



## **Digital Single Market under EU political and constitutional calling: European electronic agenda's impact on interoperability solutions**

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*ABSTRACT: Digital Single Market is the new political goal that promotes the creation of digital solutions to support the European Union's evolution. It is believed to be one means by which the EU can attract investments from new IT tools' economic agents. For that purpose, the European Union settled various interoperability measures so that both Member States and European institutions were able to set the example on how digital tools are important and one of Union's goals. In this particular setting, the European Union engaged the ISA<sup>2</sup> programme to promote interoperability solutions for Public Administrations, citizens and companies which aimed to bring more transparency to those relationships established between Public Administrations (both functional and organic European administrations) and common citizens and companies. In the medium run, interoperability solutions will provide the European Union with an e-Administration (electronic administration) which visible face will be an e-Government (electronic government) phenomenon. However, to avoid the European Union facing a degeneration based on excessive use of electronic realities, principles of proportionality, equality and non-discrimination must be used as testing principles to all measures the Digital Single Market aims to implement. In fact, a wide dissemination of IT tools in other constitutional areas – such as the definition of a democratic system and the public interest guaranteed by politics (steaming from this new equation a e-Politics) – can lead to a dangerous path, compromising society as we know it, its constitutional setting and democratic principle as they are being developed.*

*KEYWORDS: Digital Single Market – internal market – interoperability – infringement procedure – e-Administration.*

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## 1. The Digital Single Market and its political and constitutional calling

The Digital Single Market (Henceforth, DSM) is the new reality on a political level. All European and national policy makers congratulate themselves on its settlement since; “[o]nline platforms have dramatically changed the digital economy over the last two decades and bring many benefits in today’s digital society”.<sup>1</sup> In fact, “[t]hey play a prominent role in the creation of ‘digital value’ that underpins future economic growth in the EU and consequently are of major importance to the effective functioning of the digital single market”<sup>2</sup> and it can create “new opportunities for citizens’ engagement in society at large, including democratic participation, and for better public services, information exchange and cross-border cooperation”.<sup>3</sup> Therefore, online platforms and digital era also have a strong impact concerning people participation on decision processes, which could increase democratic value, and engage younger people in a more participative political structure.

DSM has a strong link with EU policy setting because the digital economy can create growth and employment across the continent.<sup>4</sup> In fact, the Commission was preoccupied to widespread the knowledge that online platforms grasp, nowadays, as of singular and unique importance to digital economy because they cover almost all economic sectors, from search engines to transportation, from movies to sports. Therefore, those areas which are still relying on usual personified platforms of actual human contact are going to cease to exist in a short period of time or, at least, they will recede to a much modest place.

This happens because online platforms have some characteristics that cannot be forgotten. In fact, “they have the ability to create and shape new markets, to challenge traditional ones, and to organise new forms of participation” since they rely “on information and communications technologies” that allow them to reach “their users [...] instantly and effortlessly”.<sup>5</sup> These had a true impact on contemporary evolution since they demand constant innovation. This state of affairs increases consumers’ choice and promotes economic competitiveness.

The European Union started betting on a Digital Single Market since the European Commission concluded that Europe only has a marginal impact on worldwide technological and online development. In fact, the Commission lets us know that “[a] number of globally competitive platforms originated in Europe” but, “on the whole, the EU currently represents only 4% of the total market capitalization of the largest online platforms” despite around 30% of global revenues concerning apps are deriving from Europe”.<sup>6</sup>

Therefore, the Commission considers it important to create the adequate environment and all framework conditions that are essential to foster the emergence of new online platforms that choose the European Union as their main base of operations.

This creates the perfect context to launch a Digital Single Market, which is being developed to encapsulate a multitude of facets of commerce such as Economy, Society,

<sup>1</sup> See Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Online Platforms and the Digital Single Market – opportunities and challenges for Europe, Brussels, 25 May 2016, COM(2016) 288 final, p. 2.

<sup>2</sup> See Communication of the Commission to the European Parliament..., p. 2.

<sup>3</sup> See Commission staff working document A digital single market strategy for Europe – analysis and evidence, Brussels, 25 May 2016, COM(2015) 192 final, p. 3.

<sup>4</sup> See Commission staff working document..., p. 4.

<sup>5</sup> See Communication of the Commission to the European Parliament..., pp. 2 and 3.

<sup>6</sup> See Communication of the Commission to the European Parliament..., p. 3.

Access & Connectivity and Research & Innovation.<sup>7</sup>

As it is possible to understand, the European Union is developing all necessary inputs to create and to fully establish a DSM under its shared competences, namely under Article 4(2) (a) TFEU, since it is developing a the matter under the full potential of the Internal Market. This only happened later because the European Union, for a long time, relied on Member States' diligences in order to establish a true competitive space for the digital era. As time went on, it became clear that the EU needed to take action in order to overcome gaps that were appearing between national legislations and actions. Therefore, three major priorities were set to this DSM 1) improving access to digital goods and services; 2) setting an environment where digital networks and services can prosper; and 3) understanding digital as a driver to growth.<sup>8</sup>

In this sense, the EU legal order was betting on data and consumers' protection and on promoting competition principles. To do so, the Commission is going to set a wide range of interoperability mechanisms "*at the latest by 2017*".<sup>9</sup> The Commission's certainty is that establishing an operative Digital Single Market is mandatory since "*there are also still many opportunities for competitive European platforms to emerge*" and this "*is perhaps the most important challenge the EU faces today in terms of securing its future competitiveness in the world*".<sup>10</sup>

As settled, the Digital Agenda for Europe (DAE) is one of the initiatives under the Europe 2020 Strategy<sup>11</sup> and "*it intends to deliver economic growth and social benefits through the completion of the digital single market*".<sup>12</sup> So it is named as one of the secondary public interests that must be pursued by the European administration – both national Public Administrations (when they apply EU law) and European institutions and, in that sense, especially National Public Administrations must feel engaged to promote this objective, otherwise if those are the ones to firstly resist innovation, the Internal Market's adaptation to new framework standards will suffer and economic prosperity in Europe might be undermined.

However, in order to promote this objective, greater use of IT tools will be indispensable, demanding "*more and faster broadband availability, a greater emphasis on research and innovation, interoperable applications, increased digital literacy and enhanced security*".<sup>13</sup>

This comes with greater importance since, as presented by Mr. Malcolm Harbour, Member of the European Parliament; "*the Digital Single Market is the Single Market, because if you now look at every single business that accesses the single market one of its strong components will be the Internet or an electronic-based offering*". In fact, in early 2016, the European Commission promoted the "*Digital4EU*" 2016 Conference, where strategic points were mentioned, especially on what concerns engaging stakeholders and economic agents on settling a DSM. Taking into account the need of public digital services, the main conclusions were

<sup>7</sup> For further information, please see <https://ec.europa.eu/digital-single-market/en> (accessed November 03, 2016).

