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**Mapping Continuity and Change of Goals,  
Protagonists, and Instruments of EU Digital Single  
Market Governance Over Three Decades**

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## Abstract

Against the background of the increasing importance of digital services, the European Commission is creating a Digital Single Market (DSM) to make Europe fit for the digital age. However, challenges related to the platform-dominated e-commerce sector, such as distorted competition and endangered fundamental rights, suggest that its traditional market-liberal governance is not suitable for the digital economy. Based on a historical-institutional analysis of selected Commission policies and legislation on the DSM since the mid-1990s, I illustrate that key DSM governance elements continue the market-liberal principles established over 25 years ago and implemented in the Lisbon period (2000-2010). The DSM period (2010-2020) added some more interventionist layers in the area of data protection. More recently, to address the challenges of “Big Tech” in the early 2020s, the EU is building on these layers and converts its governance approach towards more public interventionist elements. This ultimately empowers the European Commission to supervise very large online platforms.

### **Key words**

Digital Single Market; Digital Services Act; Digital Markets Act; General Data Protection Regulation

*General note: Opinions expressed in this paper are those of the author(s) and not necessarily those of the EIF.*

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## **1. Introduction**

Just over twenty-five years ago, before the start of the new millennium, European Union (EU) leaders put forward the idea that the single market should also encourage and allow to take advantage of the opportunities offered by the advent of an “information society”. One strategy of EU leaders to promote the development of an information society was to integrate and liberalise a European market for telecommunications, digital services, and digital content. In many respects, the strategy to promote digital innovations and solutions was a continuation of a more general market-liberal approach to European integration like it was outlined in the European Council’s Bangemann Report on the Information Society of 1994, which was calling for a “market-led passage to the new age” (European Council, 1994, p. 13). Around a decade and a half later, events such as the 2007/08 financial crisis have exposed many of the problems of an over-liberalised and under-regulated private sector. In a similar vein, more recently, the ever-growing importance of large technology companies such as Google, Amazon, Facebook, Apple, and Microsoft became an issue of public concern. Frequently referred to as “surveillance” or “platform” capitalists, “Big Tech” is often portrayed as posing challenges not only to competitive markets but to liberal democracies in general (Srnicsek, 2017; Zuboff, 2019). Lawmakers in the EU are trying to address problems associated with the digital economy and Big Tech. Important examples are the General Data Protection Regulation (GDPR) adopted in 2016 and the Digital Services Package adopted in April 2022, which consists of the Digital Services Act (DSA) and the Digital Markets Act (DMA), supposed to form “a constitution of the Internet” (Geese, 2022).

At the same time, and enforced through the Covid pandemic and the war in Ukraine, calls for more “digital sovereignty” are manifold (Floridi, 2020; Pohle & Thiel, 2020) and point to a departure from the established market-liberal approach to digital policy. The Commission argues that there is a need to rebalance the power of private companies and European citizens

in line with European values (Commission 2022b). Internal Market Commissioner Thierry Breton (2020) demands *inter alia* to reduce economic and industrial dependencies and calls for a concerted public effort to boost Europe's capabilities in key digital technologies. Prominent Facebook whistleblower Frances Haugen has been invited to testify in the European Parliament (EP) on the negative impact of Big Tech companies' products on users on 8 November 2021, the same date as the scheduled Internal Market Committee vote on the DSA. Haugen described the power of Big Tech as one of the most urgent threats to the citizens of the EU, argued that states must step in and make new laws, and demanded a strong law with firm enforcement (Haugen, 2021). What seems to be required is a re-direction of a governance approach that was traditionally interpreted by many observers as having a market- or “neoliberal” bias (e.g. Bieling, Jäger, & Ryner, 2016; Ryner, 2015; V. A. Schmidt & Thatcher, 2014).

From a broader and historical perspective, focussing on key Commission strategies and legislation to digital markets, the central question of this working paper is whether the EU has made a change in DSM governance from its established liberal path and through what processes this change has taken place. The paper contributes empirically by differentiating periods with varying distinct patterns of DSM governance in the EU. In analytical terms, the historical institutionalist analysis of EU Commission strategies and important legislation in the context of the DSM illustrates important dynamics that result from EU politics, path dependencies, and incremental institutional change. I will show that the EU gradually changes its DSM governance from a more market liberal to a more public interventionist approach. This change addresses challenges that are associated with the digital economy. It builds on the Commission's traditional dual approach, which has always combined attempts to build consumer confidence, for example in the area of data protection, with the use of single market articles that allowed European laws to be aligned with a common EU approach to the DSM.

