

Do the EU's Open Internet Regulation And Proposed Digital Services Tax Threaten the Digital Single Market?

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Reprinted from *Tax Notes International*, October 15, 2018, p. 279

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In this article, the authors consider the EU's 2015 Telecommunications Single Market Regulation and its recently proposed digital services tax, examining the ways in which both initiatives may threaten the EU's digital single market.

The EU's digital single market serves as the framework for its efforts to exploit digital opportunities and achieve sustainable growth and development in the modern era. Some of the EU's undertakings have sparked heated debates regarding their suitability for effectively pursuing their stated objectives.

This article examines two of these initiatives — the Telecommunications Single Market Regulation, adopted in 2015, and the recently proposed digital services tax (DST) — and the risks they may pose to the digital single market.

I. Introduction

New technologies are conquering the world at the speed of light. The internet, the decreasing importance of distance and time, and the press toward digitalization are the key drivers of modern-era developments in all aspects of human life. Technology's potential is unlimited, and so is its power. The force of development is unstoppable.

The question is: To what extent can development be directed to provide the most benefit to modern societies and maximize social welfare? The answer is being debated by legislators and policymakers all over the world. The challenge is to achieve diffusion of new technologies and broad access to the opportunities they envision — a real opportunity for all to grow.

In the EU, leaders are pursuing these objectives in the context of the digital single market strategy. This strategy began in 2014 with the goal of adapting the EU single market to meet the new factual circumstances imposed by digitalization.¹ Leaders called for legislation on these matters to be inspired by the fundamental principles of the single market, an innovation that represents one of the most significant steps of European integration. Specifically, the EU single market seeks to ensure the free movement of goods, services, capital, and persons across the EU in order to maximize choice and competition for consumers and ensure opportunities for entrepreneurs. Article 2 of the Treaty on European Union recognizes the principle of equal treatment as a general principle of EU law.

Following these precepts, the digital single market seeks to promote the following goals throughout the EU:

- better access to digital goods and services for both consumers and businesses;
- conditions that allow digital networks and services to flourish; and
- maximum growth of the digital economy.

Four years after the digital single market strategy was first conceived, the EU has taken several actions and implemented several legislative measures in pursuit of these objectives. This article examines two of these initiatives, both of which have inspired heated debates in the EU and beyond as to their effects (or potential effects) on the digital single market.

¹Jean-Claude Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change," Political Guidelines for the Next European Commission — Opening Statement in the European Parliament Plenary Session (July 15, 2014).

Our purpose is to assess the actual suitability of the two initiatives for effectively pursuing the objectives of the digital single market.

To this end, this article is structured in five parts. Following this introduction, Section II focuses on the Telecommunications Single Market Regulation, which was introduced in 2015. Section III focuses on the European Commission's recent proposal for an interim turnover tax on digital services. Section IV provides an overview of the implications of both initiatives on digital service providers, and Section V concludes that there is room for both initiatives to improve.

II. The Telecoms Single Market Regulation

A. Background Information

Internet and communications technologies are the foundation of digitalization. In recent decades, the regulation of these tools has been a constant topic among national and international legislative bodies. Starting as far back as 1987 with a green paper titled "Towards a Dynamic European Community: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment" (COM(87) 290 final), the EU has considered several measures aimed at implementing a common telecommunications framework. After 30 years, the EU has a regulatory framework for electronic communications comprised of a series of directives that create an open market for telecommunication.

Against this backdrop, the EU adopted the Telecoms Single Market Regulation (Regulation 2015/2120/EU, or TSM) in late 2015. Earlier the same year, the U.S. Federal Communications Commission adopted the Open Internet Order 2015 (FCC 15-24). The repeal of that U.S. legislation in late 2017 has fueled the continuing debate about the relevance of legislative measures that attempt to balance the market of telecommunications at a global level.

