It can also be specified in EU legislation, for example, that directive X shall not affect the application of directive Z. There are also principles including 'lex posterior' which specifies that the newest rule prevails in case of conflict with an older one and 'lex specialis', which means that the more specific rule will prevail in case of conflict with a more horizontal rule. The principle of the primacy (also referred to as 'precedence' or 'supremacy') of European Union (EU) law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. See further at [EUR-Lex – primacy\\_of\\_eu\\_law – EN – EUR-Lex \(europa.eu\)](#)

However, in practice, overlapping legislation can be burdensome because it contributes to difficulties in understanding which rules apply in which situations and thus counteract the achievement of coherence in the legislative framework. Hence, it can be problematic both for national authorities responsible for applying legislation and for business required to comply with them. A business survey carried out in 2021 shows that business representatives identified legislative complexity and ambiguity as the biggest challenge to their success in the digital economy.<sup>98</sup>

This situation can also make compliance a burdensome and costly process for companies; it may even be unattainable for some companies, especially SMEs that traditionally do not have the resources to spend on burdensome and costly compliance strategies. It could also create legal uncertainty, which undermines investment, innovation, and development.

The overlap problem seems to be prominent, for example, in situations where horizontal digital legislation (such as the proposed AI Act or the proposed Cyber Resilience Act<sup>99</sup>) is unlikely to seamlessly interact with vertical sector-specific or product-specific technical legislation.<sup>100</sup> In these cases, technical rules for products and new legislation concerning digital elements that may be built into products must work together.<sup>101</sup> But instead it seems that there is a risk for entanglement between legislative acts. Furthermore, some legislation that has been revised and updated to better reflect the digital economy, also seems to fall into the category where there is risk for overlap and complexity.

To illustrate this, below are some examples of potential legislative tangles. Since the legislative acts cited here are either in the process of being decided or are being implemented and applied, it cannot be said with certainty that there will be overlap. It is also not within the scope of this report to provide a detailed account of examples, nor would it be useful considering that the details may change during the ongoing decision-making processes. The aim is rather to point out areas where overlap and ensuing complexity might arise. It would be helpful if these could be considered at EU level, preferably in fitness checks, so that all stakeholders can gain greater clarity regarding how these legislative acts will relate to each other once decided and applied.

### **Revision of the Product Liability Directive and links to the proposed AI Liability Directive**

The Product Liability Directive (PLD) sets out conditions under which consumers can claim compensation for damage caused by defective products. The proposed revision of the PLD<sup>102</sup> modernises the rules to ensure they work better for a digital society. The revised Directive would cover both tangible and intangible products – software, including AI systems, and AI-enabled goods are, for example, mentioned as in-scope products (including the updates and upgrades of these) and digital services needed to operate products. The proposed new directive also sets a broader scope of liable parties – including extension of liability to distributors and online platforms under certain circumstances. The new rules would protect consumers regardless of whether the defective product was made inside or outside the EU.

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98 Sitra – the Finnish Innovation Fund, *European companies struggle to get aboard the data economy*, 2021.

99 European Commission, *Proposal for a Regulation on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020*, COM/2022/454 final. A provisional agreement on the CRA was agreed in trilogue on 30 November 2023.

100 Technical rules set out requirement regarding specific characteristics that a product should have including labelling, certification, packaging and quality and safety.

101 For more in-depth analysis of this aspect see also The National Board of Trade report *Innovation, AI, Technical Regulation and Trade: Questioning the invisible hand in the digital economy*, 2023.

102 Council Directive 85/374/EEC. The Directive is being revised through the Commission's proposal for a Directive on liability for defective products, COM(2022) 495 final ([2022/0302 \(COD\)](#)).

The proposed AI Liability Directive (AILD)<sup>103</sup> aims to complement the revised PLD. The proposed AILD aims to address consumers' liability claims for damage caused by AI-enabled products and services in situations that fall outside the scope of the new PLD. The AILD would have a broader scope than the new PLD in that it would apply to claims made by any natural or legal person against any person, for fault influencing the AI system that caused the damage. However, the two proposals seem to cover to some extent the same situations. Therefore, it is not obvious that they will provide clarity and uniformity for liability claims.

### **The above proposals also relate to the new Regulation on general product safety**

The proposals for revision of and introduction of new rules to address liability issues are also linked to the new Regulation on general product safety.<sup>104</sup> It modernises the EU general product safety framework and addresses new challenges posed by digitalisation to product safety (including cybersecurity concerns). It is closely linked to the liability rules, for example, as it specifies which actor should be considered liable for the safety of a given product and what this actor must do to ensure product safety.

However, with digital elements are included in a product, which actor is liable for a product's safety can change during the product's life cycle. If a product is modified, by physical or digital means, it can have an impact on the nature and characteristics of the product in a way which was not foreseen in the initial risk assessment of the product, and which might jeopardise the safety (and thus the essential requirements) of the product. Specific obligations are also imposed on online platforms. It is again not clear who is responsible for what, and at what point during a product's life cycle.

### **Keeping faulty or illegal products out of the Single Market**

The above-mentioned new or proposed legislative acts extends responsibility and liability for products, in some instances, to online marketplaces. The new requirements on online platforms are supplementary to those set forth in the Digital Services Act (DSA).

The DSA provides that online platforms classified as marketplaces will be responsible for tracing the identity of traders using the platform, for randomly checking products for compliance with technical regulations and informing consumers who purchased illegal products. There are, therefore, links between the different legislative acts, and also potential for overlap and it is a challenge to map out where one set of rules ends and where the next begins.

The responsibility for keeping unsafe or illegal products out of the Single Market has traditionally rested with the national Market Surveillance Authorities. Therefore, a further potentially complicating aspect is ensuring that new requirements imposed on online platforms work with the recently revised market surveillance regime outlined in the Market Surveillance Regulation.<sup>105</sup> Also, it will be important for market surveillance authorities to have methods for market surveillance beyond traditional safety requirements, that is of requirements for AI elements and cybersecurity.<sup>106</sup>

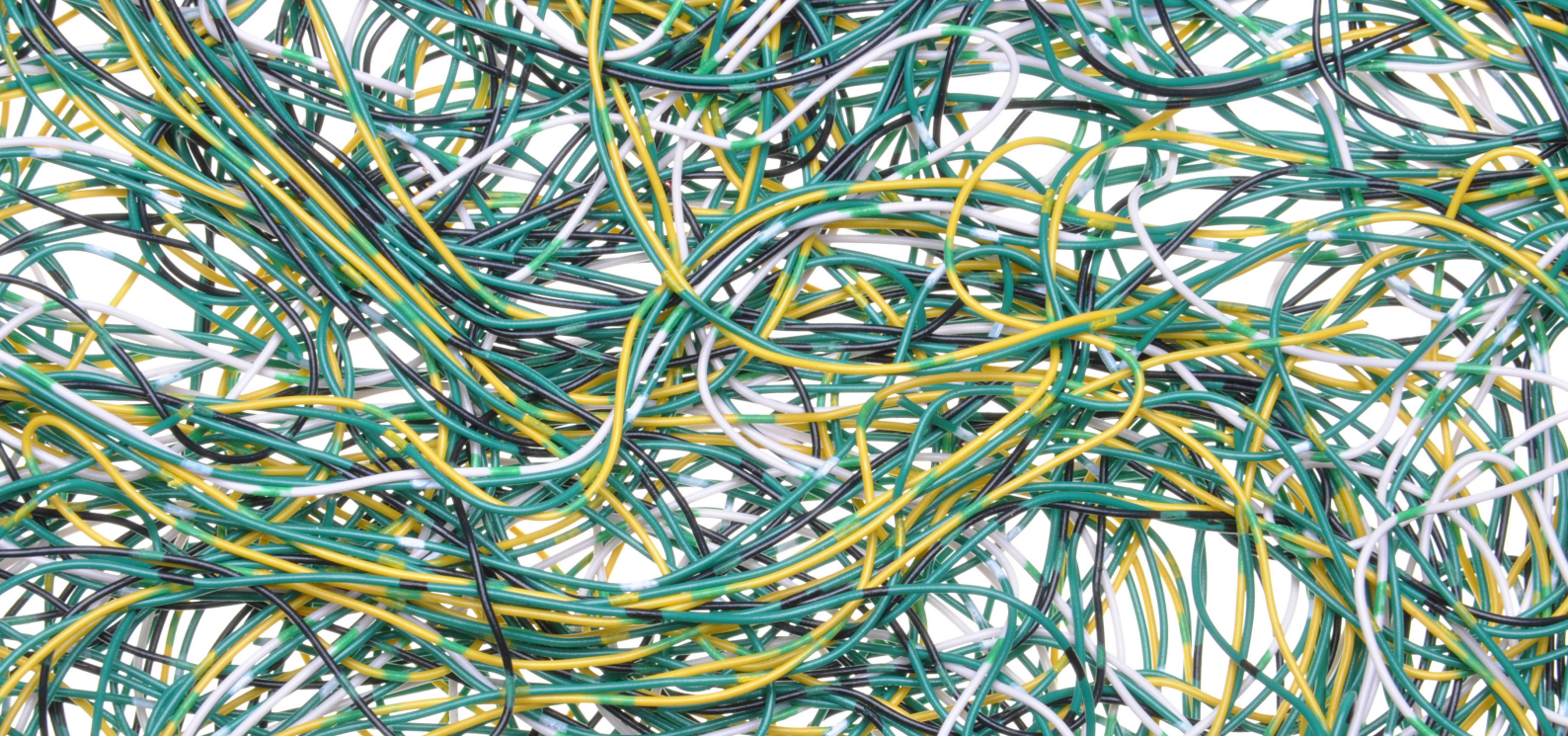
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103 Proposal COM(2022) 496 final – 2022/0303 COD.

104 Regulation (EU) 2023/988. It was published in the Official Journal of the EU on 23 May 2023, and will apply from December 2024.

105 Regulation (EU) 2019/1020 on market surveillance and compliance of products.

106 See further analysis of this aspect in the National Board of Trade's report *Innovation, AI, Technical Regulation and Trade – questioning the invisible hand in the digital economy*, 2023.



Furthermore, the Commission's proposed Customs Union Reform Package<sup>107</sup> proposes new roles and responsibilities for both e-commerce platforms<sup>108</sup> and national customs authorities to support market surveillance authorities in their task to keep products that are non-compliant with EU technical requirements from entering the Single Market.