In particular, my analysis reveals the continuity of market-liberal principles in the Lisbon period (2000-2010), which are taken over from neoliberal ideas of earlier times like it is expressed in the Bangemann report of 1994. During these earlier periods, digital policy was mostly the prerogative of national governments. For example, the market for telecommunications was fragmented with a few public-private companies holding national monopolies. The Commission addressed this issue through the application of Article 90 (of the Treaty Establishing the European Community) competition directives (that do not require Council approval). The Lisbon period, starting in the 2000s, continued on this path by relying on a dual strategy of promoting competition in the DSM through privatisation and supranational approximation while keeping home-country control. However, in the DSM period (2010-2020), the Commission addressed the problem of fragmentation of the internal market often in a more supranational approach, using Article 114 TFEU (Treaty on the Functioning of the European Union) to harmonise EU laws through supranational regulations.

Upon closer inspection, one can notice a gradual change of the established market-liberal approach, in which more public elements are layered particularly in the context of the GDPR. Establishing strong EU data protection was presented to complement the EU's DSM by creating more trust in the digital. The layering of more public elements in this context was possible because data protection was already established as an EU fundamental right. Subsequently, against the backdrop of ever-increasing challenges of Big Tech and learning from and building upon the experience of the GDPR which suffers in many respects from national bottlenecks (see below), the EU converged its approach towards stronger supranational public intervention. This ultimately empowered the European Commission in the area of EU digital policy, inter alia through the EU's digital services package adopted in early 2022. In particular, the Commission was given powers to directly monitor and sanction very large online platforms,

which is a significant step and the first time the Commission has been given these powers beyond the area of competition policy.

To illustrate a move towards stronger public interventionist elements in the governance of the DSM, the paper is structured as follows. The next section (2) presents the core features of the DSM and my applied methodological approach. The subsequent section (3) presents my empirical analysis of the DSM analytically separated into three subsections that correspond with official Commission strategies, namely: the period of the Lisbon strategy (2000-2010), the period of the digital single market strategies (2010-2020), and the period geared to make the EU fit for the digital age (since 2020). The last section (4) discusses my findings and conclusions.

## **2. Analysing Digital Single Market Governance**

The governance of the single market comprises a broad set of mechanisms, rules, and practices to design, implement, apply and enforce the EU's regulatory framework. According to the Commission, the digital single market shall allow the free movement of goods, persons, services, and capital so that individuals and businesses can seamlessly access and exercise online activities (European Commission, 2015, p. 3). However, while digital platforms allow cross-border sales globally, the European digital economy remained underdeveloped most likely also because of the fragmentation of its single market. Even if the digital products and services should theoretically be moved across national borders without any problems, they were subject to many restrictions resulting from different national legislations. These obstacles hampered digital business development, in particular of small and medium-sized enterprises (Lehdonvirta, 2022, p. 216). The necessity to build a harmonised internal market for the digital economy was outlined in early reports like the Bangemann report on the global information society of 1994 and the Lisbon strategy of 2000, which aimed to "complete" the internal market

to drive innovation and competitiveness in a knowledge-based society. For most legislation, the Commission used its powers under the single market articles, which were expanded through European Court of Justice judgments. The Commission has powers to set up rules for the establishment and functioning of the internal market, which it has often used to overcome Member States' resistance to liberalisation and supranational harmonisation (S. Schmidt, 1996; Stone Sweet & Sandholtz, 1997, pp. 307-308).

At the end of the first decade of the new millennium, the Commission realised that the Lisbon strategy to establish a European “information space” by promoting national digital convergence in the internal market was unsuccessful, and more supranational efforts were needed. The second Barroso Commission considered the territorial fragmentation of the internal market as an important obstacle to the digital economy. At the advent of his second term as Commission President, Barroso promised that his second Commission would “tackle the main obstacles to a genuine digital single market” (Barroso, 2009, p. 30), promising to reap its benefits in its Europe 2020 strategy of 2010, thereby speaking for the first time explicitly about an EU digital single market. In what can be called the digital single market period starting with the Europe 2020 strategy of 2010, the Commission also made explicit and frequent references to the single market in adjacent policy areas. For example, the responsible Vice-Commissioner Viviane Reding (2012) argued that new data protection rules, which would become the GDPR, would “build up trust ... [and] make the Digital Single Market more accessible for both businesses and consumers”.