<sup>8</sup> For further information, please see [http://ec.europa.eu/priorities/digital-single-market\\_en](http://ec.europa.eu/priorities/digital-single-market_en) (accessed November 03, 2016).

<sup>9</sup> See Communication of the Commission to the European Parliament..., p. 11.

<sup>10</sup> See Communication of the Commission to the European Parliament..., p. 15.

<sup>11</sup> See Europe 2020 Strategy presented by the European Commission: <https://ec.europa.eu/digital-single-market/en/europe-2020-strategy> (accessed December 08, 2016).

<sup>12</sup> See Re-launching the Single Market, 15<sup>th</sup> Report of Session 2010-11, (House of Lords, European Union Committee, Authority of the House of Lords, London: the stationery Office Limited: 2011), p. 25.

<sup>13</sup> See Re-launching the Single Market, 15<sup>th</sup> Report of Session 2010-11, House of Lords..., p. 25.

that a digital impact should operate first on public services and, furthermore “*Member States should implement the once only principle: once only obligation, reuse of data, making the best use of key enablers [...] and thinking cross-border services from inception*”.<sup>14</sup> This demands national authorities to create synergies in order to deal with information previously given even if it was presented to different administrative structures. In fact, DSM and interoperability mechanisms aim to develop digital databases and structures that facilitate the full effectiveness of the once only principle, even in cases when information is provided by private parties in a certain Member State and then a different Member State wants to access that same information. This will foster, once and for all, the principles of mutual recognition and of reciprocal trust between Public Administrations of different Member States, promoting even further horizontal administrative effect, where national Public Administrations fully act as European functional administrations without minding geographical barriers or frontiers. On the other hand, it will also promote a full engagement between national Public Administrations and European institutions by interconnection mechanisms that are being settled in all sorts of areas so that reciprocal trust and mutual recognition can also be deepened among national and European Administrations.

To do so, however, European institutions engage in a series of activities that are binding on Member States and, therefore, when those do not comply, juridical consequences can come from their omissions as we will see *infra*. Those juridical consequences can derive before national courts, when national Public Administrations fail to fulfill their obligations derived from EU law and that infringement produces vicious effects on individuals’ juridical sphere or, on the other hand, before the Court of Justice of the European Union (hereinafter, CJEU), when Member States (and, especially, their Public Administrations) do not comply with Union law, undermining both juridical and political aims set by the European Union. The latter gave rise to a judgment which we will be able to scrutinize in the following topics.

## 2. Interoperability solutions under Digital Single Market

For many years, experts have been saying that refusing interoperability protocols and mechanisms would only lead to more expenses and a more difficult relationship between Public Administrations and economic agents since different Public Administrations’ structures demanded, for instance, to know different procedural schemes, to be aware of different deadlines, to understand diverse organizational settings or to present all over again the same documents they had already submitted. That compromised transparency on relations set among public power, citizens and companies. Yet, even inside public power agents and authorities, the absence of interoperability facilities and mechanisms created a redundancy of costs and led those entities to be completely isolated from each other.

Interoperability mechanisms have to be thought in a way they can resist for a medium period of time since “[i]nformation systems and networking infrastructures, hence, need to be or become scalable so they can adjust to emerging or changing needs, which might be of technical nature, or, organizational and social, or both”.<sup>15</sup>

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<sup>14</sup> See “Digital4EU” 2016 – Stakeholder Forum Report: <https://ec.europa.eu/digital-single-market/en/news/digital4eu-2016-report> (accessed December 08, 2016), p. 14.

<sup>15</sup> See Yannis Charalabidis, *Interoperability in Digital Public Services and Administration: Bringing E-Government and E-Business*, Information Science Reference (New York: Hershey: 2011), xxii.

In this context, interoperability stands for “*the ability of disparate and diverse organizations to interact towards mutually beneficial and agreed common goals, involving the sharing of information and knowledge between organizations, through the business processes they support, by means of the exchange of data between their respective ICT systems*”.<sup>16</sup> It demands and implies an effective interconnection between digital components where standardization “*has an essential role to play in increasing the interoperability of new technologies within*” the Digital Single Market.<sup>17</sup> It aims to facilitate access to data and services in a protected and interoperable environment, promoting fair competition and data protection.<sup>18</sup>

But interoperability is also needed to put public services working across borders. In this context, “*digitalization of administrative formalities offers an opportunity to standardise the documents that businesses have to present to national authorities in different Member States yielding additional cost savings*”.<sup>19</sup> In fact, interoperability is a patent phenomenon in all sectors concerning this new digital era, since it relates directly to “*the amount of data that is pre-filled in Public Services’ online forms [which] varies to a great deal within the EU*” such as the following life events that are “*included in the scope of measurement: business start up; losing and finding a job, studying, regular business operations; [...] owning and driving a car; starting a small claims procedure*”.<sup>20</sup> In this matter, the Commission presented calculations and the European Union’s score was 33%, which was significantly lower than Member States such as Portugal (which had a score greater than 75%). For this matter, interoperability presupposes, simultaneously, aspects “*of intra- and inter-governmental integration and interoperability*”.<sup>21</sup>

But despite the interoperability solutions and digital approaches that have to be engaged and adopted, intra- and inter-governmental integration are phenomena that can have “*a potentially undesired tail end: Democratic societies heavily rely on the principle of dividing up powers and maintaining systems of checks and balances*”<sup>22</sup> and, for that matter, an excess of interoperability solutions amongst government decisions could lead to a weakening of the democratic component of State and so, a scenario that focuses on taking into account the principles of proportionality, equality and non-discrimination will be the best path to follow. In fact, if those principles do not act in these sensitive areas, matters that must be negotiated and scrutinized could start to be dealt in a light animus which could create a “*high risk of veering areas of democratic government into the murky waters of authoritarianism*”.<sup>23</sup>

Therefore, a path relying on those fundamental principles, combined with the principles of administrative mutual recognition and reciprocal trust is now being followed. In fact, the lack of interoperability between public entities services and private operators generates losses in transparency and creates difficulties on setting an effective mutual recognition and a reciprocal trust. In this sense, the Commission also

<sup>16</sup> See Article 2(1) of Decision (EU) 2015/2240, of the European Parliament and of the Council, 25<sup>th</sup> November 2015, establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA<sup>2</sup> programme) as a means for modernizing the public sector.