### **Ensuring future compatibility between these different legislative acts will be important**

These examples illustrate to some extent the difficulty of assessing which products and services are in scope of which requirements in which situations and which actors are responsible and liable for what in which situations. These will be important areas for the Commission to clarify.

Each of the above examples also relate in different ways to additional legislation. As mentioned above, ensuring compatibility with horizontal legislation such as the EU AI Act and with the proposed Cyber Resilience Act (CRA), which will include cybersecurity requirements for products and software<sup>109</sup> will be important. Specifically, regarding the CRA, it is vital that any given product or service is subject to one coherent set of cyber requirements; and it may not be clear that the CRA does not lead to an overlap of cyber requirements for products and services set out in other legislative acts.

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<sup>107</sup> Proposal COM(2023) 258 final – 2023/0156 (COD).

<sup>108</sup> This proposal specifies new requirements for 'e-commerce platforms' rather than online platforms (or online marketplaces). It does not include a definition of this concept which could add to certain confusion as to what is actually intended.

<sup>109</sup> Proposal COM(2022) 454 final – 2022/0272(COD). A provisional deal on the proposal was reached in trilogue on 30 November 2023.

## Potential overlap between rules for digitally developed and provided services

Another example of where there is potential overlap, or at least a grey zone, is between the European Electronic Communications Code (EECC)<sup>110</sup>, the Digital Content Directive (DCD)<sup>111</sup> and the e-Commerce Directive in terms of requirements relating to so-called over-the-top communications services (OTT) services.<sup>112</sup> These services are subject to requirements in the EECC and the DCD, but they could simultaneously be deemed to qualify as an ‘information society service’ which fall under the e-Commerce Directive.<sup>113</sup> We have not yet seen a final explanation from the Commission on how this situation should be interpreted.

## 3.3 Variation of definitions of central concepts used in legislative acts

Something that could exacerbate the potential negative effects of legislative overlap, is if legislative acts also contain the same or similar central concepts/terms with slightly different definitions in different acts.

The directives and regulations mentioned above, contain one or more similar terms to describe actors in the market and their roles: manufacturers, importers, distributors, economic operator, provider of online platforms or marketplaces, fulfilment service providers et cetera. Similarly, concepts such as gatekeeper, intermediary service and online platform are, for example, defined in the proposals for the ‘big five’ (see chapter two). Are they defined similarly in all cases? It appears that there could be lack of clarity of definitions of these terms.<sup>114</sup>

It would be important with clarification as to if they mean the same and exactly what and who is included in these concepts in all legislative acts where they are used.

Another central concept in legislation for the digitalised Single Market is, of course, ‘data’. The Commission wants to create a single market for data, so it is naturally important that there is a universal shared definition of what this is. Data is defined in the Data Governance Act<sup>115</sup> (also in the Data Act and ‘personal data’ in the GDPR).<sup>116</sup> Does this mean that the EU now has a comprehensive and uniform understanding of this concept? Without it, achieving coherence between all the legislative acts that regulate data use, data sharing, data governance, data protection et cetera will be difficult.

Artificial intelligence is another concept where common definitions in legislative acts would be of central importance. Especially in the light of the development of the EU AI Act and other legislation – such as the AI Liability Directive which, it is planned, will refer to the same definitions of AI and AI systems as will be established in the AI Act – that includes requirements on the use of AI systems. If different actors do not mean the same thing this could have serious consequences for the development of these technologies

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110 Directive (EU) 2018/1972.

111 Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

112 Communications services provided over the internet.

113 Karin Sein, Interplay of Digital Content Directive, European Electronic Communications Code and Audiovisual Media Directive in Communications Sector, *JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law*, 12 (2) 2021.

114 Sitra, *EU Regulation Builds a Fairer Data Economy*, Working Paper, 7.6.2022.

115 Regulation (EU) 2018/1724, article 2, point (1): ‘Data means digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording’.

116 Regulation (EU) 2016/679, article 4, point (1): ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’).



and for how risks related to them are addressed.<sup>117</sup> To ensure comparability between the legislative acts, it is imperative that such central concepts are defined similarly in all of them.

Another complicating factor would be if the EU uses definitions that differ from internationally agreed definitions. Importantly, the provisional agreement on the EU AI Act aligns the definition of AI systems to that proposed by the OECD.<sup>118</sup>

### 3.4 Harmonising measures could lead to new divergence

The concept and occurrence of ‘fragmentation’ – or heterogeneity or divergence – play an important part in discussions on governance of the Single Market because it depicts the opposite of the joint EU ambition of its approximation of legislation. Fragmentation prevents businesses, and persons, from enjoying the advantages of complying with just one set of rules rather than 27 (or 30)<sup>119</sup> different ones. Such fragmentation could lead to additional costs and may prevent cross-border activities in the Single Market.

117 Joakim Wernberg, *Vad menas med AI, vad regleras och varför är det viktigt?* Polycysammanfattning 2023:2, Entreprenörskapsforum, 2023 (in Swedish only).

118 Reached in trilogue on 8 December 2023. Find the OECD definition here: [Updates to the OECD's definition of an AI system explained – OECD.AI](#)

119 See footnote 9.

## Types of fragmentation in the Single Market

Fragmentation of the Single Market takes many forms. It can simply be caused by a lack of harmonised EU legislation. But even where common legislation is adopted to harmonise rules in a certain policy area, differences or delays in transposition, or variations in the application of the rules often result in fragmentation remaining, albeit in a different form.

Some fragmentation is allowed, and expected, to leave room for the differences in legal systems in Member States. Also, the principles of subsidiarity and proportionality govern the exercise of the EU's competences (in areas where the EU does not have exclusive competence)<sup>120</sup> to safeguard the ability of Member States to take decisions and action. They authorise intervention by the EU only when the objectives of such intervention can be better achieved at Union level.<sup>121</sup>

Where directives are used, there is room for Member States to devise their own laws to achieve the goals set out in the EU legislative act (and which all countries are required to achieve). Directives can set a level of minimum harmonisation in which case Member States have the right to set higher standards than those set in the directive (as long as they are justified and proportional).<sup>122</sup>

Maximum harmonisation directives, on the other hand, require Member States to comply with the harmonised standards set by the directive and Member States cannot implement national measures that are stricter than those foreseen by the EU measure.

The application of EU law is often open to interpretation at national, regional, and local levels. However, the aim should be for as much coherence of application as possible between Member States. And in all cases, EU law they must be applied correctly.

A certain amount of divergence must be expected, and accepted, in the EU context. EU law sits above 27 national legal systems and 24 official languages. Due to the inherent cultural, linguistic, and legal differences between Member States in the EU, common legislation must, to some degree, allow for differences. However, the established joint ambition is to strive towards as much coherence as possible.

Often when fragmentation, caused by variations in the application of joint EU legislation, is discussed the focus is on directives. The Single Market Scoreboard<sup>123</sup> shows the transposition deficit (the gap between the number of Single Market directives adopted by the EU and the number of directives transposed by each Member State) in the Member States on an annual basis. It is important that directives are transposed in time and correctly. However, the focus on legislation in need of transposition fails to recognise that regulations can also give rise to fragmentation as they allow for national variations in how they are applied.

120 More information regarding the division of competence within the EU is available at: [EUR-Lex – ai0020 – EN – EUR-Lex \(europa.eu\)](#)

121 More information about the principles of subsidiarity and proportionality and their legal basis is available at: [The principle of subsidiarity | Fact Sheets on the European Union | European Parliament \(europa.eu\)](#)

122 Also, to prevent fragmentation, in the area of product regulation, for every requirement that is not harmonised, mutual recognition applies so that a product lawfully marketed in one Member State should be allowed to be marketed anywhere in the EU.

123 [The Single Market Scoreboard | Single Market Scoreboard \(europa.eu\)](#)



## Regulations that aim to harmonise could lead to new divergence

A tendency that we have observed in the revision of or adoption of new digital Single Market legislation, is the increasing use of regulations.<sup>124</sup> This appears to have become a method used to avoid the divergence caused by the inherent differences that occur when directives are transposed and implemented.

Regulations are binding legislative acts and are directly applicable in all Member States, without the need for transposition or implementation at national level. Thus, the use of regulations is often motivated with the fact that they impose clear and detailed rules, which leave no room for divergent transposition by Member States. Consequently, regulations should counter fragmentation that arises when Member States adopt national rules in formerly non-harmonised areas, as well as fragmentation caused by differences in transposition and implementation).

The problem, however, is that regulations often leave room for variation in application, where Member States are left to decide how to deal with certain aspects of the regulation. Regulations may require changes in national legislation and may also impose responsibilities on national authorities to put the legislation into practice. This, thus, gives rise to a new type of divergence where in theory there should be none.

The General Data Protection Regulation (GDPR) is an often-cited example of this. A key objective of the GDPR was to increase harmonisation in the protection of personal data within the EU. However, since the GDPR allows specific national decisions in certain areas, for example with regard to the conditions for processing sensitive personal data and data on crime, it gives rise to new divergence at the application stage. Moreover, in areas that are fully harmonised in the GDPR, the national supervisory authorities' guidance is not fully co-ordinated. The European Data Protection Agency (EDPB) has provided EU-wide guidance in many areas to lessen fragmentation, but there are still areas that have not been addressed.<sup>125</sup>

**'The GDPR has created administrative burdens and duplication of costs since each EU Member State seems to have their own rules, guidance and interpretation. This means that companies are obliged to tailor their services to 27 member states rather than one uniform set of requirements.'**<sup>126</sup>

Another example is the Platform-to-Business Regulation (P2B Regulation),<sup>127</sup> the first horizontal EU regulation for the platform economy to be adopted (in 2019). In terms of enforcement, the P2B Regulation gives Member States an option to either establish a public enforcement system or to rely on private enforcement through national courts. This results in very different enforcement results at national level. Additionally, it turns out that in Member States with a private enforcement regime in place, business users of online platforms have low awareness of their rights under the regulation, there are low rates of compliance among platforms and there is a very low number of complaints or court cases registered. The level of awareness among business users, associations and platforms alike tends to be lower in Member States that do not have a public enforcement system.<sup>128</sup>

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<sup>124</sup> The Commission confirms that at an aggregate level, the number of directives has declined, while there is an increasing use of regulations as a legislative tool. See the European Commission Communication, *Enforcing EU law for a Europe that delivers*, COM(2022) 518 final.