However, since the early 2010s, the digital economy and its political effects have raised more public and political concerns. For example, the Snowden revelations in 2013 have resulted in a “salience shock” (Kalyanpur & Newman, 2019) about the issue of privacy and the revelations by Frances Haugen in 2021 demonstrated the many harmful effects of large online platform companies' business models. In political science and EU scholarship, to date only relatively



few studies have addressed the EU's strategy to make a digital single market (DSM) and they provide inconclusive results. One of the most comprehensive accounts mapping the DSM is provided by Newman (2020), who argues that the EU is applying both market-making and market-shaping policies, which leads ultimately to a more human centered approach to digital policy (*ibid.*, p. 295) and sets the EU on a unique path among advanced economies (*ibid.*, p. 289). But has the EU's unique path developed straightforwardly or do we observe changes in the direction of this path? Recent work by Cioffi, Kenney and Zysman (2022) interprets recent EU legislative proposals as a regulatory response to the comprehensive economic, social and political challenges posed by the digital economy. More sector-specific and single case studies frequently report important changes. For example, Cini and Czulno (2022) interpret the DMA's new ex-ante competition tool as a significant policy change promoted by the Commission, and Laurer and Seidl's case study of the making of the GDPR reports a departure from the alleged "neoliberal bias" of the European integration process (2021, p. 257). This trend is confirmed by Farrand and Carrapico (2022) for the field of cybersecurity, which according to them is characterised by the rhetoric of digital sovereignty accompanied by attempts to regain control of cyberspace.

To analyse the governance of a DSM, I combine two analytical strategies. First, I loosely build on arguments developed by Scharpf (1999) and others. Scharpf shows that the creation of a European single market is not a politically neutral activity and that lawmakers always had to balance the economic rationale for liberalisation of market interactions on the one hand, with the necessity for market intervention through effective regulation on the other. He distinguishes between two ideal-typical approaches to market integration. One follows a logic of effectiveness and presents markets as competitive and innovation-promoting. Citizens benefit as customers from lower prices and better products. The other highlights that competition and disruptions in integrated markets depress business models and production costs, so that citizens

can lose in their role as workers and producers through lower wages or job losses. This creates a challenge for the state because its market governance must consider the needs of both groups and follow a logic of democratic legitimacy.

Drawing on this argument can inform my analysis of the direction of the governance of a European digital single market by distinguishing between different possible approaches that rely on more market liberal or more public interventionist elements, respectively. Market-liberal principles are often associated with neoliberal ideas, that rest on the assumption of a superiority of market-based competition over other modes of organisation (Mudge, 2008). While the market-liberal policy goal is geared towards increasing competitiveness, an alternative and more public interventionist approach is likely to promote different policy goals instead, or in addition to competitiveness. Market-liberal ideas present private actors as superior and describe them as protagonists that should be included in governance processes, for example through private sector self-regulation or the setting up of voluntary codes of conduct. Alternatively, on the other hand, private actors can be treated as something that has to be overseen and controlled (Farrand & Carrapico, 2022). In the more public interventionist governance version, DSM governance would be entrusted to broader stakeholders like non-commercial organisations and public institutions. Because neoliberal ideas consider attempts to correct market results as illegitimate (Amable, 2011), more market-liberal instruments are geared to reduce market obstacles, like member state standards or regulations, for example through the principle of mutual recognition of the country of origin principle. Interventionist instruments may be used, but only as a means to promote competition. By contrast, interventionist EU governance typically introduces market-correcting instruments, like stronger competition policy (Cini & Czulno, 2022; Meunier & Mickus, 2020), or economic regulation that aims to compensate for negative effects of the digital economy (Cioffi, Kenney, & Zysman, 2022).

In my analysis, I trace the direction of single market governance by focussing on the following three categories. (1) I map the goals by differentiating between an orientation towards competitiveness or broader goals like citizen representation or control of the digital; (2) the protagonists in terms of reliance on public or private actors for governance and the relative distribution between member states or supranational institutional control; (3) and policy instruments by distinguishing more market-liberalising instruments (e.g. internal market clause) or more market-intervening instruments (e.g. enforced public supervision).