<sup>17</sup> See Commission staff working document..., p. 64.

<sup>18</sup> For further development, please see Catarina Sarmiento e Castro, *Comentário ao Artigo 8.º - Proteção de dados pessoais*, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 120-128.

<sup>19</sup> See Commission staff working document..., 65.

<sup>20</sup> See Commission staff working document..., 65.

<sup>21</sup> See Yannis Charalabidis, *Interoperability in Digital Public Services and Administration...*, xxii.

<sup>22</sup> See Yannis Charalabidis, *Interoperability in Digital Public Services and Administration...*, xxii.

<sup>23</sup> See Yannis Charalabidis, *Interoperability in Digital Public Services and Administration...*, xxii.

calls for our attention for the need “*of a horizontal action at EU level, across sectors, to prevent Member-States from opting for mutually incompatible solutions that will build new barriers to the delivery of European public services*”.<sup>24</sup> That is why “*achieving full interoperability in the connected [Digital Single Market] will [allow] public services to offer [...] cross-border services to citizens*”.<sup>25</sup> The Commission had already promoted and supported a cross-border and cross-sector interoperability which was transposed by the great majority of Member States and it was revised in 2015, under Decision (EU) No. 2015/2240, which created the ISA<sup>2</sup> programme.

The ISA<sup>2</sup> programme centres on interoperability solutions and common frameworks for European Public Administrations, business and citizens [Article 1(1)]. It aims to increment both solutions on interoperability created under the ISA programme and all those cross-border / cross-sector solutions that are going to be implemented during its period of 2016-2020. This will promote interaction amongst European Public Administrations on one hand, and between European Public administration and businesses and citizens on the other. Finally, it will also contribute to a more effective, simplified and user-friendly electronic administration (e-Administration) at all levels where public administration has its influence and activity.

Nonetheless, all these goals must be followed, taking into account social and economic aspects made indispensable to interoperability, especially SME's and microenterprises' situation since, as stated on recital 20 of this Decision; “[*t*]he commitment of Member States is essential to ensure the rapid deployment of an interoperable e-Society in the Union and the involvement of Public Administrations in encouraging the use of online procedures”. This decision is applicable from 1<sup>st</sup> January 2016 to 31<sup>st</sup> December 2020.

It has particular importance when we face e-Government. This is one of the other goals that has to be met under the Digital Single Market, namely under its goal “*digital economy and society*”, and that is intrinsically connected to interoperability concerns. In fact, some people understand e-Government to be the visible face of interoperability – e-Government develops using interoperability solutions adopted by Public Administrations. E-Government relates to those situations (more and more frequent) when government relies on IT tools to develop its competences, especially when Member States' governments started to implement online portals where created several devices to interconnect with the population. Those facilities generated and “*improved quality and performance of services*”.<sup>26</sup>

We can cope with that if we set it apart from other phenomena such as e-Politics. However, we have to be aware of the danger in order to sort out which is the line we want to draw before digitalization goes too far.

E-Government relates to citizens and companies' rightful expectations of digitally accessible public services. However, the Commission came to the conclusion that “*in many EU countries the public sector is slow in [...] achieving cross-border interoperability*”.<sup>27</sup> As we will see, e-Administration and e-Government set a new principle: the once only principle

<sup>24</sup> See Commission staff working document..., 66.

<sup>25</sup> See Commission staff working document..., 67.

<sup>26</sup> See Y.S. Wang and Y.W. Liao, *Assessing E-Government systems success: a validation of the DeLone and McLean model of information system success*, in *Government Information Quarterly*, Vol. 25, No. 4, (2008), 717-743.

<sup>27</sup> See Commission staff working document *A digital single market strategy for Europe – analysis and evidence* (Accompanying the Document), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Brussels, 6<sup>th</sup> May 2015, COM(2015) 192 final, 74.

because economic agents and citizens' expectations derived from IT tools' usage by Public Administrations and they no longer have to provide the same documents and information they previously made available. This principle "*strives to enable users to inform the public sector of different changes in their lives once*".<sup>28</sup> Therefore, the evolvement of this principle includes not only data that has severe importance to governmental matters (such as the name, the address, the employment) but also concerning all data provided on proceedings that were set in motion by individuals. So, "*[t]he registers and databases on the government side should be capable of gathering such data through easy to understand online services and deliver the data to all responsible authorities*".<sup>29</sup>

Still, if national interoperability is difficult to set, it is quite usual cross-border interoperability appearing as even more tricky. This is quite clear when we look to *Commission v. Portugal*, of 5<sup>th</sup> October 2016,<sup>30</sup> based on an infringement procedure, which lead to a declaration of infringement against Portugal. In this case, the Commission claims to be declared a Portuguese infringement, based on it not having created, under Regulation No. 1071/2009, of 21<sup>st</sup> October 2009, a national electronic database of road transports' operators allowing electronic interconnection between national databases. That infringement was declared because, by not creating that database, Portugal was raising severe difficulties on achieving interoperability solutions (recital 6) and, therefore, preventing administrative cooperation and simplification among Member States.

Regulation No. 1071/2009<sup>31</sup> establishes common rules concerning the conditions to be complied with the pursue the occupation of road transport operator. It is a legal act that minds the necessary adaption of this specific economic sector to Internal Market rules since "*[t]he completion of an internal market in road transport with fair conditions of competition requires the uniform application of common rules*" since "*[s]uch common rules will contribute to the achievement of a higher level of professional qualification for road transport operators, the rationalisation of the market and an improved quality of service, in the interests of road transport operators, their customers and the economy as a whole, together with improvements in the road safety*".<sup>32</sup>

As it is under Recitals 13 to 17, we can understand why this Regulation also has a particular impact on administrative interoperability and in increasing electronic tools' implementation, leading to a better and more transparent relationship between Public Administrations (especially functional ones) and individuals. In fact, better administrative cooperation leads to an improvement of monitoring effectiveness among enterprises operating in several Member States, as well as lesser administrative expenses. For that, electronic registration of all road transport operators throughout Europe in an interconnected way would promote that cooperation and contribute substantial costs savings. Since many Member States already have their own electronic registration databases and necessary measures were taken to implement an interconnection method, this Regulation only demands; "*[a] more systematic use of electronic registers*".<sup>33</sup> However, on Recital 16, the Union's legislator clearly states the need to promote the mentioned

<sup>28</sup> See Mitja Dečman, *The role of government portals: an evaluation of the new Slovenian government portal*, in ECEG 2016 – Proceedings of the 16<sup>th</sup> European Conference on e-Government, ed. Mitja Dečman et al., (Academic Conferences and Publishing International Limited: 2016), 46.