According to its recitals, the EU regulation is an effort to address a deficiency in the regulatory framework, targeting "traffic management practices which block or slow down specific applications or services." However, the commission had identified several member states that were acting unilaterally through national

laws and it seems the commission's true goal was to prevent fragmentation of the single market. While the regulation was under discussion, Sir Tim Berners-Lee — known as the inventor of the World Wide Web — authored a post on the European Commission's Guest Blog emphasizing the importance of safeguarding net neutrality across the EU.²

B. Basic Elements of the 2015 Directive

The TSM "aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights."

To this effect, the regulation presents open internet access as a right of end-users. It also affirms the principle of technological neutrality, seeking to protect users' rights regardless of the specific technology the user chooses.

According to many experts, net neutrality — the principle of equal treatment of all data traffic on the internet that prohibits access providers from discriminating against data transmitted through their network based on content, destination, or source — is key to ensuring an open internet.³ Net neutrality promises end-users open access to information, the ability to disseminate data, and the opportunity to participate in the use and offer of applications and services.

There are, however, noteworthy arguments against the net-neutrality principle. Some internet access service providers have criticized the rule as unnecessary, suggesting it may negatively affect the future of the industry while stressing the potential positive effects of practices like zero-rating.

Notably, the regulation does not make explicit reference to the net-neutrality principle. That omission has led some to question the extent to which open internet access — which the regulation mentions and seeks to protect — coincides with net neutrality. In fact, there seem to be significant differences between the two. As is discussed below, net neutrality is broader than

²Tim Berners-Lee, "Net Neutrality Is Critical for Europe's Future," European Commission Blog of Andrus Ansip (Feb. 2, 2015).

³Tim Wu, "Network Neutrality, Broadband Discrimination," *J. of Telecommunications and High Tech. L.* (2003).

just the prohibition against “negative neutrality” contained in the open internet concept that the regulation embraces.

After establishing a right to open internet access, the TSM makes some broad exceptions. These involve three main issues:

- reasonable traffic management;
- pursuit of certain purposes identified in the regulation; and
- specialized services.

Reasonable traffic management involves internet service providers intervening in the transmission of data to ensure optimal network resource allocation and maintain high-quality service overall. The TSM permits this type of intervention under some circumstances and dictates that the intervention should be:

- transparent;
- nondiscriminatory;
- proportionate; and
- not based on commercial considerations.

In any case, any discrimination arising from these interventions must be justified by the “objectively different technical quality of service requirements of specific categories of traffic” and not by commercial reasons.

Intervention in internet traffic is also permissible if the measure pursues one of the following purposes:

- complying with the internet access provider’s legal obligations, such as blocking specified content to comply with criminal law;
- ensuring the integrity and security of the network and the users’ equipment — for example, preventing the transmission of viruses; or
- preventing network congestion, such as when the internet access service provider cannot meet excessively high demand.

The third exception refers to specialized services, namely “electronic communication services other than internet access services” that require a particularly high quality of service. The regulation provides the example of services for the public interest, a category that could include e-health tools and similar applications. The regulation also mentions machine-to-machine communications, suggesting the use of smart cars

and like technologies. The TSM specifies that any intervention favoring the specialized service is subject to the condition that the capacity of the network is not affected.

Finally, the regulation assigns to the national regulatory authorities of each member state the task of ensuring that internet access service providers comply with its provisions. In turn, they are to report to the Body of European Regulators for Electronic Communications (BEREC).

C. Criticism and Potential Risks

The regulation has attracted strong criticism⁴ and not without reason. The main argument is that it leaves room — even if limited — to exercise the very practices it targets. Critics say this renders it inefficient and unable to guarantee internet users’ rights. For example, the European Consumer Organization contends that the regulation allows zero-rating practices (described below) and discrimination in favor of specialized services, even at the expense of internet access service quality.⁵

From a business perspective, inefficient regulation of the telecommunications market could potentially discourage — or even impede — engagement with and exploitation of relevant technologies. Dated October 25, 2015, an open letter to the European Parliament sent on behalf of technology companies and investors in the United States and Europe in anticipation of the then-upcoming discussion of the TSM proposal illustrates this view. Nonetheless, evidence shows that net neutrality has beneficial effects on competition and growth.⁶

Some critics accuse the regulation of allowing internet access service providers to engage in zero-rating. Zero-rating occurs when a provider stipulates that specified internet traffic

⁴ See, e.g., Alex Hern, “EU Net Neutrality Laws Fatally Undermined by Loopholes, Critics Say,” *The Guardian*, Oct. 27, 2015; and Juliette Garside, “Freedom Campaigners Warn Against EU Ministers Pushing for 2-Speed Internet,” *The Guardian*, Mar. 5, 2015.