<sup>125</sup> Confederation of Swedish Enterprise, *What's Wrong with the GDPR*, authored by Martin Brinnen and Daniel Westman, 2019.

<sup>126</sup> Sitra, *EU regulation builds a fairer data economy*, Working Paper, 7.6.2022.

<sup>127</sup> Regulation (EU) 2019/1150. It aims to create a fair and transparent environment for smaller businesses and traders on online platforms when using online intermediation services (OISs) and online search engines (OSEs).

<sup>128</sup> European Commission, *Report on the first preliminary review on the implementation of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services*, COM (2023) 525 final.

The Commission has noted that it does not have a well-established system in place for monitoring the application of regulations. This work is often left to national authorities. The Commission, therefore, committed, in 2022, to stepping up its work in this area.<sup>129</sup> A year later, it was concluded that no consistent approach had been agreed for monitoring the application of regulations across policy areas.<sup>130</sup> Even if it is challenging, it is important that this commitment is turned into action.

### **The use of delegated acts**

It also seems that there is an increased use of delegated acts<sup>131</sup> in connection with digital legislation. The co-legislators at EU level can delegate powers to the Commission (this right is established and defined in Article 290 of the Treaty on the Functioning of the EU). This delegation of power gives the Commission the right to adopt ‘non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act’. The non-legislative acts are meant to clarify and facilitate the application of EU law.

This is not a problem per se. However, there is an ongoing debate about how the extent to which the Commission uses the delegation granted to it and the definition of ‘non-essential elements’. If the details of a given legislative act are to a large extent transferred to delegated acts, this can lead to less predictability in terms of how the legislation will be applied.

There is often a time gap between when the main legislative act comes into force and the publication of delegated acts by the Commission. This means that all information is not known to national authorities tasked with the application of EU law or to business making preparations to ensure compliance when legislation comes into force. Late adoption of a delegated act may lead to the implementation and application of the main legislative act without the necessary preparations, and sometimes before all of the necessary elements that will be specified in the delegated act are in place. In such instances, businesses need to make adaptations to be compliant without knowing the final details for compliance.<sup>132</sup>

Although this practice does not necessarily lead to traditional fragmentation it certainly causes uncertainty even in cases where the main legislative act is a regulation.

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129 European Commission, *Enforcing EU law for a Europe that delivers*, Communication COM(2022) 518 final.

130 European Commission, *Stocktaking report on the Commission working methods for monitoring the application of EU law*, SWD(2023) 254 final.

131 The Centre for European Studies at Lund University (authors are Maria Strömviik and Jelle Verheij) has published an interesting study of delegated and implementing acts: *Transparency and stakeholder participation in executive EU lawmaking, 2022*. It shows that the use of delegated acts has increased dramatically over the last decade from fewer than 50 per year to over 200 per year. Most of them stem from delegated powers given in regulations.

132 BusinessEurope, *Delegated Acts: streamlining the scrutiny*, Position Paper, 2022.



### **3.5 Inconsistent application of legislation at national level**

As concluded above, fragmentation in the Single Market is often caused by variations in application of EU legislation at national, regional, or local level. This is often connected to legislative choices at EU level and the fact that EU legislation is difficult to interpret and apply. This seems to be the case with much of the legislation for the digital economy and is most certainly linked to the problems discussed in the previous sections.

Adoption of common EU legislation is only the first step towards approximation and harmonisation in any given policy area. To go from theory to practice, EU legislation needs not only to be transposed (if it comes in the form of directives), it needs to be applied.

## What happens after EU legislation is adopted

**Transposition** is the process that takes place at national level of incorporating EU directives into the national laws of Member States.

Regulations or decisions apply directly in all Member States and from the time they come into force, they become part of national law. Thus, they do not require transposition into national law. However, they may still require changes in national legislation, and, like directives, they require implementation and enforcement by national authorities.

**Implementation** is when EU legislation is applied in Member States either through their legal measures or through Implementing Acts that the Commission (or exceptionally the Council) may adopt if this power has been delegated to it by the co-legislators in a given legal act.<sup>133</sup>

**Application of EU law** is often used as a collective term for Member States' and their authorities' work to implement (transposed directives or directly applicable regulations) and enforce legislation.

**Enforcement** is carried out to ensure that EU legislation, as implemented in Member States, is complied with. At EU level, the Commission is entrusted with overseeing the application of EU law (article 17(1) of the Treaty of the European Union) The Commission can, through the infringement procedure, take enforcement measures against Member States in cases where they fail to either incorporate a directive into national law by the set deadline, or they fail to correctly apply EU legislation (all legal acts).

At national level, enforcement is carried out by national authorities charged with ensuring that companies or citizens comply with the requirements of a particular legal act.

**Infringement procedures** are actions that the Commission can take against a Member State. The procedure follows several steps laid out in the EU Treaties (articles 258, 259 and 260 of the TFEU), ranging from a letter of formal notice to referral to the Court of Justice of the European Union (CJEU). Key aspects of the application of EU law and infringement cases by policy area and country are published in an annual report.<sup>134</sup>

In 2008, the Commission introduced a complementary tool, the EU Pilot. This is a pre-infringement process used for informal dialogue with Member States to investigate if problems can be solved without the Commission having to launch a formal infringement procedure.<sup>135</sup>

**Compliance** is the process by which Member States ensure that legislation is implemented in a correct and timely way. It is also the process by which companies adhere to rules that regulate business practices.

<sup>133</sup> Implementing acts, as well as Delegated acts, are EU acts that are of a non-legislative nature but are legally binding. The Lisbon Treaty – the Treaty on the Functioning of the European Union – introduced new articles to allow the Council and European Parliament to delegate power to the Commission: Delegated acts Article 290 TFEU and Implementing acts Articles 291 TFEU.

<sup>134</sup> The latest in the series is the [2022 Annual Report on monitoring the application of EU law](#)

<sup>135</sup> [EU Pilot | Single Market Scoreboard \(europa.eu\)](#) There has been some controversy over the use of the EU Pilot as the Commission announced in 2016 that it was abandoning the tool ([eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0370](#)) but since then it has again reported on its use [COM\\_2023\\_453\\_1\\_EN.pdf \(europa.eu\)](#)

## Co-ordination between authorities

The complexity of the legal framework is aggravated by the fact that enforcement of many digital legislative acts will often be the responsibility of several authorities in each Member State, each with different competencies and that may, or may not, have previous experience of co-operating.<sup>136</sup>

It is not always clear in Member States which existing authorities will handle these new legislative instruments. Furthermore, Member States can also independently establish new authorities for the application of some regulations.

To give one example, the application of the Digital Services Act (DSA) will require co-ordination at national level between authorities responsible for, among other areas, electronic communication, media, consumer protection, protection of privacy, as well as co-ordination between Member States and with the EU level (such co-ordination is provided for in the Regulation).<sup>137</sup> The DSA is also a wide-ranging legislative act that will place high demands on the responsible authorities.

Many of the digital directives and regulations provide for the establishment of EU supervisory authorities and new European co-operation bodies. Other instruments will rely on national supervisory authorities and allow Member States to designate one or more authorities to handle enforcement.

For a visualisation of the scale of the work that national and European authorities and agencies have before them, another useful table/dataset published by the Bruegel think-tank gives an overview of EU enforcement mechanisms and agencies in the digital sector.<sup>138</sup>

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<sup>136</sup> Sitra, *EU Regulation Builds a Fairer Data Economy*, Working Paper, 2022.

<sup>137</sup> For example, in articles 49, 58 and 60.

<sup>138</sup> Kai Zenner, J. Scott Marcus and Kamil Sekut, *A Dataset on EU Legislation for the digital world, Table 2: Overview of EU enforcement Mechanisms and Agencies in the Digital Sectors*, 2023.

**Table 2. Overview of EU Enforcement Mechanisms and Agencies in the Digital sector** (continued on next page).

Research & Innovation	Industrial Policy	Connectivity	Data & Privacy	IPR	Cybersecurity
1 European Commission (DG CNCT): Unit D.I [(EU) 2021/694, (EU) 2021/695]	4 Governing Board of European High Performance Computing Joint Undertaking (EuroHPC JU), [(EU) 2021/1173]	1 European Commission (DG DEFIS): Unit B.1, [(EU) 2023/5881]	2 European Health and Digital Executive Agency (HaDEA), [(EU) 2021/1731]	3 European Union Intellectual Property Office (EUIPO) [(EU) 2012/386, (EU) 2017/1001]	1 cert-eu [2022/0085(COD)]
2 European Research Council Executive Agency (ERCEA) [(EU) 2021/173, (EU) 2021/694, (EU) 2021/695]	4 European Chips Infrastructure Consortium (ECIC) [(EU) 2023/17811]	3 Body of European Regulators for Electronic Communications (BEREC) [(EU) 2015/2120, (EU) 2018/1972, (EU) 2022/6121]	4 European Data Protection Board (EDPB) [(EU) 2016/679]	5 European Patent Organization (EPO) [(EU) 1257/20121]	2 European Cybersecurity Competence Centre (ECCC) [(EU) 2021/8871]
2 European Innovation Council & SMEs Executive Agency (EISMEA) [(EU) 2021/173, (EU) 2021/694, (EU) 2021/6951]	4 European Digital Infrastructure Consortium (EDIC) [(EU) 2022/24811]	3 European Union Agency for the Space Programme (EUSPA), [(EU) 2021/696, 2023/5881]	4 European Data Protection Supervisor (EDPS) [(EU) 2018/17251]	6 Compulsory licences advisory body [2023/0129 (COD)]	3 EU Agency for Cybersecurity (ENISA) [(EU) 2019/8811]
2 European Research Executive Agency (REA) [(EU) 2021/173, (EU) 2021/694, (EU) 2021/695]	4 Governing Board of Chips Joint Undertaking (Chips JU) [2022/0033 (NLE)]	4 Governing Board of Smart Networks and Services Joint Undertaking (SNS JU), [(EU) 2021/2085]	6 European Statistical System Committee, [(EC) 2009/223]	6 European Observatory on Infringements of IPR [(EU) 2023/386]	3 European Defence Agency (EDA) [(EU) 2019/881]
4 European Institute of Innovation & Technology (EIT) [(EU) 2021/173, (EU) 2021/694, (EU) 2021/695]	6 European Critical Raw Materials Board [2023/0079 (COD)]	5 European Space Agency (ESA), [(EU) 2023/588]	6 European Data Innovation Board (EDIB) [(EU) 2022/868]		4 European Cyber Shield [2023/0109(COD)]
7 European Digital Innovation Hubs Network (EDIH), [(EU) 2021/694]	6 European Semi-conductor Board, [(EU) 2023/17811]	6 Communications Committee (COCOM), [(EU) 2018/1972, 2019/517. 2022/6121]	6 European Health Data Space Board (EHDS), [2022/0140(COD)]		6 European Cybersecurity Certification Group (ECCG) [(EU) 2019/8811]
	6 Net-Zero Europe Board, [2023/0081 (COD)]	6 .eu Multistakeholder Advisory Group [(EU) 2019/517]			6 Interinstitutional Cybersecurity Board (IICB) [2022/0085(COD)]
	7 European network of competence centers in semiconductors [(EU) 2023/17811]	6 Interoperable Europe Board [2022/0379 COD]]			6 Interinstitutional Information Security Coordination group [2022/0084(COD)]
					6 NIS cooperation group (EU) 2022/2555]
					7 Network of National Coordination Centres [(EU) 2021/8871]
					7 CSIRTS network [(EU) 2022/2555]
					7 EU CYCLONE [(EU) 2022/25551]
					7 EU Cybersecurity Reserve [2023/0109(COD)]