<sup>29</sup> See Mitja Dečman, *The role of government portals: an evaluation of the new...*, 46.

<sup>30</sup> See judgment *Commission vs. Portugal*, 5 October 2016, Case C-583/15.

<sup>31</sup> See Regulation (EC) No. 1071/2009, of the European Parliament and of the Council, 21<sup>st</sup> October 2009, establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC.

<sup>32</sup> See Regulation (EC) No. 1071/2009..., recital 1.

<sup>33</sup> See Regulation (EC) No. 1071/2009..., recital 13.

interconnection because only when that happens will it will be possible that that; “information [can be] exchanged rapidly and efficiently between Member States and [...] that road transport operators are not tempted to commit [...] serious infringements in Member States other than their Member States of establishment”.<sup>34</sup> This is one lucrative way to promote transparency on administrative intervention towards citizens and economic operators that deal with road transport operators and, furthermore, allow the observance of fundamental freedoms.

As mentioned on Article 1, this Regulation “governs admission to, and the pursuit of, the occupation of road transport operator” and it will apply to all individuals and enterprises established in the European Union that are engaged in road transport as undertakings. For that matter, “undertakings”, under this Regulation’s scope of application, “means any natural person, any legal person, whether profit-making or not, any association or group of persons without legal personality, whether profit-making or not, or any official body, whether having its own legal personality or being dependent upon an authority having such personality, engaged in the transport of passengers, or any natural or legal person engaged in the transport of freight with a commercial purpose”.<sup>35</sup>

Under Chapter IV – “Simplification and Administrative Cooperation”, Article 16 deals with “National electronic registers”. From its n.º 1, we can derive an obligation imposed on all Member States to keep a national electronic register of road transport undertakings that are authorised to engage in the occupation of road transport. Data obtained is processed under the supervision of a national competent authority and all data that is considered relevant shall become available to all competent authorities of this Member State. On the other hand, Article 16(5) states that all Member States’ registers should be interconnected and accessible throughout the Union and national contact points have been settled until 31<sup>st</sup> December 2012. As we will see when analysing judgement *Commission v Portugal* those measures were not observed in Portugal in due time, leading to the Commission’s declaration of this Member State’s infringement.

This Regulation, as well as other European legal acts and soft-law acts the Union has been adopting show how the transports’ policy has been evolving, as it is important to “consider problems in different contexts, in wider ranges and in more localized ranges than the national scope”.<sup>36</sup> In this context, there was a particular worry to settle as soon as possible this interoperability solution since one of road transport operators major fault was trying to escape fulfilling obligations national entities imposed on them because they had their registered office in other Member State, which clearly undermined Internal Market functioning.

#### ***a. Interoperability solutions: Commission vs. Portugal (October 2016)***

The judgment *Commission v Portugal* is based on an infringement procedure that the Commission presented before the CJEU, concerning the Portuguese’s lack of compliance with EU law. Portugal, pursuant to Regulation No. 1071/2009, of 21<sup>st</sup> October 2009, had the obligation to create a national electronic database of road transport operators allowing electronic interconnection between national databases of

<sup>34</sup> See Regulation (EC) No. 1071/2009..., recital 16.

<sup>35</sup> See Regulation (EC) No. 1071/2009..., Article 2(4).

<sup>36</sup> See Manuel Carlos Lopes Porto, *Do reforço do princípio da subsidiariedade à necessidade crescente de dar resposta a desafios globais e locais*, in Boletim de Ciências Económicas – Homenagem ao Prof. Doutor António José Avelãs Nunes, Volume LVII, Tomo III (Coimbra: Universidade de Coimbra, Faculdade de Direito, 2014), 2697 (free translation).

all Member States. The Commission asked the CJEU to declare that the Portuguese infringement on those grounds.

On 6<sup>th</sup> March 2013, the Commission stressed the need for the Portuguese Government to make sure national electronic registries' interconnection in order to guarantee access to information by all Member States of the European Union, mentioning Article 16(5) of the Regulation No. 1071/2009. Using the same electronic platform – EU Pilot – Portugal replied to the informal notice given by the Commission, stating that it was doing all it could to ensure its national electronic registrations' interconnection with the European Registration. It did this through the Portuguese Mobility and Transportations' Institute (IMTT – Instituto da Mobilidade e dos Transportes) – Recital 5. Despite an internal restructuring of IMTT causing a delay to the Portuguese initiative, it was forecast to be operational by the end of 2013.

On 21<sup>st</sup> February 2014, the Commission issued a formal notice/notification letter, in which it declared that Portugal did not comply with the deadline stated by Article 16(5) of the Regulation to promote the interconnection. Portugal replied by letter on 5<sup>th</sup> May 2014, informing the Commission that the interconnection process was in a final implementation phase and the connection would be settled in September 2014. The delay was due to several informatic projects running contemporaneously.<sup>37</sup> Once the 2 month deadline elapsed the Commission, on 27<sup>th</sup> November 2014, issued a new formal notice/notification letter – also concerning new information related to the need of settling compliance with Article 16(1) of the Regulation.

On 24<sup>th</sup> April 2015, Portugal gave notice to the Commission about internal developments and stated the previously transmitted timetable had suffered several vicissitudes concerning the Financial and Economic Assistance Plan (implemented in Portugal) that demanded structural changes to its Public Administration. IMTT's organizational instability and its resources were insufficient to execute informatic developments.<sup>38</sup> In the same letter, Portugal also mentioned that the project's first stage was only going to be completed in September 2015 but, instead, a platform would be created in advance to link the IMTT to the European Union. The second stage of the project would only be ready in June 2016.

On 30<sup>th</sup> April 2015, the Commission issued a reasoned opinion where it recognised Portugal was not able to implement a national electronic register and, therefore, was not capable of promoting an interconnection of national electronic registrations, thereby infringing by omission Article 16(1)(5) of the Regulation. It gave Portugal two months to comply with that reasoned opinion and, therefore, to adopt necessary measures to overcome that infringement.

At the end of that deadline, Portugal did not comply with the reasoned opinion and the European Commission started the litigation phase before the CJEU on 12<sup>th</sup> November 2015.