⁵ European Consumer Organization, “Factsheet: The EU’s Net Neutrality Rules” (Oct. 2015).

⁶ Viktória Kocsis and Jarst Weda, “The Innovation-Enhancing Effects of Network Neutrality,” SEO Economic Research (June 12, 2013) (detailing results of a study commissioned by the Ministry of Economic Affairs).

corresponds to zero data.⁷ When end-users' agreements with the internet access service provider contain data caps, the result of zero-rating is that the provider excludes specific content from the data cap. The launch of a closed platform called "internet.org" (later renamed FreeBasics) — an effort aimed at exponentially increasing the number of internet users across the globe — provides a recent example of zero-rating. This Facebook-led program provided internet access to several internet-connected services and applications. Despite Facebook's claims of success⁸ in providing free internet access to millions in developing countries like Colombia, Ghana, India, and Paraguay, the overwhelming majority of the users ultimately could not afford the data plans needed to gain full access to the internet. It follows that the users with data-capped internet access agreements have a strong de facto incentive to prefer the zero-rated traffic over the positively rated traffic.

The regulation does not make any explicit reference to the practice of zero-rating. Most importantly, the regulation seems to focus on only one of the two forms of net neutrality — negative neutrality — thus allowing zero-rating. Specifically, net neutrality entails (i) that the internet service provider cannot discriminate against internet traffic by blocking or throttling some traffic (negative neutrality) and (ii) that the internet service provider must not favor some content over other content in any way (positive neutrality). Both are crucial to ensuring true net neutrality, as Berners-Lee noted when the EU leaders were debating the TSM.⁹ The TSM prohibits the negative aspect — explicitly referencing the practice of blocking or slowing down content. As to positive neutrality, however, not only is there no express prohibition of content prioritization, but the exceptions seem to allow margin for such prioritization.¹⁰ Remarkably, the

equivalent U.S. legislation — that is, the Federal Communications Commission's now-repealed Open Internet Order — forbade content prioritization.¹¹

Further, a 2016 study by Rewheel, an independent Finnish consultancy on network economics, revealed that zero-rating harms consumers and impedes competition.¹² In particular, the study found that European mobile internet access providers that offered zero-rated video services tended to charge more than twice what providers charged under standard competitive conditions. Also, operators that engaged in zero-rating imposed extremely restrictive gigabyte caps, offering half the data provided under normal market conditions.

Zero-rating — which only works alongside data caps — is not the only way that internet service providers can use the exceptions in the TSM to prioritize specific content. First, the scope of the exceptions is not always straightforward. For example, the exceptions for reasonable traffic management and the prevention of network congestion could be interpreted broadly. This affords internet access service providers additional discretion. Second, the exception allows internet access service providers to prioritize services that objectively require higher network quality, such as streaming videos or chatting, as long as the privileged treatment does not affect the network capacity.

In light of the above, it is apparent that the TSM allows internet access service providers to give special treatment to selected traffic, at least under certain conditions. Affording internet access service providers discretion to determine whether or not to promote specific traffic may encourage paid-prioritization agreements with content providers — or at least those providers that can afford it. Meanwhile, content providers that do not — or cannot — offer payment could find their content undermined based on various excuses. Globally, the repeal of U.S. open internet legislation is another source of risk. Lower standards of global protection should — more than ever before — give the EU reason to lead and

⁷ Christopher T. Marsden, "Comparative Case Studies in Implementing Net Neutrality: A Critical Analysis of Zero Rating," 13(1) *SCRIPTed* 1 (Apr. 2016).

⁸ "One Year In: Internet.org Free Basics Services," Facebook Newsroom (July 26, 2015). Other examples are Facebook Zero, Twitter Access, and Google Free Zone.