Explanation

- 1 EU Institution      3 Decentralised agency      5 Independent body      7 Network of Member States
- 2 Executive agency      4 Governing board      6 Advisory body      8 European Standardisation Organisations

Every enforcement body listed in this table is a recognized entity supported by EU law unless only the COD number is provided.

Source: Zenner, K., Marcus, J.S., and Sekut, K. (2023).

A dataset on EU legislation for the digital world ([bruegel.org](https://bruegel.org)) 16 November 2023, Bruegel.

**Table 2. Overview of EU Enforcement Mechanisms and Agencies in the Digital sector** (continued from previous page).

Law Enforcement	Trust & Safety	E-commerce & Consumer Protection	Competition	Media	Finance
3 European Anti-Fraud Office (OLAF) [(EC) 1999/352]	6 Gateway coordination group [(EU) 2018/1724]	1 European Commission (DG JUST): Unit B.3 [Consumer Enforcement and Redress]	1 European Commission (DG CNCT): Unit F.2 & F.3 [(EU) 2022/1925, (EU) 2022/2065]	6 European Board for Media Services / ERGA, [C(2014) 462, (EU) 2010/13, 022/0277(COD)]	1 European Central Bank (ECB) [(EU) 2015/2366, 2023/0212 (COD)]
3 EU Fundamental Rights Agency (FRA) [(EC) No 2007/168]	6 European Artificial Intelligence Board [2021/0106(COD)]	6 European Board for Digital Services, [(EU) 2022/2065]	1 European Commission [DG COMP: Antitrust]		3 European Securities and Markets Authority (ESMA) [(EU) 2022/858, (EU) 2022/2554, (EU) 2023/1114]
3 Europol [(EU) 2016/794]	8 European Committee for Electrotechnical Standardization (CENELEC) [(EU) 2012/1025]	7 Consumer Protection Cooperation Network (CPC) [(EU) 2017/2394]	1 European Commission (DG GROW): Unit A.4 [2022/0278 (COD)]		5 European Banking Authority (EBA) [(EU) 2015/2366, (EU) 2022/2554, (EU) 2023/1114, 2023/0205 (COD)]
3 European Public Prosecutor's Office (EPPO) [(EU) 2017/1939]	8 European Committee for Standardization (CEN) [(EU) 2012/1025]	7 European Consumer Centres Network, [(EU) 2021/690]	6 Advisory Committee on Restrictive Practices and Dominant Positions, [(EC) 2003/11]		5 European Insurance and Occupational Pensions Authority (EIOPA) [(EU) 2022/2554, 2023/0205 (COD)]
3 eu-LISA, [(EU) 2018/1726, (EU) 2018/817]	8 European Telecommunications Standards Institute (ETSI) [(EU) 2012/1025]	7 Consumer Safety Network [(EU) 2023/988]	6 Advisory Committee on Concentrations, [(EC) 2004/139]		6 Committee on Administrative Cooperation for Taxation, [(EU) 2011/16]
3 Eurojust [(EU) 2018/1727]			6 Contact Committee, [(EU) 2017/1132]		6 VAT Committee, [(EC) 2006/112, (CNS) 2022/0407]
3 Frontex [(EU) 2019/1896]			6 High-Level Group on DMA [(EU) 2022/1925]		6 The Standing Committee on Administrative Cooperation, [(CNS) 2022/0407]
6 Interoperability Advisory Group, [(EU) 2019/817]			7 European Competition Network (ECN), [(EC) 2003/11]		
7 European Judicial Network in criminal matters, [2022/0066 (COD)]			7 Union Product Compliance Network [(EU) 2019/1020]		

Explanation

- 1 EU Institution      3 Decentralised agency      5 Independent body      7 Network of Member States  
 2 Executive agency      4 Governing board      6 Advisory body      8 European Standardisation Organisations

Every enforcement body listed in this table is a recognized entity supported by EU law unless only the COD number is provided.

Source: Zenner, K., Marcus, J.S., and Sekut, K. (2023).

A dataset on EU legislation for the digital world ([bruegel.org](https://bruegel.org)) 16 November 2023, Bruegel.

To achieve harmonisation of application throughout the Single Market, this new legislative landscape will require increasing co-ordination between authorities at national level, between national authorities in different Member States and between the national authorities and EU Agencies. It is important that authorities are given sufficient time and resources to establish the required structures and expertise.

### **Late or non-transposition**

A further complicating factor is the late transposition of directives, or non-transposition. This is a general challenge in the Single Market but can become especially troublesome when different legislative acts build on each other.

For example, in the February 2023 Infringement Package,<sup>139</sup> the Commission announced that it had decided to refer several Member States to the European Court of Justice for failing to enact EU rules on open data and public sector data re-use (the Open Data Directive).<sup>140</sup> This directive is complemented by the Data Governance Act (DGA), which entered into force in June 2022 (and is applicable since September 2023).<sup>141</sup> The DGA will in turn be complemented by another step in the EU's work to ensure the use of data, the Data Act.<sup>142</sup> But what happens if the first step is not in place when the second and third steps are to be added?

Another example is legislation for the European telecom sector (or electronic communications sector), which has been on the legislative agenda of the EU since, at least, the launch of the Single Market. Despite this, a recent Commission exploratory consultation showed that a large majority of respondents were of the view that the single market for electronic communications is fragmented.<sup>143</sup>

The deadline for transposing the European Electronic Communications Code into national legislation was 21 December 2020. Only four Member States had fully transposed the EECC by that deadline, and the Commission opened infringement procedures against the others in February 2021, referring ten Member States to the Court of Justice of the European Union (CJEU) in April 2022 over their failure to fully transpose and communicate measures taken to transpose the EECC to the Commission.<sup>144</sup> This legislation, and the sector and services it regulates, plays a central role in Europe's quest to reach its connectivity goals, and in many ways it is the very basis on which the European digital economy and society is to be built.<sup>145</sup> This, therefore, is another step that needs to be in place before others can be properly added.

However, the particularity of the telecoms sector and how it sits between the legislative competence of the EU and that of the national level must be considered in this context. While the EU has taken action in areas such as market development, service provision and access, fairness for consumers et cetera, the sector relies on Member States to ensure the provision of a telecoms and connectivity infrastructure. This involves the management of national resources (including inter alia radio-frequency spectrum and

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<sup>139</sup> Available at: [February infringements package: key decisions \(europa.eu\)](#)

<sup>140</sup> Directive (EU) 2019/1024 on open data and the reuse of public-sector information. It can also be worth noting that at the same time, the Commission referred several Member States to the European Court of Justice for failing to notify transposition measures under two directives that are designed to modernise copyright rules for the digital world.

<sup>141</sup> The Open Data Directive regulated re-use of publicly available information held by the public sector. The DGA provides rules and safeguards for use of protected data held by the public sector.

<sup>142</sup> Regulation (EU) 2023/2854. It aims to unlock accessibility and use of industrial data generated by use of connected devices across economic sectors.

<sup>143</sup> European Commission, *Exploratory consultation on the Future of the Electronic Communications Sector and Its Infrastructure*, 2023.

<sup>144</sup> [EU Electronic Communications Code \(europa.eu\)](#) In October 2023, one case was still open.

<sup>145</sup> [Connectivity | Shaping Europe's digital future \(europa.eu\)](#)



networks or transmission capacity) and is an area of national competence (for reasons such as national sovereignty and public security concerns).<sup>146</sup> While the EU can encourage investments in infrastructure, the sector is still fragmented into national markets.

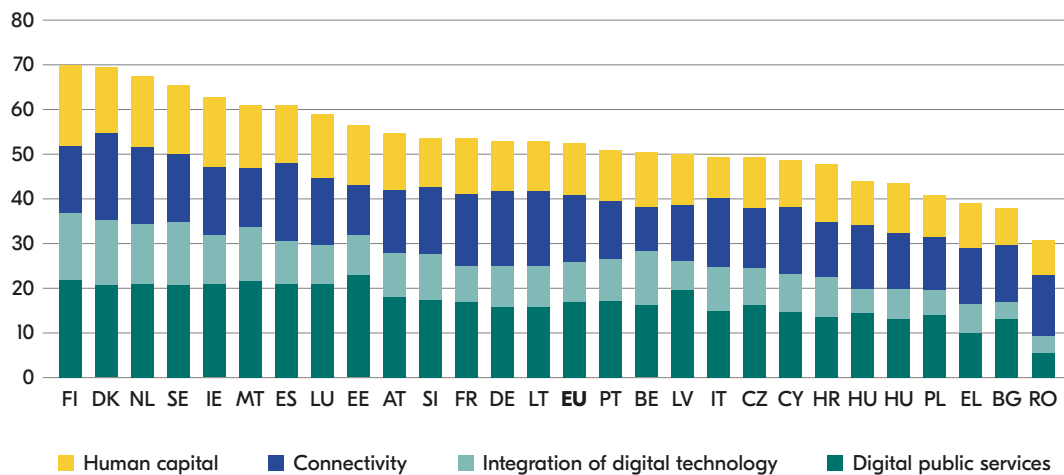
### Digital capacity to manage the application of legislation

The success of the digital transformation will not only impact the EU's competitiveness and productivity. It also has the potential to affect the readiness of governments at national, regional, and local level to administer EU legislation developed for the digitalised Single Market.