Using a letter in response, Portugal replied the reasoned opinion on January 2016, where it mentioned a Protocol had been signed among all entities involved in order to regulate information exchange between the coordinator authority and other intervening entities.<sup>39</sup>

Before the CJEU, Portugal did not state that when the reasoned opinion was issued, it was not complying with Union law, especially those obligations derived from

<sup>37</sup> See judgment *Commission vs. Portugal...*, recital 7.

<sup>38</sup> See judgment *Commission vs. Portugal...*, recital 9.

<sup>39</sup> See judgment *Commission vs. Portugal...*, recital 14.

Article 16(1)(5). However, this Member State considered a set of internal and external events that prevented them from complying with their EU law obligations.

Portugal pleads that those delays came from “*diverse conjuncture factors determined by the Financial Assistance Programme*”.<sup>40</sup> Under this setting, Portugal pleaded that the national authority responsible for coordinating the process had to deal with strong financial constraints and several restructuring schemes that impacted on its human resources’ allocation.

Portugal added that its national authorities were still committed to fulfilling their European obligations. In December 2015, They concluded their national electronic registration application and a communications’ platform, meaning it was now able to start the necessary acceptance tests with the European Union’s platform. Portugal also informed the CJEU that a Protocol was settled among IMIT and other national entities concerning offenses committed by road operators in the Portuguese territory. Under this Protocol, necessary measures should be concluded in the first semester of 2016.

As derived from the Portuguese formal reply to the reasoned opinion, Portuguese entities that had to create national synergies to comply with EU law were: the National Road-Safety Authority (Autoridade Nacional da Segurança Rodoviária – ANSR), Labour Conditions’ Authority (Autoridade para as Condições do Trabalho – ACT) and General Directorate of Justice Administration (Direção-Geral da Administração da Justiça - DGAJ). However, those national entities were not able to settle an agreement and, so, those entities’ electronic registration databases continued to exist in as separate entities.

As mentioned in Recital 23, the infringement the Commission held against Portugal was proved, and cannot be set aside by the Portuguese reasoning as “*a Member State cannot evoke dispositions, practices nor situations of internal juridical order to justify obligations’ in observance that were derived from Union Law*”.<sup>41</sup> Therefore, when Portugal did not create a national electronic registry for road transport operators, upholding an interconnection with other national electronic registration of other Member States, Portugal did not comply with Union Law.

The infringement procedure is a European Union procedural mechanism provided for in Articles 258 to 260 TFEU. The Commission has *locus standi* to start an infringement procedure and it is responsible for leading a pre-litigation phase (ie. administrative phase) to understand if a Member State is, in fact, not complying with Union law. This pre-litigation phase ends when the Commission notifies its reasoned opinion and where it sets a peremptory deadline to the infringing Member State so it can comply. After that period elapses, the Commission can start the litigation phase before the CJEU.<sup>42</sup>

In fact, an administrative practice (or the lack of it) can be submitted to the undetermined concept of “*failed to fulfil*” under Article 260(1) TFEU. To be under the CJEU’s scrutiny, this failure to fulfil of the national administrative entities has to

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<sup>40</sup> See judgment *Commission vs. Portugal...*, recital 17.

<sup>41</sup> See judgment *Commission vs. Portugal...*, recital 24.

<sup>42</sup> See, for further developments, Joana Covelo de Abreu, Infringement procedure and the CJ as an EU law’s assurer: Member States’ infringements concerning failure to transpose directives and the principle of an effective judicial protection, in *Towards a Universal Justice? Putting International courts and jurisdictions into perspective*, ed. Dário Moura Vicente, (Leiden: Brill, 2015), 468-475 and Joana Covelo de Abreu, *Inconstitucionalidade por omissão e ação por incumprimento: a inércia do legislador e as suas consequências* (São Paulo: Juruá, 2012).

be consistent and of a general matter.<sup>43</sup> In fact, as said early on by the CJEU: “*an administrative practice to constitute a measure prohibited [...] must show a certain degree of consistency and generality*”.<sup>44</sup> Furthermore, “*that generality must be assessed differently according to...the market concerned*”.<sup>45</sup> So, the idea underlying a failure to fulfil based on an administrative practice (or lack of it) stems from the fact that national administrative authorities are not complying with EU law and, therefore, with the obligations that a Union’s normative act sets for that Member State. In this particular case, Regulation No. 1071/2009 says that all Member States should create a national electronic register and they should interconnect it with the European Union. However, for that to happen, Portugal had to congregate the commitment of three of its national administrative authorities but they were not able to reach an agreement. That void of agreement led to maintaining their individual electronic registries and, therefore, it determined Portugal’s lack of compliance with European Union law.

In this context, there are two major juridical developments enshrined in the judgement under analysis, especially in Recitals 20 and 24.

One of the most decisive matters concerning infringement procedures that are presented before the CJEU is to determine, until which moment, infringement has to continue in order to be declared by the Court. As settled in this Court’s jurisprudence, the existence of an infringement will be assessed, taking into consideration the situation a Member State had at the end of the deadline given in the reasoned opinion issued by the European Commission as they only proceed to the litigation phase before the Court when that deadline has passed. All changes set in motion or that have happened after that moment cannot be taken into consideration in the Court’s decision. In fact, using the CJEU’s own wording: “[i]t must be added that, in any event, the question whether a Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent change”.<sup>46</sup> Therefore, even when Member States, after the deadline given in the reasoned opinion, comply with Union law, their compliance will not change the fact that they breached EU law. The Portuguese infringement in the present case – which persisted throughout the time the case was before the CJEU – is a clear case of the necessity to declare the infringement. According to settled jurisprudence,<sup>47</sup> “*adopted measures by a Member State to satisfy its obligations after the infringement action was presented cannot be taken into consideration by the Court of Justice*”.<sup>48</sup>

On the other hand, Recital 24 states the CJEU cannot take into consideration Portuguese reasoning when it calls upon internal difficulties to proceed its obligations derived from Regulation No. 1071/2009 – in fact, as its settled jurisprudence, the CJEU recalls that “*a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law*”.<sup>49</sup> Even when the CJEU does not develop the idea, in a scenario where national entities, as those evolved in the case, cannot settle an understanding on how to interconnect their registries, it is quite obvious the Member State and its administrative structure will have to face a non-

<sup>43</sup> See Koen Lanaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law*, (Oxford: Oxford University Press, 2014), 165.

<sup>44</sup> See judgment *Commission vs. France*, May 5 1985, 21/84, recital 13.

<sup>45</sup> See judgment *Commission vs. France...*, recital 13.

<sup>46</sup> See judgment *Commission vs. Belgium*, February 5 2015, Case C-317/14, recital 34.

<sup>47</sup> See, for instance, judgment *Commission vs. Italy*, July 19 2012, Case C-565/10, recital 22.