⁹ *Supra* note 2.

¹⁰ J. Scott Marcus, "New Network Neutrality Rules in Europe: Comparisons to Those in the U.S.," 14(2) *Colo. Tech. L.J.* 259 (May 2016).

¹¹ FCC, "Open Internet Order," FCC 15-24, para. 18.

¹² Rewheel, "Tight Oligopoly Mobile Markets in EU28 in 2015" (Jan. 2016).

to establish a strong, decisive, and clear position in favor of net neutrality.

Also, some have argued that the TSM is not an appropriate way to address the purposes for which it was adopted. As discussed above, the commission claimed one of the main reasons for the TSM initiative was to avoid fragmentation in the single market when it comes to the regulation of internet access. However, the TSM assigns responsibility for its implementation and enforcement to the member states' regulatory authorities under the supervision of BEREC. This has led to different practices at the member state level and fragmentation in the single market despite the common regulation.¹³ Although the European Commission recently advocated for BEREC to assume an enhanced role,¹⁴ the European Council rejected the proposal in late 2017¹⁵ in favor of preserving the existing market fragmentation, at least for the time being. Because fragmentation entails extra compliance burdens and increased business risks, it may be one more factor discouraging investment and innovation in the single market.

III. The Digital Services Tax

A. General Remarks

As if the risk to the digital single market from the TSM were not enough, a more recent initiative of the European Commission seems to promise more of the same. This time, the rules involve the taxation of services provided in a digital manner. Although the measure should be temporary and is still under discussion, it has already caused a lot of unease among business operators in the digital single market as well as among member states.

In March the European Commission adopted the digital tax package,¹⁶ which included two

proposals for directives aimed at effectively taxing digital business models throughout the single market. The first proposal (COM(2018) 147 final) envisions extending the permanent establishment concept to include cases involving a significant economic presence through digital means, regardless of physical presence. The proposal's supporters believe the digital PE offers a comprehensive, long-term solution for the single market. The second proposal (COM(2018) 148 final) attempts to ensure the taxation of some digitally provided services, until the EU can adopt a comprehensive solution. As a result, that proposal should be temporary.

As the press release announcing the digital tax package illustrates, the commission's initiative stems from both the widely acknowledged need to tax the digital economy and also the ever-present need to prevent fragmentation in the single market. Digital and communications technologies have led to new ways of doing business that push the limits of the existing international framework for business taxation.¹⁷ The international community has recognized this issue, as the OECD's base erosion and profit-shifting project's action 1 final report evidences. The commission's digital tax package seeks to promote a "modern and stable tax framework for the digital economy" within the digital single market. A prolonged lack of effective rules leads to the loss of tax revenue, a concern that has caused several EU and extra-EU countries to introduce local legislation to address the issue.¹⁸ Those unilateral measures risk fragmentation, at the EU and global level, on a matter that requires wide consensus.

It is the temporary proposal in the commission's digital tax package that has raised the most concerns regarding its potential to create a range of distortions in the single market as well as concerns about its overall fitness for purpose.¹⁹ The DST proposal is the topic of heated discussion in the EU, and the Council of the European Union

¹³ Marta Cantero, "Testing EU Experimentalist Governance in the Telecoms Sector," *EU Law Analysis Blog* (May 30, 2016).

¹⁴ European Commission, "Proposal for a Regulation of the European Parliament and of the Council Establishing the Body of European Regulators for Electronic Communications (BEREC) and the BEREC Office," COM(2016) 591 final (Sept. 14, 2016).

¹⁵ EU Council, "Proposal for a Regulation of the European Parliament and of the Council Establishing the Body of European Regulators for Electronic Communications," Interinstitutional file 2016/0286 (Nov. 17, 2017).

¹⁶ European Commission, "Digital Taxation: Commission Proposes New Measures to Ensure That All Companies Pay Fair Tax in the EU," (Mar. 21, 2018) (digital tax package).

¹⁷ Piergiorgio Valente, "Digital Revolution. Tax Revolution?" *Tax Notes Int'l*, Apr. 1, 2018, p. 117.