Second, I apply a historical institutionalist (HI) analysis, which is well placed to illustrate how the process of institutional development of my case, DSM governance, has changed over time. In HI, scholars often refer to processes of institutional path dependencies, arguing that earlier institutional choices explain the scope for subsequent decisions (Mahoney, 2000; Pierson, 2000). While institutions are often subject to gradual changes that follow path dependencies, institutions can also be changed more radically and in a short period of time, which is often theorised in terms of critical junctures. In accordance with Capoccia and Keleman (2007), in critical junctures actors are (somewhat) released from “normal” structural and institutional constraints, and deviations from previous path developments are more likely. However, the institutional changes in our case, DSM governance, will likely follow more gradual processes. For example, many of the Commission's initiatives address the sometimes rapid and disruptive technological developments in digital technology. However, associated developments such as the commercialisation of the Internet and the emergence of the digital economy take place over years or even decades and should be understood as processes rather than singular critical events. To distinguish between different processes of institutional change, I use Streeck and Thelen's (2005) canonical framework of gradual institutional change. The authors distinguish between four types of institutional change and define displacement as a slowly rising salience of subordinate relative to dominant institutions. Layering is a process of attaching new elements

to existing institutions, gradually changing their status and structure. Drift describes deliberate neglect of institutional maintenance despite external changes. Conversion, finally, refers to a redeployment of old institutions to new purposes (ibid, 31). Drawing on the related work of Mahoney and Thelen (2010) adds further analytical nuance to my analysis. The authors highlight the importance of the characteristics of the targeted institution (high/low level of discretion in interpretation/enforcement) and the political context (strong/weak veto possibilities) in which the institutional change occurs. They expect that, if the political context offers defenders of the status quo strong veto possibilities and the targeted institution offers actors opportunities for exercising discretion in interpretation or enforcement, institutional change will most likely take the form of adding new rules to existing institutions (layering). The institutional framework of the DSM has a long market-liberal tradition, supported by the decision of the Court of Justice which renders discretion over alternative interpretations of the rules unlikely. Given the veto possibilities of Member States in the Council and the well-documented lobbying activities of big technology companies in Brussels (Bank, Duffy, Leyendecker & Silva, 2021), the institutional environment is characterised by low discretion and strong veto players. Therefore, institutional change of DSM governance institutions should take the form of layering.

In my illustrative case study of DSM governance, I trace the development in the goals, protagonists, and instruments over time in all Commission initiatives and strategies since the year 2000 which are explicitly dedicated to digital topics. I supplemented these documents with official evaluative reports on these programs, like the mid-term reviews produced by the Commission or related expert groups. I further included important horizontal legislation<sup>1</sup>, for the development of the DSM, centring on e-commerce (e-Commerce Directive of 2000, DSA and DMA both of 2022), and important legislation from adjacent areas that are explicitly linked

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<sup>1</sup> I use the term horizontal legislation to refer to legislation that applies to all sectors, as opposed to more specific legislation that targets a specific issue or industry.

to the DSM, in particular important developments in the area of data protection in particular. See the table in the Annex for an overview of considered important documents, which also offers online links to the official documents.

### **3. Mapping Continuity and Change in European Digital Single Market Governance**

#### *a. Market Liberal Continuity from 2000 to mid-2010*

Just before the turn of the millennium, digital technology underwent a radical change that led to the commercialisation of the internet and the rise of the "new economy" (Newman, 2020, p. 285). The previous period since the mid-1980s was in many respects concerned with the "completion" of the internal market (Commission 1985). In order to establish common European standards, the Commission relied on private actors and used the so-called "new approach" of delegating standardisation powers to private European standardisation organisations. However, European leaders and the Delors Commission became increasingly concerned with the strong position of US digital companies and the increasing European dependence on them. To address this issue, German Commissioner Martin Bangemann (European Council, 1994) prepared a report which promoted "a market-driven revolution" to achieve European competitiveness in a global information society. The report set out a clear market-liberal agenda that informed in many respects the EU's further approach, arguing that "[t]he prime task of government is to safeguard competitive forces" (ibid, p. 13). It promoted the goal to achieve competitiveness, the reliance on private protagonists to finance and drive the digital economy including the privatisation of public telecommunication sectors, as well as to establish only "the minimum of regulation needed" (ibid., p. 17).

In the early 2000s, accelerating technological and economic developments were addressed by the EU's prominent 2000 Lisbon Strategy, in which European leaders ambitiously aimed to make Europe "the most competitive and dynamic knowledge-based economy in the world ..."