<sup>48</sup> See João Mota de Campos et al., *O direito processual da União Europeia – Contencioso Comunitário*, 2.<sup>a</sup> edição revista e aumentada (Lisboa: Fundação Calouste Gulbenkian, 2014), 533.

<sup>49</sup> See, for instance, judgment *Commission vs. Greece*, December 2 2014, Case C-378/13, recital 29.

compliance procedure and, therefore, an infringement declaration is inevitable. As the CJEU lets us know at Recital 22, National Entities that had to intervene in order to set National Electronic Registers were not able, until the deadline set in the reasoned opinion, to come to an agreement on how to connect or to fuse their individual registries, which meant everything was kept the same. In fact, Member States usually participate in the preliminary drafts and discussions concerning European Union acts' adoption and, for that matter, "they must be [...] in a condition to elaborate on legislative dispositions or other needed to its execution within the settled deadline",<sup>50</sup> as the CJEU stated in *Commission vs. Belgium*.<sup>51</sup> In this matter, it means Portugal knew, for a long time, interoperability solutions would be necessary, not only to connect national registries, but also to interconnect them in a European scale across the EU. As we can derive from Portuguese reasoning – or its lack! – Portugal tried to indefinitely postpone the creation of those digital connections and it led the Commission to believe that the arrangements were delayed to facilitate their compliance with EU law. But when facing the CJEU, Portugal does not argue that it was not able to comply. As we can see, Portugal would have been better prepared if, under the administrative phase of the infringement procedure, it had used the Commission's informal approaches to sensitize its administrative entities in order to make them sign the necessary commitment. Perhaps, by doing that, maybe Portugal would have been able to prevent its infringement declaration.

When these kind of difficulties come to light in applying EU law, an infringement declaration can come as the "tie breaker" in order to make the Member State surpass its entities disagreements, since a second infringement procedure can signify a lump sum or a penalty payment to be applicable to the same Member State. As we can derive from this judgment, an infringement declaration was perhaps the best event Portugal could experience since it has to comply with European Union law on those matters and, with the infringement declaration, this Member State will feel the need to, more promptly, overcome national entities' rivalries and comply with those obligations steaming from Regulation No. 1071/2009.

On the other hand, as we concluded before, Member States are still struggling on how to implement interoperability solutions – only judgments like the one we analysed can have a strong impact on other Member States by creating the true feeling that the demands of a DSM are a reality that has already arrived and, therefore, must be fulfilled. In fact, based on Commission's calculations, the European Union must evolve even faster by using new IT tools to promote economic growth and to become more attractive to investors and economic agents. Furthermore, a development of administrative interoperability will promote a better functioning of the Internal Market and it will simplify requirements needed to exercise fundamental freedoms. In fact, only in a place where the "once only" principle is being settled is it possible to freely circulate and, therefore, trust that an administrative entity retains all necessary data and information concerning the activity that the economic agent is aiming to develop outside his home Member State.

That infringement was declared because by not creating that database, Portugal was causing severe difficulties in achieving interoperability solutions (Recital 6) and, therefore, it was preventing administrative cooperation and simplification. Although recent, this judgment can have the necessary strength to promote, in the future, a faster implementation of interoperability solutions and to enhance the true political value the

<sup>50</sup> See João Mota de Campos et al., *O direito processual da União Europeia...*, 532.

<sup>51</sup> See, among others, judgment *Commission vs. Belgium*, November 23 2000, Case C-319/99, recital 10.

interoperability system has as one of the second public interests associated with the political and constitutional agenda of the DSM.

### 3. Digital single market and its implications: settlement of an e-Administration and its consequences on democratic structure – avoiding e-Politics

DSM will have a strong impact on the way Public Administrations have to behave in a digital era as an e-Administration is being settled. In the last few years we have faced; “*the birth and proliferation of a new socio-political space – the Internet – and, consequently, more access to information*” and “[...] *the emergence of new / other social movements*”.<sup>52</sup>

In fact, the current democratic system that is settled today corresponds to a participative democracy that was, more or less, established since the liberal revolutions. Since then, we now continue to believe that the power must remain with the people and, therefore, electing representatives may not be the only choice possible. But this merely gains a harmful meaning because people also distrust political parties since “*they misrepresent their political-constitutional functions, maxime the public interest defence*”.<sup>53</sup>

This gains particular importance in this matter since “[t]o the traditional idea of limited government and of legitimacy on decision-making processes it must be added, among others, changes provoked by globalization, by multiculturalism, by human rights’ protection, by the opening, by competition”.<sup>54</sup> In this matter, constitutional democracy is demanding a new scene based on a “*civic-political constitution*” that will be relying on electronic mechanisms and IT tools. However, to enlighten the discussion concerning e-Politics in direct relation to interoperability and e-Administration, principles of proportionality, equality and non-discrimination must be set in motion because only with their full effectiveness can we rely on electronic solutions and IT tools.

Any instrument that aims to bring to the political discussion the role Internet and electronic tools have on our daily basis will always have an impact on how we devise any constitutional space – in fact, since Internet became a new socio-political space,<sup>55</sup> it created the idea of a more open, plural and transnational space. This brings up severe problems to democracy and its traditional setting but I will not discuss them here. On the other hand, it has potentiated that transnational spaces, as the EU, could implement actions aiming at bringing their citizens and the economic agents to the national entities and the European institutions. Moreover, the Internet has supported the enhancement of new political arrangements and, due to it, activists were capable of putting into practise new movements leading to *ad hoc* manifestations in several locations, i. e., spontaneous street demonstrations potentiated by the social communication organs and the phenomena of e-mailing.<sup>56</sup>

In this scenario, we do not believe e-Politics is the way out (or even e-Democracy for that matter) – it helps to create a better-informed society and it acts as an

<sup>52</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia e e-participação*, in Boletim da Faculdade de Direito, Universidade de Coimbra, Volume XC, Tomo I, Coimbra (2014), 461 (free translation).

<sup>53</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia...*, p. 462 (free translation).

<sup>54</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia...*, p. 462 (free translation).

<sup>55</sup> See, for further information, Karen Mccullagh, *E-democracy: potential for political revolution?*, in International Journal of Law and Information Technology, Volume 11, Issue 2, September (2003), 149-161.