¹⁸ Piergiorgio Valente, "Taxless Corporate Income: Balance Against White Income, Grey Rules and Black Holes," 57(7) *European Taxation* 27 (July 2017).

¹⁹ See, e.g., "EU Member States Remain Divided Over Digital Services Tax," *Tax Notes Int'l*, Sept. 17, 2018, p. 1247.

will have the last word. At this stage the member states seem to be divided, with some asking for a deeper review of the proposed measures while others are urging quick adoption. Meanwhile, outside the EU, some allege that the measure is targeting mainly non-EU internet giants, and the proposal has raised outrage, especially in the United States.²⁰

B. Basic Elements of the DST Proposal

According to the commission, the DST proposal is designed to target the cases that present the most significant misalignment between taxation and value creation. Specifically, it targets digital business models in which users make a major contribution to value creation. The commission suggests that the existing rules cannot adequately take user contribution into account, leading to loss of tax revenue in the jurisdictions where that value is created.

To remedy this mismatch, the proposal envisages an EU-wide tax of 3 percent on gross revenue from specified services that the commission believes rely highly on user contribution. The DST would apply much like the EU VAT or the U.S. sales tax.

The only services within the scope of the DST are:

- “the placing on a digital interface of advertising targeted at users of that interface” — in other words, online advertising services;
- “the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users” — in other words, intermediation services; and
- “the transmission of data collected about users and generated from users’ activities on digital interfaces” — in other words, the sale of users’ data.

In a series of clarifications regarding these taxable services, the proposal tries to restrict the application of the DST to cases in which the users’

contribution is fundamental to value creation. For example, in the case of advertising services, the proposal clarifies that DST would apply to the revenue of the advertising entity — ownership of the website on which the advertisement appears is irrelevant. Likewise, intermediation services within the scope of the DST do not include services in which the principal purpose is to enable the service provider itself to provide digital content like videos, communication, or payment services to users. In those excluded cases, the main factor for the production of revenue is ownership of the website and, respectively, either the specific digital content, the guarantee of an appropriate framework for communication, or the promise of payment. While it is necessary for the provision of the service, the participation and interaction of the users is not considered a primary source of value.

Furthermore, the proposal limits the subjective scope of DST to taxpayers that exceed two revenue-related thresholds:

- €750 million annual worldwide revenue from any source; and
- €50 million annual EU revenue from the services within the scope of the DST.

If the taxpayer is part of a group, the assessment of each of the thresholds would consider the respective revenue of the whole group — not just that of the specific taxpayer.

For DST collection purposes, taxpayers would file an EU-wide DST return in a single member state. The assessed DST would be paid to the member states where the users of the relevant service are located. The criteria for the determination of a user’s location vary for each category of service. For advertising services, the key factor is the location of the device the user is using to access the website on which the advertisement appears. For intermediation services, the key factor is the location of the user’s device either at the time an agreement is concluded or at the time the user opened an account to access the intermediation service.

The core text of the proposal does not expressly regulate the interaction of the DST with other taxes. According to recital 27, member states would be expected to alleviate the burden of the DST by providing for it to be deducted from the corporate income tax base. However, whether and

²⁰ Teri Sprackland, “EU Digital Tax Would Affect Only U.S. Companies, Observers Say,” *Tax Notes Int’l*, Mar. 26, 2018, p. 1262.

to what extent to provide such a deduction is left to the discretion of the member states. Hence, it is very likely that each member state will apply different rules, leading to de facto fragmentation.

C. Potential Risks

Observers have advanced various arguments regarding weak or questionable points in the DST proposal and called for further elaboration. One of the most straightforward questions is the extent to which the proposal is actually designed to be temporary, especially given that it does not include a mechanism for transitioning to the long-term solution — that is, the digital PE. However, that discussion is beyond the scope of the present article, which focuses on the distortions that the proposal may create in the digital single market.