(European Council, 2000). In many respects, the Lisbon strategy followed the market-liberal logic of increasing competitiveness. The related eEurope initiative continued some of the elements of that earlier period, formalised a new governance mechanism and laid the groundwork for future developments in the governance of the digital economy. The Commission's goal was geared to improve the needs of citizens in their role as customers and stated that "[t]he success of the new economy will depend on consumers' ability to take full advantage of the opportunities on offer" (European Council, 1994, p. 4). For achieving this goal, the Commission argued that "[in] general terms, e-commerce regulation should be limited" (Commission, 1999, p. 9) and it promoted a relatively soft and "more flexible regulatory approach" (Commission 2000, p. 19). This was reflected in the formalisation of the Open Method of Coordination (OMC), a new approach to EU governance, based on iterative benchmarking of national progress and organised mutual learning (Armstrong, Begg, & Zeitlin, 2008, p. 436). According to Radaelli (2003, p. 7), the OMC was part of a competitiveness-oriented "master discourse" limiting "feasible" policy options. From the outset, this has been coupled with arguments emphasizing that a lack of consumer confidence is inhibiting the market potential of e-commerce. Therefore, the Commission has accompanied its liberalisation efforts with measures to encourage the development of "alternative" (i.e. private) dispute resolution systems, (business) trust marks and effective codes of conduct, encouraged by "appropriate incentives for stakeholders" (Commission 2000, p. 19). These attempts aimed to include private protagonists in the governance of the DSM.

For the overarching goal of achieving competitiveness, EU leaders put forward the idea that competition in liberalised markets is the way to success. This logic informed important policy instruments in the area of e-commerce legislation, like the important e-commerce directive of 2000 which has set the path for e-commerce in the single market for more than two decades. It is based on three important principles. The (1) internal market clause (Article 3) ensures that e-

commerce service providers have to comply with the legislation of the member state in which they are established and not of the state in which the service is offered. This increases economies of scale, but may imply incentives for legal arbitrage, particularly given the importance of intangible assets to the digital economy, such as software, which can be more easily relocated to “business-friendly” regulatory environments than services based on tangible assets. The (2) principle of limited liability of intermediaries (Article 12) shall ensure that service providers are not responsible for illegal content on their platforms, although they should remove or disable access to it once notified. The principle of limited liability ensures the functioning of the internet ecosystem and is intended to prevent ex-ante screenings of uploads. The principle encourages uploads to platforms that could benefit consumers, its liberal logic might however conflict with the copyrights of producers. Finally, the (3) ban on a general monitoring obligation principle (Article 15) ensures that service providers do have to check all activities on their platforms, such as blog posts, for illegal activity. Similar to the principle of limited liability, it is intended to support online activities.

A mid-term report on the Lisbon strategy of 2004 prepared by Wim Kok, former Prime Minister of the Netherlands, spoke of a “disappointing delivery” and warned that as a result the EU’s growth gap with North America and Asia has widened (High Level Group 2004, p. 6). The report argued for the continuation of market-liberal principles and demanded faster delivery and progress, “so that competition is more effective in driving down prices for consumers and businesses” (ibid.: 22). The Kok report informed much of the subsequent Commission policies. The Barroso I Commission (inaugurated in 2004) eventually demanded “a new start for the Lisbon strategy” (Commission 2005) and addressed digital services in the responding i2010 strategic framework proposing rather vaguely a more proactive policy approach. Although the EU was hit by the financial crisis after 2007, caused in many ways by an over-liberalised and

under-supervised private sector, the key market-liberal principles of the Lisbon strategy for digital market governance remained in place after its 'new start'.

*b. Continuity and Layering: mid-2010 to early 2020*

After the outbreak of the financial crisis in 2007, the second Barroso Commission became increasingly occupied with the consequences of the crisis and the necessity to reform the Economic and Monetary Union. The new Europe 2020 strategy, issued in 2010, was accordingly dedicated to areas of economic growth, employment, and social cohesion. It defined, in the context of financial crisis, relatively ambitious headline targets for these areas. For the digital realm, the Commission proposed - as one of seven flagship initiatives - a "Digital Agenda for Europe", which was built in particular through inputs from a Commission's report of 2009 that set out "digital competitiveness" as a key goal and identified fragmented digital markets as the central problem of "Europe's competitiveness in the digital economy" (European Commission, 2010, p. 7).

The market-liberal approach is reflected by policy instruments and key legislation like the push to fix an end date for national payment systems to migrate to the single euro payment area (SEPA) in 2012, an attempt to apply liberal and competitive principles to the payment market that are meant to accompany the single currency in the realm of electronic payments. Further legislative instruments aimed to open up digital access to licensed content. One telling example is the collective management organisations (CMO) directive concerning licensed musical works for online use. The directive institutionalised a competition principle in that former and in some respect more solidarily organised CMOs were set to compete with each other by giving copyright owners the freedom to choose the particular collecting society they prefer across the EU. This increases competition between CMOs and is arguably to the disadvantage of smaller producers (instead of commercial intermediaries) that might benefit from specific social



functions like collective bargaining and social benefits that have been provided by the German GEMA and not by the UK's PRS/MCPS (Schroff & Street, 2018).