<sup>56</sup> Cfr. Paula Veiga, *Democracia em voga e e-política, e-democracia...*, 464

“*instrument of interests*” cohesion’ but, it presupposes some “*risks and inefficiencies*”.<sup>57</sup> The most important because directly impacting on the democratic principle is the lack of control since the system of checks and balances, even if revised (as it was and still is in the European Union), always has to subsist since the regulator also needs to be regulated. In fact, there are already some external manifestations of the negative impact electronic tools have on people’s lives. As they are more engaged in public life – even if having a misleading opinion from Social Media –, they demand more ways of democratic participation. That is why constitutional means of democratic participation such as referenda – that were forgotten for ages – are now being used again. In fact, as proved on the referendum that determined the vote leave to the United Kingdom leaving the European Union (the so-called “*Brexit*”),<sup>58</sup> participative demands made especially by using Internet tools and Social Media, closely potentiated by stakeholders that represent a particular interest in the process, in order to rearrange the political and democratic setting, can be a strong counter-phenomenon against the democratic principle’s enhancement: in that particular scenario, we are not able to understand if the results comply with the true majority will. As it has been said, “[i]f there are two words that characterize the sentiments of many British-based academics anticipating Brexit, they would be ‘*uncertainty*’ and ‘*sadness*’”.<sup>59</sup> Furthermore, this referendum had a great adhesion – the greatest since the 1992 elections. However, that majority will seemed to be a fallacy: in the referendum’s aftermath, the second most asked question on the United Kingdom Google’s search engine was “*What is the European Union?*” That information, presented by “*Google*” on its “*Twitter*” account, seems to reveal that many of those that voted were unable to understand what they were expressing through their vote and, more impressive, what is the European phenomenon where they were integrated.

Furthermore, this is a mere episode of a ‘*daily plebiscite*’<sup>60</sup> that e-Politics can create: the system can be determined to become “*circular and, consequently, closed if public decisions were adopted just after a free deliberation among well informed citizens*”.<sup>61</sup> The problem is understanding what is meant by a ‘*well informed citizen*’ – as we have the opportunity to state, that citizens that resort to and rely on IT tools and digital information are “*well informed*” since they can be more easily instrumentalised by Social Media to adhere to a position they would not support if they had all the necessary data. On the other hand, digital participation creates a feeling of responsibility absence and we all agree we do not want to rely on those that hide behind a computer screen or a fake profile ID.

Here is where the fear of e-Politics resides: using electronic tools to divert public opinion on matters where information can be manipulated more easily (since different contexts can be updated by the second on any Internet platform) can be a motif to adopt electronic solutions with caution. It is a known need to settle DSM

<sup>57</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia...*, p. 462 (free translation).

<sup>58</sup> For further information concerning withdrawing ability stated under Article 50.<sup>o</sup> of the TEU, see Alessandra Silveira, “Out is out” (including in relation to the Mediterranean diet...). On the Article 50 of the European Union Treaty in the light of the federative principle of European loyalty, in Official Blog of UNIO, Comments, July 7 2016, <https://officialblogofunio.com/2016/07/07/out-is-out-including-in-relation-to-the-mediterranean-diet-on-the-article-50-of-the-european-union-treaty-in-the-light-of-the-federative-principle-of-european-loyalty/> (access December 9 2016).

<sup>59</sup> See Elaine Dewhurst and Dimitrios Doukas, A perspective on Brexit, in Official Blog of UNIO, Essays, August 4 2016, <https://officialblogofunio.com/2016/08/04/a-perspective-on-brexit/> (access December 9 2016).

<sup>60</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia...*, 468 (free translation).

<sup>61</sup> See Paul Veiga, *Democracia em voga e e-política, e-democracia...*, 469 (free translation).

demands – as the latest political calling – but it is vital to draw the line until a decision is made on which electronic devices and digital mechanisms will be adopted without compromising citizens' rights and expectations. We think the line must be drawn by using proportionality, equality and non-discrimination principles – by using those, we rapidly understand that e-Administration and e-Government are as far DSM can impact on constitutional matters since the Internet and digital tools cannot have a isolated role on redefining democratic values or political settings. They are important to act as a faster means to react against political decisions and as information vehicles but they cannot be the only factor to set a completely new background or paradigm on democratic participation and political representation. They must not be forgotten but they cannot be seen as the one and only requirement to take into account.

Despite being a new way to look to the needed proximity that the State must have to the population in a more transparent way, we believe that the path does not follow along this e-Politics phenomenon since intervention in the Internet context allows several stakeholders, interested parties and informatic terrorists to act without a face and, in last resort, politics and democracy always needed and still need a face to cope with it. In public affairs, we all need a face and not just a “*username*”.

We believe, however, that going digital may enshrine the solution. However, it relies on DSM primal objectives: setting concrete solutions like e-Administration and e-Government. So that e-Administration works properly, interoperability must be the first step to promote a data interconnection and the settlement of common databases and transnational registries which will exponentiate a deepening of Public Administrations' reciprocal trust and their decisions and acts' mutual recognition in the European Union context.

To do so, Member States must develop the conscience that they must implement all necessary measures to promote interoperability under the ISA<sup>2</sup> programme so that electronic registrations, IT tools and Social Media can work to benefit the complete implementation of a DSM. Otherwise, we will have to deal with continuous means of weakening public power by new ways of demanding democratic participation when, in fact, just a portion of the population is aware of those demands made online and just apparently enlarged by the reflex-effect any position made visible online can have.

The path to follow must consider the principles of proportionality (especially because it already has a particular feature that acts within the Public Administrations' scope and equality and non-discrimination as those that will define strictly, the wider range interoperability solutions that must be enforced without leading to phenomenon such as e-Politics.

We believe principles will be the best way to rest difficulties, especially in a legal order such as the European Union's, where general principles emerged from the CJEU's action. In these matters – on a European Union Administrative Law – principles, such as proportionality, were derived jurisprudentially, taking into consideration the “*articulation among the European Union legal order and the Member States legal orders, with consequences in the application of European Union law by Member States' administrative entities*”.<sup>62</sup> In fact, the reality that stems from the Treaties does not set a complete arrangement of general principles and administratively derived acts are too segmented in order to create a linear path – which means the CJEU's jurisprudence acts as the natural “*fount*”/ *source of general*

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<sup>62</sup> See Sophie Perez Fernandes, Administração Pública, in *Direito da União Europeia – Elementos de direito e políticas da União*, ed. Alessandra Silveira, Mariana Canotilho and Pedro Froufe, (Coimbra: Almedina, 2016), 119 (free translation).