Most alarming in this regard is that the proposal only applies to some digital services. In other words, the proposal distinguishes some digital services from others and would subject them to a different tax burden. Hence — to ensure that the proposal does not entail unjustified discriminatory treatment — it must be verified that digital services within the scope of the DST are not comparable to services outside the scope. This task has never been easy for the commission, for the member states, or for the Court of Justice of the European Union.

Here, the first question involves online advertising services. Under the proposal, when an advertisement appears on a website, the advertiser would be subject to DST on the gross revenues from the advertisement provided it meets the requisite thresholds. However, if the advertiser puts the same advertisement on TV or a billboard, then no DST would apply to the revenue therefrom. Instead, the relevant net income would be subject to corporate income tax along with all of the advertiser's other income. Since the DST is limited to services in which user contribution is key to value creation, the rationale for the different treatment of online and TV advertising should involve a different level of user/viewer contribution. However, the difference in contribution is not clear. Television viewership and the number of billboards posted have always been key points of reference when pricing those advertising services.

Intermediation services can provide a similar example. Digital intermediation services within

the scope of the DST are those that “enable users to find other users and to interact with them,” regardless of whether the users had contact before using the service. Thus, the primary targets of this provision include applications or digital platforms such as Uber or BlaBlaCar. For example, the particular service that Uber provides is that it enables independent drivers using the application to connect with potential clients in need of a driver and willing to pay. In a less-digitalized world, a company could offer a similar service over the phone — the potential client could call the intermediary company to request a driver, and the company would connect the client with an available independent driver. However challenging it might seem to identify the difference between the two services, apart from the means of communication applied, the difference in the tax burden under the DST proposal is clear.

The thresholds for the application of the DST also seem to have the potential to distort the single market. The revenue thresholds seek to exclude small and medium-size service providers from the tax. While this should, in theory, favor innovation and competition in the digital single market, there seem to be cases in which the thresholds have the opposite effect. For example, a stand-alone start-up with annual EU revenue of €50 million from services within the scope of the DST proposal (second threshold) may be excluded from DST, provided its total worldwide revenue is below €750 million. The same start-up with the same annual EU revenue from the same services might fall within the scope of the DST if it is a group entity and the relevant group's worldwide revenue exceeds €750 million, even if the source of that revenue is nondigital. Thus, the application of DST would discriminate in favor of stand-alone service providers at the expense of integrated ones. This seems to conflict with the commission's traditional position supporting the comparability of group and stand-alone entities.²¹ Furthermore, this approach risks discouraging innovation and digitalization in the single market by large group entities that are using traditional

²¹ See, e.g., European Commission, “Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union,” O.J. C 262/1 (July 19, 2016).

business models and investing funds to promote digitalization.

Another distortion scenario can stem from the proposed application of the DST to gross revenue. The proposal would apply 3 percent DST on gross income from services within the tax's scope — that is, it would not consider the service provider's business expenses. This implies that digital service providers with different levels of profit would be treated equally for the purposes of DST: In practical terms, a start-up with important expenses and a low profit margin would be liable for the same amount of DST as a large entity with established market share and a high profit margin. Once again, this scenario demonstrates that it is questionable whether the DST proposal is an appropriate tool for inspiring entrepreneurship, investment, and digitalization in the EU.

Apart from the aforementioned risk of distortion, applying the DST to gross revenue comes into direct conflict with the established international standard of net profit taxation. At the same time, the entire digital tax package — including the DST proposal — seems to rush ahead of wider-ranging measures under discussion at an international level.²² In this respect, the risk arises that other nations and multinational bodies will perceive the commission's initiatives as unilateral action in disregard of the international tax framework and ongoing efforts to identify multilateral consent for the taxation of the digital economy. It is, in that event, not unlikely that extra-EU countries would react in a noncooperative manner to protect their own taxable bases.

By definition, the digital economy is not limited to one state or even one continent. Equally, it cannot be taxed effectively by national or continental legislators. Unilateral initiatives are destined to fail and risk delaying agreement on widely applicable measures.