The varying degree of digital maturity between Member States – or digital divide<sup>147</sup> – is one factor that may also contribute to fragmentation in the application of rules for the digitalised Single Market. If some Member States have more capacity to manage the application of legislation than others, there could be fragmentation in terms of how legislation is applied in practice.

The DESI 2022 shows a varied picture of how far Member States have come in their digital transformation and adoption of digital technologies.

**Figure 2. Digital Economy and Society Index 2022 Key findings – DESI 2022 ranking.**



Source: Digital Economy and Society Index (DESI) 2022 | Shaping Europe's digital future (europa.eu)

The DESI 2022 index was structured around four main dimensions (to align it with the four principal policy areas of the Digital Decade Policy Programme – that will guide digital transformation in Europe until 2030): human capital (internet user skills and advanced digital skills), connectivity (fixed broadband take-up, fixed broadband coverage, mobile broadband and broadband prices), integration of digital technology (business digitalisation and e-commerce), digital public services (e-government).<sup>148</sup>

<sup>146</sup> See footnote 120 for further information on the division of competences.

<sup>147</sup> A digital divide, or gap, refers to the distinction between those who have access to the internet or other digital technologies and are able to make use of online services, and those who are excluded from these services – from Eurostat, Statistics Explained, [Glossary:Digital divide – Statistics Explained \(europa.eu\)](#)

<sup>148</sup> For the DESI 2022 Metodological Note, please see [5\\_DESI\\_2022\\_Methodological\\_Note\\_yiZnlukLCKDfkDnfSnmt78JuiU\\_88557.pdf](#)

## 4 Is digital different?

The Single Market is undeniably one of the EU's main achievements. Without hesitation, we can answer 'no' to the question 'was the single market process merely a flash in the pan?' which was posed in the 1993 European Commission White Paper on growth, competitiveness, and employment.<sup>149</sup>

But, as has been concluded in this analysis, and elsewhere many times before, making the Single Market work as intended is not without its challenges. And many of the challenges linked to the initiatives to adapt the Single Market to digitalisation, fall into the same categories as the challenges that have been identified and discussed over 30 years of building the Single Market. These include a lack of high-quality impact assessments, leading to legislation that is not fit-for-purpose and is perceived as overly burdensome by stakeholders, varied application, or lack thereof, not enough ex-post evaluations of the actual consequences of legislation et cetera.

This is what the legislative tendencies identified and discussed in chapter three also amount to. So, digital is not different from the perspective that the rules adopted for the digitalised Single Market are rules that need to be developed and managed according to the established principles and objectives for efficient legislation agreed at EU level. It is also likely that already established approaches and tools can be used to deal with many of the challenges identified above.

But digitalisation is also bringing new legislative challenges or is at least making some of the weaknesses in the EU decision-making process more apparent than before. So, from the perspective of the five legislative tendencies analysed in this report, how is digital different?

- The EU is legislating for a new digital era. The stakes are high because the way the EU regulates the future use of digital technologies in business and society will impact the potential benefits these for European productivity, economic growth, and future competitiveness. Legislation must be responsive to change in order to capture the potential gains of the digital economy and offset its potential negative impacts.
- The time gap between identifying a societal problem and the adoption of a legislative to address it has often been perceived as problematic for decision makers. However, with digital technologies, this 'pacing problem'<sup>150</sup> is becoming more pressing than before, and the sheer pace of technological change increasingly challenging the traditional EU decision-making process, which cannot keep up. The National Board of Trade has previously reported on the difficulties that arise when trade (e-commerce) transforms rapidly and has moved into the digital era, but legislation has not kept up as it evolves at a slower pace.<sup>151</sup>
- Moreover, new legislative proposals have often been prompted by an identified problem that needs a joint EU response. However, there are tendencies at EU level to diverge from the traditional approach. One much debated example of this is the EU AI Act that is arguably an ex-ante legislation aiming to pre-empt potential challenges that could arise due to the use of AI technology. Of course, one explanation is that the EU is acting with the aim of preventing fragmentation in areas

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<sup>149</sup> European Commission, *Growth, Competitiveness, Employment: the challenges and Ways forward into the 21st Century – White Paper*, COM(1993) 700 final, 1993, page 10.

<sup>150</sup> OECD, *Regulatory effectiveness in the era of digitalisation*, 2019.

<sup>151</sup> National Board of Trade, *Online Trade, Offline Rules – A Review of Barriers to E-commerce in the EU*, 2015.

where there is no existing EU legislation (to proactively act before Member States start regulating an area at national level). However, such pre-emptive legislation could the risk limiting innovation and development if it turns out to be too restrictive.

- Digitalisation of society and business also gives rise to the need to regulate previously unknown phenomena and to increase integration between regulatory expertise and technological knowhow. Also, digital tends to blur established delineations between policy areas. This increases pressure to break down long-established traditional silos, which encourages cross-sectoral co-operation to widen the knowledge base for decisions about legislation and its application.<sup>152</sup> This necessitates closer interaction between different parts of government – between different directorate-generals in the Commission and between ministries and authorities at national level. More co-operation between government and stakeholders will also be necessary to facilitate knowledge sharing in different areas.
- Digital technologies enable businesses to engage in cross-border activity to an extent not seen before. This puts pressure on the traditional enforcement activities of national authorities as digitalisation does not respect national and jurisdictional boundaries. Wide discrepancies between levels of enforcement of EU legislation in Member States increases opportunities for companies to choose the regime within the Single Market that they find most lenient. This also demands more close co-operation between national authorities in different Member States, as well as increasing attention to minimising national differences in implementation, application, and enforcement of legislation to a minimum.
- The cross-border aspect of digitalisation is also present, of course, in international trade outside the EU. Governments around the world are regulating the digital economy and are adopting different approaches when developing legislation. Unilateral policy interventions that are not aligned with those of trading partners create a fragmented international digital policy landscape. This is costly for businesses that operate in different countries around the world and risks exacerbating tensions between states at the governmental level. To avoid this risk, increased international regulatory co-operation is needed. We have not focused on this aspect in this report, but it is an important factor that deserves further consideration.

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<sup>152</sup> OECD, *Regulatory effectiveness in the era of digitalisation*, 2019.

## 5 From legislative complexity to clarity?

Establishing and developing the Single Market is an incremental and continuous process. It must constantly evolve to reflect the ever-changing society and world around us. This also means that the legislative framework governing the Single Market must be designed, revised, and updated to reflect this. It is work that will never be fully complete.

The Commission has identified a number of ‘root causes’ for barriers to free movement in the Single Market.<sup>153</sup> These include regulatory choices at EU and national level, transposition, implementation and enforcement of legislation and administrative capacity and practices in the Member States. With a legislative landscape that is fragmented and lacking an overarching narrative to tie different legislative acts together, it becomes difficult to understand and apply legislation correctly and in a similar way across the Single Market.

This is the picture that emerges of the legislative landscape of the digitalised Single Market. Given the situation, what can be done to increase coherence between different legislative acts and the way they are applied in practice?

### 5.1 Adherence to the Better Regulation Agenda

To address the ‘root causes’ of barriers in the Single Market, a wide array of actions, processes and tools have been identified at EU level. They are described, not least in the Commission’s Communications ‘Identifying and addressing barriers to the Single Market’<sup>154</sup> and the ‘Long term action plan for better implementation and enforcement of single market rules’<sup>155</sup> as well as the European Parliament’s study ‘Legal obstacles in Member States to Single Market Rules’.<sup>156</sup>

These measures would also likely go a long way in dealing with the challenges posed on development of legislation by digitalisation – if they are applied and resourced adequately and adhered to. Especially important is that there is political will and determination to make a change. This requires strong commitment from the Commission, the co-legislators, and the Member States.

With the risk of stating the obvious, the legislative framework governing digital activity in the Single Market is made up of Single Market rules. As such they need to be developed and applied in accordance with the objectives and principles of the EU Better Regulation agenda. A first important step would therefore be improved adherence by policy makers to the Better Regulation agenda both at EU and national level.

Interesting to note is that the 2023 BusinessEurope Reform Barometer showed that the regulatory environment is perceived as one of the top three challenges to doing business in the Single Market by almost 60 per cent of the organisation’s members. Furthermore, the majority of respondents considered regulatory burdens to be higher in the EU than

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153 European Commission, *Identifying and Addressing Barriers to the Single Market*, COM(2020) 93 final, 2020. The Communication also lists ‘general business and consumer environment’ and ‘causes not linked to public policy such as language or culture’ as root causes of barriers. However, in this analysis we have limited ourselves to looking at causes linked to public policy and legislation.

154 Communication COM(2020) 93 final, 2020.

155 Communication COM(2020) 94 final, 2020.

156 E. Dahlberg et al., *Legal obstacles in Member States to Single Market Rules*, Publication for the Committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

in other major developed economies, and they report having noted a decline in the quality of application of the EU Better Regulation tools in recent years.<sup>157</sup>

The European Parliament, the Council and the Commission have agreed, in the Inter-Institutional Agreement (IIA) of 2016, to jointly ensure that EU legislation adheres to the principles of Better Regulation.<sup>158</sup> Better Regulation processes have also been developed at national level in Member States. The principles of Better Regulation should therefore be part of the entire decision-making process from the ex-ante consideration and preparation of a legislative proposal at EU level through the application in Member States, and then during ex-post evaluation to assess if legislation needs to be amended, or even removed.

In its circularity, the Better Regulation agenda covers all steps of the legislative decision-making process. In the context of this report, there are two steps that appear particularly important to focus on: Improved evidence bases and more extensive use of ex-post evaluation and especially fitness checks.

### 5.1.1 Improved evidence bases

**‘Better regulation is not about “more” or “less” EU legislation, and it is not about deregulating or deprioritising certain policy areas. Instead, it means providing solid evidence as a basis for timely and sound policy decisions.’<sup>159</sup>**

To ensure better evidence bases for new legislative proposals, the general quality of impact assessments (IAs) carried out needs to reach the quality requirements set for them at EU level.