*principles of administrative law.*<sup>63</sup>

Proportionality is partially enshrined in Article 5(4) TEU, where it states; “[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. In fact, this Article only mentions one of this principle’s dimensions – the necessity – when we know the CJEU also looks to the adequacy and proportionality (in a strict sense)<sup>64</sup> to fully test if a reality is undermining the European standard of proportionality. On the other hand, it only mentions European institutions are bound to its observance when we also know that National Public Administrations – when applying Union law – are also bound to its observance. In fact, the CJEU clearly stated, since quite early, under the topic “*infringement of the principle of proportionality*” that: “[t]he Court has consistently held that the principle of proportionality is one of the general principles of [European Union] law” and that its influence should be tested to see if “*measures are appropriate and necessary for meeting the objectives legitimately pursued*”.<sup>65</sup>

Therefore, any measure adopted in the DSM aiming to set interoperability solutions must be tested under the principle of proportionality to see if that solution will only have an impact on promoting an e-Administration and an e-Government or, on the other hand, will have adverse effects, also creating grounding for avoidable phenomenon such as e-Politics. Therefore, solutions adopted under this interoperability concept must be appropriate, necessary, and proportional:

- Appropriate: it must be proper to assure the expected outcome, under the Union law;
- Necessary: before several proper and adequate solutions, it must be the one less restrictive/prejudicial;
- Proportional (in a strict sense): minding both beneficial and prejudicial outcomes, benefits have to be greater than the losses, which must be merely residual. In fact, these losses cannot be disproportionate to the beneficial effects the solution can create.

Thus, both principles of equality and non-discrimination are of a particular and complementary importance since, in a transnational space, interconnective digital solutions cannot have an adverse effect of promoting unfavorable treatment (both treating differently which is equal and equally who is equal).

The equality principle stems from the TEU’s Preamble as a universal value.<sup>66</sup> Furthermore, it is enshrined in Article 2 TEU and In Chapter III of the CFREU.

When presented together with non-discrimination, both equality and non-discrimination appear as the European Union’s main objectives [Article 3(3) TEU]. However, they also appear in separated terms when, in the CFREU, we find ‘*Equality*’ setting a complete Chapter (the third one) but also addressed in Article 20. and non-discrimination receiving partial developments in Article 21.

Under European Union law, equality and non-discrimination complement each other and the CJEU has been clear about it when stated that the proscription of discrimination is; “*a specific expression of general principle of equal treatment, which requires that*

<sup>63</sup> For further information, see Mario Chiti, *Forms of European Administrative Action*, in Law and Contemporary problems, Vol. 68 (2004), 37-60.

<sup>64</sup> See judgment Schröder, July 11 1989, Case C-265/87.

<sup>65</sup> See judgment Schröder..., recital 20 and 21.

<sup>66</sup> See TEU, recital 2.

*comparable situations are not be treated differently and different situations are not be treated alike unless such treatment is objectively justified*.<sup>67</sup>

In our interest, these two principles – closely connected and corresponding “*to a same juridical reality*”, as “*two faces of the same principle*”<sup>68</sup> – will act within the proportionality in a strict sense to let us understand which are the benefits and the losses so that we can confirm, on a case-by-case assessment, if interoperability solutions are going to become disproportionate to the ends they want to implement.

In fact, a significant part of the European population is not yet able to deal with informatic tools and digital components. Therefore, when interoperability systems start to rely also on citizens’ skills to deal with Public Administrations (both national and European, even if both of them are acting within the European Union Law scope of application), it can lead to transparency losses since that portion of the population will not be able to be heard and to interact with public powers. Therefore, after creating interoperability solutions as those mentioned and analyzed having in mind the CJEU’s infringement decision in *Commission v Portugal*, the European Union must invest in informatics literacy for all – bearing in mind this literacy is already implemented on all levels of Public Administration and its agents – and only then will be possible to settle exclusive IT tools in citizens’ relations with the Public Power.

Before this happens, a long path must be followed to prevent e-technocracy taking a leading role and leaving us dealing with politicians without a face, instead only upholding a “*nickname*” or “*username*”.

#### 4. Closing remarks

DSM is the new demand on political level, congregating strong impact on the constitutional paradigm as it deals with topics where political scrutiny can be negatively impacted.

One of its renewed faces is interoperability between administrative structures which demand, not only European organic administration, but also National Administrations (especially when they are applying Union law) to rearrange their setting by using more and more electronic proceedings and IT tools in complete interconnection – both horizontally and connected to central electronic infrastructures with European institutions.

From this electronic operative approach derives new phenomenon such as e-Administration and e-Government, where more transparency can be achieved because economic agents can more easily access public information, spending less time and money with their relationship with Public Administration. Plus, this enforcement of mutual recognition and reciprocal trust among National Administrations and with the European institutions aims to implement, in the long run, a new and profound approach to the ‘*once only*’ principle. The ‘*once only*’ principle demands that if an economic operator/individual provides, in an administrative proceeding, a document, it does not have to provide it again, at least to the same administrative entity. In the future, this principle will have brighter amplitude to prevent individuals and companies from having to provide documents already presented in previous administrative proceedings before

<sup>67</sup> See judgment Karlsson, 13 April 2000, Case C-292/97, recital 39.

<sup>68</sup> See Ricardo Leite Pinto, Comentário ao artigo 20.º - Igualdade perante a lei, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 257.

a public entity when they want to start a new proceeding before another Member State or European Institution.

However, phenomena as e-Government and e-Administration can signify, as a hidden face, a risk: they can propitiate new phenomenon, such as e-Politics, where some proceedings that, once subjected to wide enquiry, can now have less democratic scrutiny unless principles of proportionality, equality and non-discrimination test how far digital solutions can be enforced and implemented in those matters.

On the other hand, judgments as *Commission vs. Portugal* (October 2016) reveal how implementing interoperability solutions can be difficult since, sometimes, Member States' public entities are not able to commit themselves which makes it even harder to establish European interconnection. That notwithstanding, we believe these infringement decisions are needed as any 'preventive treatment' in order to settle once and for all, in Member States and their national entities, that digital era is a reality and they must cope with it.

In fact, since infringement procedures lead, in these matters, to a need to comply, Member States can overcome internal difficulties by just presenting the CJEU's decision. Sometimes, to prevail over institutional impasses, a judicial decision's presence (especially if it has a transnational character) is the best inaudible solution.

Therefore, we conclude that digital solutions derived from political agenda set by the European Single Market need to be, as fast as possible, implemented. However, we also believe digital solutions must meet a limit: otherwise, they will increase an information gap between those that are aware of the digital era and its tools (even if not participating) and those that, even being participative and social, democratic, and politically aware, will be prevented from continuing to participate because will face phenomenon such as e-Politics.