IV. Combined Reading of the Two Initiatives

As demonstrated above, both the TSM and the DST proposal carry the risk to create distortions in

the digital single market. The TSM seems to leave room for internet access service providers to prioritize some traffic (positive neutrality) through the series of exceptions in a regulation theoretically devoted to the principle of equal treatment of internet traffic. Affording discretion to internet access service providers to differentiate among internet content could encourage the formation of special agreements between service providers and content providers. The result would be unequal treatment of content, depending on whether there is a relevant agreement and its specific terms. The net-neutrality principle would be absent from the digital single market — both literally and in substance. Secondary prioritization of content implies less opportunity to attract viewers or users — thus, reduced access to funding. Under these circumstances, it is the smaller content providers, including start-ups, that run the highest risk of receiving unequal treatment and being unable to compete with the giants of the internet.

The same is true in the context of the DST proposal, although that measure would not apply to the same content providers as the TSM because its scope is much more limited. Small digital service providers with low profit margins — provided they meet the thresholds for the application of DST — are likely to suffer the same tax burden as internet giants that have much higher profits. Even if the amount of the tax seems the same, the burden will fall differently on each one, once again challenging the principle of equal treatment. Since the tax burden might not apply if the provider performs the same activity through traditional means, it might be reasonable for smaller service providers to “traditionalize” their services.

These scenarios, especially played together, risk driving start-ups, entrepreneurs, investors, and innovators away from the EU. A market with fewer players will have a decreased potential to generate healthy competition and stimulate development, thwarting the main objectives of the digital single market and the single market more generally. If so, it may not be an exaggeration to suggest that — at the very heart of the digital age — the EU is flirting with slowing down the pace of digitalization and sticking to traditional ways of doing business. Digital times leave no margin

²²See, e.g., OECD, “Tax Challenges Arising From Digitalization — Interim Report 2018” (Mar. 16, 2018).

for such mistakes. Moreover, the measures could — despite the goal of ensuring open and equal access — hand control of the digital single market over to the internet giants it is trying to target. Finally, viewed through an EU consumer lens, the result would be fewer options and potentially higher prices for lower quality digital goods and services. This cannot be compatible with the fundamental principles of the single market and the digital single market — not to mention the objectives of the EU in general.

V. Conclusion

This article has examined the progress toward the completion of the EU digital single market by studying two major initiatives undertaken to this purpose: the 2015 regulation of telecommunications and the 2018 proposal for a tax on digital services. Both initiatives have inspired long and continuing debates in the EU and beyond. Given the impact that these rules can have on the evolution of the single market in the era of digitalization, it is crucial to ensure that they are consistent with the general objectives of the EU.

Both initiatives risk creating distortions in the single market. They may discourage smaller-size entrepreneurs from exploiting the digital opportunity and prejudice digitalization in the EU in general.

The vision of the single market — and the digital single market in particular — was to inspire economic development in the EU. This vision is a key pillar of the EU project: The single market's objectives cannot and must not be compromised. Policymakers must revisit both of the examined initiatives to consider the danger they pose to the EU objectives. A similar evaluation should be made for any other rules

adopted in the digital single market context that may engender similar risks.

EU leaders should consider the special features of digital business models and the needs of the modern digital reality, with a view toward encouraging innovation and entrepreneurship. The EU must exploit the digital opportunity to the fullest extent possible within the single market if it is to remain an important international force. Revisions must be made without delay: Digitalization will not wait.

This study gives rise to two final conclusions. First, the commission intended both the TSM and DST initiatives to help prevent fragmentation of the single market. Both responded to member states' unilateral legislative actions — actions that the commission feared could lead to such fragmentation. If this fear can explain the proposal of dubious EU legislation, it must be overcome to show the way to a complete digital single market.

Second, in neither case is fragmentation effectively prevented since both initiatives leave significant discretion to the member states. The TSM assigns responsibility for monitoring its application to the national regulatory authorities in each member state. The DST proposal allows member states to decide how the tax will interact with income taxes. Therefore, it is reasonable to expect diverse practices across the single market, which creates complexity and uncertainty for investors. There is no question that complex and unstable frameworks repel innovation and development.

It is high time that the EU project moves forward, leaving aside unilateralism in favor of supranational compromise and cooperation. The digital world does not tolerate overemphasized national borders. ■