Furthermore, the European Parliament and the Council have agreed (in the IIA) to carry out IAs of any significant amendments they make to legislative proposals. Such amendments can significantly alter the implications of legislation. If updating IAs throughout the decision-making process does not happen, the final adopted legislative text will lack the necessary evidence base. There is an ongoing debate at EU level about the need for high-quality evidence bases for legislative decisions and updated IAs that follow a proposal through to a final decision.<sup>160</sup>

Furthermore, to achieve increased coherence of legislation- going forward, there is a specific need to take into consideration how new proposals may interrelate with other proposals or existing legislation to avoid overlap. This aspect must be given appropriate weight in IAs.

Additionally, the Commission’s new proposed competitiveness check is meant to ensure that legislative proposals consider the expected impacts of each proposal on cost and price competitiveness, international competitiveness, the capacity of business to innovate, and also specifically on SME’s competitiveness. It is important that these ambitions are turned into reality.

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157 BusinessEurope, *Reform Barometer 2023 – the EU’s Global Competitiveness under Threat*, 2023.

158 Interinstitutional Agreement of 13 April 2016 on Better Law-Making between the Commission, the European Parliament and the Council, which sets out the shared responsibility between the three institutions, and the Member States, to deliver high-quality EU legislation, as well as how the work should be carried out.

159 European Court of Auditors, *Law-making in the European Union after almost 20 years of Better Regulation*, Review No 02, 2020.

160 See, for example, policy positions from BusinessEurope at [Better regulation | BusinessEurope](#)

Another aspect that is particularly important for the issues discussed in this report, is the ‘digital by default’ principle. It was added in the revised Better Regulation guidelines and toolbox in 2021. This followed from the Berlin Declaration in which Member States called on the Commission to ‘ensure through the “better regulation” framework that policies and legislative acts proposed by the European Commission are digital-ready and interoperable by default.’<sup>161</sup>

This principle should now be considered when a preferred option for a legislative measure at EU level is considered. According to the Better Regulation toolbox, digital-ready policies should consider the fast pace of digitalisation and technology development, and the policies should be ‘digital, interoperable,<sup>162</sup> future-proof and agile by default’.<sup>163</sup> This tool should help policymakers make the best use of digital technology and data in the development of new proposals for legislation. As it is a recent addition to the Better Regulation tools, it remains to be seen the extent to which this new principle will deliver its intended benefits.

The impact of EU legislative initiatives outside the EU, the so-called ‘Brussels Effect’,<sup>164</sup> is another important aspect that should be assessed. Digitally enabled trade and competition in the Single Market is subject to EU law irrespective of where economic actors are located in the world; the extraterritoriality of EU legislation means that it applies to all companies offering products and services in the EU, not just to those based in the EU. When the EU legislates at an increasing pace to ensure that it can profit from the opportunities and benefits, and guard against the risks, offered by digitalisation, this will undoubtedly have implications for actors from third countries as well. It is thus important that the Commission has committed to better consider the external implications of EU policies and their impacts on third countries. These effects should therefore be analysed in more detail in impact assessments and presented in explanatory memoranda accompanying Commission proposals.<sup>165</sup>

### **Adding tools designed for the digital era**

Given the pressure to speed up the decision-making process, it is easy to forego time-consuming elements such as impact assessments, including stakeholder consultation to capture the expertise of those involved in developing and using new technologies, and proper ex-post evaluation and fitness checks. But rushing the legislative process brings the risk of sub-optimal decisions and legislation. Therefore, rather than hurrying through, or forgoing, the steps of the traditional tools for preparing quality legislative proposals, the EU institutions should complement them.

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161 *Berlin Declaration on Digital Society and Value-Based Government at the ministerial meeting during the German Presidency of the Council of the European Union*, December 2020.

162 The European Interoperability Framework (EIF) has defined ‘interoperability’ as the ‘ability of organisations to interact towards mutually beneficial goals, involving the sharing of information and knowledge between these organisations, through the business processes they support, by means of the exchange of data between their ICT systems’.

163 European Commission, *Better Regulation Toolbox*, 2021, Tool #28, page 230. At Swedish national level, the Agency for Digital Government (Digg) has developed [guidelines](#) for developing regulation in a digitally-friendly way (only available in Swedish).

164 The expression “Brussels effect” derives from Anu Bradford’s 2020 book ‘The Brussels Effect. How the European Union Rules the World’. The expression refers to the process of the EU externalising its laws outside its borders. This way, the EU would ensure that actors from third countries wanting to trade in the Single Market must adhere to EU rules on, for example, data privacy, consumer safety, antitrust, environmental protection etc. Criticism extended against the Brussels effect implies that the process is driven by protectionist motives and that the EU is engaging in regulatory imperialism imposing its own rules and standards rather than engaging in international co-operation aimed at developing global trade rules.

165 European Commission, *Better Regulation: Joining forces to make better laws*, Communication COM(2021) 291 final, 2021, page 14.

One tool, or method, for handling situations where legislation is needed, though it may be too soon to predict how it should be designed, are regulatory sandboxes. Regulatory sandboxes allow for the testing of innovative technologies, products, services, or approaches. These may not be fully compliant with existing legislation, but with the help of regulatory sandboxes tests can be done for how new legislation might be designed in an effective way. Testing can be done in controlled and carefully defined but real-life environments. Such testing facilitates regulatory learning and allows for legislation to be designed based on actual situations that have arisen in the regulatory sandbox without there being any risk of harm to wider society.<sup>166</sup>

Another example is drawn from the European financial sector that was targeted with extensive sector-specific EU legislation, put in place after the last financial crisis. Here, a whole new area of Regulatory Technology (RegTech) has developed, providing tools that can be used in the management of compliance and risk, reporting for businesses, and the enforcement and supervision activities of public authorities.<sup>167</sup> There is thus already experience in this area to learn from.

The National Board of Trade has also previously argued that ‘continuous compliance’<sup>168</sup> on the product side will be required as the characteristics of products will keep changing as their integrated software or AI systems are continually updated. With digital services, the capacity to oversee digital processes will put new pressure on the skills and abilities of EU agencies and national authorities.

There are also other ongoing initiatives in different policy areas at EU and national levels for designing digital tools for, for example, e-government, analysis of legislation, compliance, and enforcement. Notably, the Commission announced in the 2024 Work Programme<sup>169</sup> that it is developing AI tools and large language models, which will be used for the exercise to reduce burdens of reporting requirements by 25 per cent. AI tools and large language models could help identify efficiencies in traditional legislative decision-making processes in order to make them less time and resource consuming. These types of initiatives could thus be continued and extended, naturally employing necessary safeguards (privacy, security, non-discrimination et cetera).

### 5.1.2 Ex-post evaluation and fitness checks

The Commission has also announced that it will ‘work on how to better assess the cumulative impacts of different policy measures at the EU level with a view to develop a methodology’.<sup>170</sup> This will be of great importance to gain a better overview of how different pieces of legislation for the digital economy interact or counteract each other, as the case may be. It will be interesting to see the results of the Commission’s assessments of the cumulative impact of policy measures.

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166 Tambiama Madiaga with Anne Louise Van De Pol, *Artificial intelligence act and regulatory sandboxes*, Briefing from Members’ Research Services, European Parliamentary Research Services, 2022.

167 Laura Grassi and Davide Lanfranchi, RegTech in public and private sectors: the nexus between data, technology and regulation, *Journal of Industrial and Business Economics* 49, 441–479 (2022).

168 National Board of Trade, Innovation, AI, Technical Regulation and Trade – questioning the invisible hand in the digital economy, 2023.

169 European Commission, *Commission Work Programme 2024*, COM(2023) 638 final.

170 European Commission, *Long-term Competitiveness of the EU: looking beyond 2030*, COM(2023) 168 final, page 17.

This ties in with our expectation that there will be a need for careful ex-post evaluation of new digital legislation. Ex-post evaluations are an important policy-making tool under the Better Regulation agenda. They are both backward-looking assessments of the performance of existing legislation and forward-looking as their findings inform policy planning and decisions about new legislative interventions. Evaluation clauses are now often included in legal acts.<sup>171</sup> Ex-post evaluations consider the performance of individual legal acts.

### **Fitness checks**

However, as noted in this report, the seemingly extensive overlap between legislative acts for the digital economy, means that it will not be enough to consider the workings and effects of individual pieces of legislation. Therefore, the Commission will need to put resources into carrying out fitness checks of whole regulatory areas. This is especially important where several legislative acts complement each other and where there is perceived confusion as to which requirements apply in which situations, to which actors and to which products and services.

The 2021 Better Regulation Guidelines<sup>172</sup> state that fitness checks are particularly well suited for identifying legislative overlaps, inconsistencies, synergies, digitalisation potential and cumulative impacts. It is important to note that the Commission states in the guidelines that it will endeavour to conduct more fitness checks in the future.

So far, however, fitness checks have mainly been carried out on horizontal policy issues in the fields of environment and agriculture. One check has been carried out in relation to the adaptation of legislation to be fit for the digital era (on EU consumer law in the digital environment<sup>173</sup>). This one must be followed by many more.

We are not alone in calling for such measures. The Special Committee on Artificial Intelligence in a Digital Age (AIDA) in the European Parliament requested a study<sup>174</sup> on the interplay specifically between the proposed AI Act and other legislation that shapes EU digital policy. It concludes that the ongoing legislation in the digital field is becoming increasingly complex and that legislative coherence is therefore difficult to achieve. Furthermore, an overview of digital legislation along with the identification of any legislative gaps to allow for greater understanding of how different legislative acts interact with each other is requested. This would be important for other clusters of digital legislation as well, and not just ones related to regulating AI.

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171 Data presented in a study published by the European Parliamentary Research Service (*Evaluation in the European Commission – rolling check-list and state of play Fifth Edition*, 2023) show that 60 per cent of legal acts adopted under the ordinary legislative procedure during the first half of the 2019–2024 legal term contain some type of clause mandating future evaluation of the act.

172 European Commission, *Better Regulation Guidelines*, SWD(2021) 305 final.

173 See further at: [Digital fairness – fitness check on EU consumer law \(europa.eu\)](#). According to information compiled and published by the European Parliamentary Research Service (*Evaluation in the European Commission – rolling check-list and state of play Fifth Edition*, 2023), since 2015, the Commission has published results of 19 fitness checks, eight of which were in the area of environmental policy. Another four fitness checks are planned as per September 2023.

174 C. Cadagnone et al., *Identification and assessment of existing and draft EU legislation in the digital field*, January 2022. Study for the Special Committee on Artificial Intelligence in a Digital Age (AIDA), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2022.



## 5.2 Supporting consistent application of digital legislation

The National Board of Trade has previously reported that European businesses, when surveyed, favoured improved application of EU law via increased co-operation on enforcement between the Member States and the Commission.<sup>175</sup>

### 5.2.1 More co-operation and co-ordination

More co-operation and co-ordination between authorities at the national level and between the national and EU level seems particularly important in the complex landscape of digital legislation. With the level of overlap between legislative areas and new horizontal legislation, the lines of division between areas of responsibility between authorities are less clear.

In 2022, the Commission adopted the Communication ‘Enforcing EU Law for a Europe that Delivers’, setting out its work to ensure compliance with that EU law.<sup>176</sup> One theme in the Communication is increased co-operation with Member States and specialised authorities.

However, it is also important that within the Commission, where directorate-generals (DGs) have historically handled separate policy areas, they must work more closely together to ensure that the legislation they each propose fits with the proposals of other DGs. The Commission’s ‘EU Policymaking Hub’ project is an interesting example in this context. It is a development programme for policymaking staff in the Commission. It calls for collaboration across DGs and policy areas to streamline views, priorities, and perspectives during the policymaking process. It emphasises interservice collaboration and work in multidisciplinary teams. It is emphasised that this is particularly important when designing digital-ready policies.<sup>177</sup>

### Co-operation and co-ordination between authorities needs to increase

There are already many examples of where co-operation and co-ordination is taking place between authorities at national level, and at EU level. The following are a few:

- The national competition authorities within the EU and the European Commission have built up a network for cooperation and information exchange, the European Competition Network.<sup>178</sup> The purpose is to ensure that the EU’s common competition rules are applied in a similar way throughout the EU.<sup>179</sup>
- The informal network of Platform-to-Business Regulation enforcement authorities has been established by Member State authorities responsible for enforcing the Regulation to support the exchange of information and coordinate enforcement activities.<sup>180</sup>

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175 National Board of Trade, *Green Services in the Single Market – facilitating the transition of the EU’s industrial ecosystems*, 2022.

176 European Commission, Communication COM(2022) 518 final.

177 European Commission, *Better Regulation Toolbox*, July 2023 edition.

178 [The European Competition Network \(ECN\)](#)

179 [International cooperation on competition enforcement | Swedish Competition Authority \(konkurrensverket.se\)](#)

180 European Commission, *Report on the first preliminary review on the implementation of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services*, COM(2023) 525 final.

- The Consumer Protection Co-operation Network is made up of national authorities to coordinate actions aimed at tackling violations of consumers' rights in cross-border shopping situations.<sup>181</sup>
- To support the digitalisation of the public sector, there is the European Interoperability Framework, which provides guidance to national authorities on, for example, handling new legislation and also supports co-ordination between authorities. At national level, this is mirrored, for example, in a Swedish Framework for Interoperability, which aims to facilitate co-ordination activities between Swedish authorities.<sup>182</sup>

This is an area that the Commission, and Member States, need to put more effort and resources into. This is important to ensure that both existing and new more joint working structures can be developed and maintained, not least to fulfil requirements for co-operation and co-ordination included in new digital legislation (for example, as mentioned, the DSA) and to achieve as much harmonisation as possible in application and enforcement of legislation.

### 5.2.2 More and better guidance

The Commission has committed to supporting Member States in preventing new barriers to the Single Market by assisting them in the application of legislation. A part of this will be through the provision of guidance documents, the facilitation of co-ordination between national authorities through EU expert groups and workshops, provision of information through dedicated websites, and promotion of training for practitioners.<sup>183</sup>

Given the extent of complexity and overlap between different legislative acts, the Commission will have to the leading role in explaining how it is all meant to work. This will likely require a more horizontal approach to guidance that covers whole policy areas, in addition to more traditional guidance that focuses on one piece of legislation. In this work, European agencies/regulators also have an important role in providing overall guidance that can inform guidance that is developed at national level by Member State authorities. In the end, of course, it is the CJEU that interprets EU legislation, and many cases will possibly have to be brought before the court before final interpretation and following guidance can be established.

Overlapping rules and difficulties interpreting these rules is not a new occurrence in the Single Market. The evaluation of the New Legislative Framework (NLF) for EU product legislation<sup>184</sup> shows that this problem existed for legislation that set the framework for the free movement of goods. It may be possible to transfer the ideas of the NLF to some of the legislative areas that have now been digitalised. For example, by establishing coherent definitions of concepts commonly used in the area (such as discussed in Section 3.3) and establishing a procedure to ensure that sectorial legislation becomes more consistent and thus easier to implement and apply.

181 The CPC is an example of where such co-operation is established in a regulation. For more information see [Consumer Protection Cooperation Network \(europa.eu\)](https://european-council.europa.eu/media/e300042c-326d-4741-8000-000110000000_62402_1_en.pdf)

182 [Svenskt ramverk för digital samverkan | Diggu](https://www.diggu.se/ramverk-for-digital-samverkan)

183 European Commission, *Better Regulation Guidelines*, SWD(2021) 305 final.

184 See further [Industrial products – evaluation of the new legislative framework \(europa.eu\)](https://european-council.europa.eu/media/e300042c-326d-4741-8000-000110000000_62402_1_en.pdf)

In both the areas of products and services there are horizontal guides (the Blue Guide on the Implementation of the Product Rules,<sup>185</sup> and the Handbook on the Services Directive 2022),<sup>186</sup> which have been developed by the Commission to explain and clarify applicable rules and to facilitate their uniform application across sectors through the Single Market. ‘Digital’ is, of course, not one sector or one policy area, but it cuts across a wide range of policy and legislative areas. However, some sort of Blue Guide or Handbook could likely be useful to allow businesses and national authorities to understand what is required under all of the different legislative acts for the digital economy and how they should be interpreted together.

The need for improved application of EU legislation to reduce excessive administrative complexity, tackle unnecessary national requirements, and generally address obstacles to trade to complete the Single Market has been well-documented.<sup>187</sup> If this is done successfully, the European Parliamentary Research Service suggests that it could generate economic benefits of at least 644 billion Euro per year by 2032 stemming mainly from an increase in the free movement of goods, services, capital and people, from fair and simpler taxation, and a more level playing field within the Single Market, which is beneficial for competition, efficiency gains and economies of scale.<sup>188</sup> The same study concludes that digital transformation and more harmonised rules for the digital economy could yield an additional 384 billion Euro yearly for the EU economy.<sup>189</sup>

These numbers underscore the importance of prioritising work to improve better application and enforcement of Single Market legislation. This must continue to be a shared responsibility between the EU and national levels.

### 5.3 Proposals for a fourth decade of digitalisation of the Single Market

The gradual digitalisation of the Single Market has been ongoing for the last 30 years. With digitalisation and use of digital technologies permeating more and more areas of activity in the Single Market, the divide between what is ‘digital’ and what is ‘non-digital’ in the Single Market is becoming blurred. We conclude, therefore, that the challenge going forward is ensuring the success of the Single Market in the digital era.

We initiated this analysis by stating that the joint overall ambition of the EU, its institutions and Member States, for the Single Market is the continuous and gradual approximation, and harmonisation, of legislation to enable the free movement of goods, services, capital, and persons. This also brings the need to harmonise as far as possible the application of EU legislation to achieve as much consistency as possible between Member States.

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185 [The Blue Guide on the implementation of the product rules 2022 is published \(europa.eu\)](#) The product rules are aligned with the NLF. The Blue Guide also provides explanations and advice regarding the EU conformity assessment system, the accreditation of laboratories, the CE marking, and market surveillance.

186 [Handbook on the implementation of the Services Directive – Publications Office of the EU \(europa.eu\)](#)

187 Not least by the EU institutions, for example in the Commission’s action plans and guidelines cited above or its Annual Single Market Reports, or the study published by the European Parliamentary Research Service: *Increasing European added value in an age of global challenges*, 2022, among many more.

188 Lauro Panella ed., *Increasing European added value in an age of global challenges – Mapping the cost of non-Europe (2022–2032)*, Study of the European Added Value Unit, European Parliamentary Research Service, 2023.

189 *Ibid.*, page 17.



When studying the wide-ranging legislative landscape created to prepare the Single Market for the digital era, it has become clear that the EU is far from reaching its aim. What is instead apparent is that this legislative landscape is difficult for business and government to navigate. In the confusion concerning how it should all play out in practice; one may wonder at what point the ambition for approximation of legislation in the Single Market will go from a realistic ambition to a mirage. The risk is that the EU will reach a critical stage where legislation perceived as excessive and complex makes the Single Market lose its appeal as a business location.

To avoid this undesirable outcome, and attain higher levels of legislative coherence for the digitalised Single Market, we propose the following:

- **The next Commission needs to show a commitment to attaining a well-functioning Single Market.**  
This must include allowing time for and ensuring that legislation already adopted, or about to be adopted, for the digital economy can come into effect, be applied and its impacts assessed. Emphasis should be placed on supporting and guiding all actors concerned so that they are able to gain an overview and understanding of new requirements and how they will work in practice.
- **The EU institutions – the Commission, The Council, and the European Parliament – must truly deliver on their commitments to the Better Regulation Agenda.**
  - In the context of this analysis, the quality of impact assessments (IAs) in particular must be improved to ensure that legislative initiatives have a high-quality evidence base. This must include thorough stakeholder consultation and input from experts in different digital fields. IAs must also be carried out by the legislative institutions in the case of major amendments to proposals. In cases where a large amount of legislative detail is carried over to delegated acts, these acts also need impact assessments.
  - Furthermore, ex-post evaluation, and especially fitness checks of whole legislative and policy areas, must be prioritised. This would be key to establish where there is overlap between legislative acts, as well as where there are grey zones in terms of definitions of central concepts used in legislation. The Commission must take responsibility for explaining how this is meant to work in practice and answering the questions: Which requirements apply in which situations, to which actors and to which products and services?

- **The Commission must support all stakeholders both in government and the business community in grasping how Single Market legislation for the digital economy is meant to work in practice.**

The Commission and European agencies will need to provide more extensive and timely guidance for national authorities responsible for the application of legislation at national level. Guidance must also take a broader perspective than the traditional focus on separate legislative acts. This could be done by exploring the possibility of adapting established approaches to mitigating legislative overlap and difficulties interpreting rules (for example the New Legislative Framework and the Blue Guide for product rules and the Handbook on application of the Services Directive) to rules developed for the digital economy.

- **The Commission, the European Agencies and Member States and their authorities should continue to expand and institutionalise co-operation and co-ordination between themselves, at EU and national level.**

Digitalisation transcends traditional established divisions between policy areas and national boundaries. Government structures and approaches to handling the enforcement of legislation need to reflect this. The Commission must take lead in facilitating co-operation between Member States, for example by strengthening existing networks. This will be especially important with a view to avoid diverging application of legislation.

- **The processes and tools in place to handle Single Market legislation could be complemented and enhanced by new ones, for example regulatory sandboxes or other tools enabled by digital technologies.**

The use of digital tools as support in the analysis needed for development of new legislative proposals or for compliance and enforcement is not an area of expertise of the National Board of Trade. We can, however, see that the technical developments that pose new challenges for designing and applying legislation could also have the potential to provide useful tools, given appropriate safeguards are in place, for analysis and on both the compliance and enforcement side. Ongoing initiatives to explore this area should be continued.

The Single Market must be fit to function in the digital era and the EU will need to move from legislative complexity to clarity. All the proposed measures are time-consuming and resource-intensive (even if tools are developed to make them more efficient) but the costs of not doing this work in relation to European competitiveness and productivity will likely be much higher. It is going to take real commitment at both EU and national level to replace the digital legislative tangle with a legislative puzzle where all the pieces fit together.

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# Sammanfattning på svenska

## Summary in Swedish

Att försäkra att lagstiftning för den inre marknaden är anpassad för den digitala ekonomin är en prioritering för EU. Detta ses som centralt för att säkerställa Europas potential att tillgodogöra sig möjligheter som erbjuds genom användande av digital teknik; möjligheter för näringsliv och konsumenter, stöd till den gröna omställningen och säkrande av framtida europeisk produktivitet och konkurrenskraft.

Den här rapporten undersöker några av de utmaningar som EU står inför med avseende på att förbereda och anpassa den inre marknaden för den digitala eran. Bland dessa finns övergripande begreppsförvirring och upplevd hög nivå av komplexitet i lagstiftning för den digitala ekonomin.

Det har varit vanligt inom EU att göra åtskillnad mellan ”den inre marknaden” och den ”digitala inre marknaden”. Att skapa eller namnge ”inre marknader” inom den inre marknaden är vanligt förekommande praxis inom EU då det är ett sätt att ge ökad tyngd åt prioriterade policyområden.

Givet att digitalisering numera genomsyrar de flesta områden inom den inre marknaden så är det dock långt ifrån tydligt vilka policy- och lagstiftningsområden som är ”digitala” och vilka som är att anse som ”icke digitala”.

Något som ytterligare ökar risken för begreppsförvirring och missuppfattningar är att EU:s strategi för digital omställning (vilken omfattar bland annat åtgärder och investeringar i digital teknik, digitala färdigheter och digital infrastruktur) också ibland läggs in under rubriken ”digital inre marknad”. Även om åtgärder för digital omställning och utveckling av en digitaliserad inre marknad behöver pågå samtidigt och är ömsesidigt förstärkande, så bör de nog inte missuppfattas som samma.

Denna begreppsförvirring bidrar till otydliga policydiskussioner om reformer som behövs för att tillåta EU att framgångsrikt omfamna möjligheter som erbjuds genom digitalisering.

Vi instämmer därför i de argument som tidigare framförts på EU-nivå om att digitalisering bör ses som central för den inre marknaden och dess funktion. Det ger mer klarhet och understryker dessutom att digitalisering numera påverkar en rad policy- och lagstiftningsområden och behöver ses som en naturlig del av all analys av och diskussioner om den inre marknadens framtid. En viktig aspekt av detta är att det inte får finnas någon tvekan om att inre marknadslagstiftning är just inre marknadslagstiftning. Sådan lagstiftning måste leva upp till och beslutas enligt de principer för ändamålsenlig lagstiftning som gemensamt beslutats på EU-nivå. Även om detta verkar självklart så är det värt att understryka, särskilt eftersom EU-lagstiftning för den digitala ekonomin ofta inte anses leva upp till den kvalitet som krävs enligt EU:s policy för bättre lagstiftning (Better Regulation Agenda).

Varje rättsakt som tas fram för den europeiska digitala ekonomin får mycket uppmärksamhet och analyseras i detalj av många aktörer. Övergripande analyser av det samlade landskapet av lagstiftning för den inre marknaden i den digitala eran, och de utmaningar som finns för en väl fungerande inre marknad, är mer sällsynta. Det är därför som den här rapporten har som ambition att bidra just med ett övergripande perspektiv.

Vi har analyserat och exemplifierat några av de återkommande och problematiska tendenser i lagstiftningsprocessen som diskuteras flitigt inom EU i relation till utvecklingen av inre marknadslagstiftning anpassad för den digitala eran. Vi har sammanfattat dessa till fem övergripande tendenser som vi fokuserar på i den här rapporten:

- Lagstiftning verkar sakna kompletta beslutsunderlag.
- Lagstiftning verkar överlappa.
- Det är oklart om definitioner av centrala begrepp används konsekvent i olika lagstiftning.
- Harmoniserande åtgärder kan leda till nya skillnader.
- Inkonsekvent tillämpning av EU-lagstiftning på nationella nivå.

Sammantaget bidrar dessa tendenser till att lagstiftningen för den digitala ekonomin inom EU upplevs som komplex i stället för tydlig och att den tillämpas alltför olika på nationell nivå. Detta är motsatsen till EU:s gemensamma strävan mot en integrerad inre marknad med en gemensam lagstiftningsram som bygger på tillnärmning av lagstiftning och principerna för bättre lagstiftning: att den är inriktad på områden med störst mervärde, är effektiv och ändamålsenlig, så enkel och tydlig som möjligt, inte reglerar i onödan eller orsakar onödiga administrativa bördor samt är lätt att införliva och tillämpa i praktiken.

Risken är att om lagstiftningen för den digitala ekonomin är för komplex – oavsett om den upplevs som det eller det faktiskt är konstaterat att den är det – så verkar det hindrande, och inte stödjande, i EU:s ansats att skapa en väl fungerande inre marknad anpassad för den digitala eran.

Därför är det viktigt för EU:s institutioner och medlemsstater att tillsammans motverka oroande tendenser i lagstiftningsprocessen. Vi föreslår därför följande åtgärder:

- **Nästa EU-kommission behöver prioritera strävan mot en väl fungerande inre marknad.**  
Det här måste innefatta att den tillåter tid för och försäkras sig om att lagstiftning som redan är antagen, eller som kommer att antas, för den digitala ekonomin kan falla på plats i alla delar, tillämpas och dess faktiska effekter utvärderas. Framför allt behöver det prioriteras stöd och vägledning till alla aktörer som ska hantera lagstiftningen så att de kan tillgodogöra sig förståelse för nya krav och hur all lagstiftning ska fungera i praktiken.
- **EU:s institutioner – kommissionen, rådet och europaparlamentet – måste leva upp till vad de förbundit sig till inom området bättre lagstiftning.**  
I det här sammanhanget betyder det särskilt till exempel att försäkra sig om att förslag till ny lagstiftning har kompletta beslutsunderlag. Sådana måste beakta den internationella aspekten och att EU-lagstiftning speglar internationellt regulatoriskt samarbete. Även samråd med berörda intressenter och inhämtande av information från experter på berörda områden är viktigt. Dessutom, måste utvärderingar och särskilt så kallade ”fitness checks” av hela lagstiftnings- och policyområden prioriteras. Det kommer att bli avgörande för att etablera om och var lagstiftning överlappar och var det finns grå-zoner vad gäller definitioner av centrala begrepp som används i olika rättsakter. EU-kommissionen måste ta ansvar för att förklara hur all ny lagstiftning ska fungera i praktiken; vilka krav gäller i vilka situationer, för vilka aktörer och för vilka produkter och tjänster?

- **EU-kommissionen måste stödja alla intressenter – inom förvaltningar och i näringslivet – i att få klarhet i hur inre marknadslagstiftning för den digitala ekonomin är avsedd att fungera i praktiken.**

Det kommer att bli nödvändigt för EU-kommissionen och europeiska myndigheter att tillhandahålla omfattande och läglig vägledning för nationella myndigheter vad gäller tillämpning av EU-lagstiftningen på nationell nivå. Vägledning måste även utarbetas med ett vidare perspektiv än det traditionella med fokus enbart på ett en enskild rättsakt. Det här skulle kunna göras genom att undersöka möjligheten att efterlikna etablerade sätt att mildra effekterna av överlappande lagstiftning och påföljande svårigheter att tolka lagstiftning. Här kan den så kallade ”New Legislative Framework” och ”Blue Guide for product rules” eller handboken om genomförandet av tjänstedirektivet utgöra inspiration.

- **EU-kommissionens, de europeiska myndigheterna och medlemsstater och deras myndigheter kommer att behöva utvidga och institutionalisera samarbete och samordning sinsemellan, på EU- och nationell nivå.**

Digitalisering överskrider traditionellt etablerade uppdelningar mellan policyområden och nationella gränser. Förvaltningsstrukturer och processer för att hantera genomförande av EU-lagstiftning behöver spegla detta.

- **Befintliga processer och verktyg för att hantera inre marknadslagstiftning kan kompletteras och förstärkas med sådana som möjliggörs av digital teknik.**

Digital teknik kan sannolikt, med tillräckliga skyddsåtgärder på plats, utgöra ett stöd i framtagandet av lagstiftning samt vid genomförande och efterlevnad av den. Pågående initiativ för att utforska det här området bör fortsätta och förstärkas.

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We provide the Swedish Government with analyses, reports and policy recommendations. We also participate in international meetings and negotiations.

The National Board of Trade, via SOLVIT, helps businesses and citizens encountering obstacles to free movement. We also host several networks with business organisations and authorities which aim to facilitate trade.

As an expert agency in trade policy issues, we also provide assistance to developing countries through trade-related development cooperation. One example is Open Trade Gate Sweden, a one-stop information centre assisting exporters from developing countries in their trade with Sweden and the EU.

Our analyses and reports aim to increase the knowledge on the importance of trade for the international economy and for global sustainable development. Publications issued by the National Board of Trade only reflect the views of the Board.

The National Board of Trade Sweden, February 2024. ISBN: 978-91-89742-24-6