The continuity of market-liberal principles is displayed also by the reliance on private protagonists that shall increase customers' confidence. For example, the Commission pursued the idea of an EU online trustmark in consultation with stakeholders, which culminated in the e-commerce trustmark issued since 2015 by the European association of e-commerce businesses (Ecommerce-Europe) and their national associations. A regulation of 2013 established also "alternative", that is private, dispute settlement schemes. These rely on so-called online dispute resolution bodies, private entities that are intended to be less expensive and quicker for consumers than public courts (European Commission, 2022c).

In the meantime, the political dimension of digital technology has become ever more apparent, internally for instance in terms of privacy and security, externally in terms of global competition and (inter-) dependence (Farrell & Newman, 2016). The so-called Arab Spring that started in December 2010 was often associated with the widespread usage of social media and messenger services and the revelations by Edward Snowden in 2013 highlighted the political dimensions of the internet (Farrell, 2012, pp. 43-47; Kalyanpur & Newman, 2019; Laurer & Seidl, 2021). Aware of the importance of the digital, EU leaders were concerned about the lagging behind of the EU's digital economy compared to US ICT competitors. Although large telecommunication companies like Deutsche Telekom provided core services, new and important sectors like machine learning, social media, and platform services were developed nearly entirely outside the EU (see on these points also Newman, 2020, p. 289) .

Against this background, the Juncker Commission (inaugurated in 2014), took global competition into account and named "a connected Digital Single Market" as its second priority (out of ten). One goal was to promote a specific European approach by means of the DSM to avoid becoming a receiver of standards that were set in the US and China. On the one hand, the

Juncker Commission's DSM Strategy, issued in 2015, was promoted by arguing that it will create "hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society" (European Commission, 2015). On the other hand, the DSM had a geopolitical dimension and for example, the mid-term report on the strategy of 2017 presented the DSM as "Europe's main asset in the global digital economy and society" (European Commission, 2017).

In many respects, the DSM Strategy's policy instruments continued the liberal market approach of the previous periods by promoting open-market policies and soft governance tools. For example, the Commission initially aimed to harmonise European sales laws to allow sellers to rely on the national laws where they are established and thereby embraced the application of the country of origin principle. To facilitate open markets, the Commission also issued an e-commerce package, which was composed of three regulations that addressed impediments to the single market, namely unjustified geo-blocking, impediments to cross-border parcel delivery services together with a regulation to strengthen consumers' rights practice in the digital world by giving more powers to national authorities to enforce consumer rights (European Commission, 2016).

To track EU countries' progress in terms of their "digital competitiveness", the Juncker Commission has also further developed a soft governance tool launched in 2014, the Digital Economy and Society Index (DESI). It resembles the OMC and its logic of standardisation and soft tools like naming, shaming, and faming. The DESI indicators score the progress of EU member states by creating a benchmark of five composite dimensions: connectivity, human capital, use of the internet, integration of digital technology, and digital public services (European Commission, 2022a). Similar to the OMC in its soft governance design, the DESI can be interpreted as a new layer that continues the goals and instruments applied in the Lisbon

period. It relies on the Commission as a market-liberal policy coordinator and its goal to increase competitiveness continues the market-liberal logic of the Lisbon era.

The early years of the decade were also the time of the further development of the EU legal framework for the protection of personal data in the form of the GDPR. The regulation builds up on the data protection directive from 1995. Already during that time, EU policymakers considered data protection as an important dimension that should complement the single market for digital services by creating trust in the digital economy. The directive created a strong legal precedent of the latter regulation, in that it made the creation of Data Protection Authorities compulsory in all member states and formalised their cooperation in a new European institution, the so-called Article 29 Working Group. This institution should ensure the uniform application of the directive in all member states and advise the Commission “on any proposed amendment of the directive” (Article 30, data protection directive) and was a very influential pusher for strong privacy in the subsequent debates about EU data protection (Laurer & Seidl, 2021).

Building upon the 1995 data protection directive, data protection has also become part of the EU’s Charter of Fundamental Rights (CFR) proclaimed already in 2000, which is legally binding since the entry into force of the Lisbon Treaty in 2009. Building on the CFR, respectively Article 16 of the TFEU laid out a strong legal basis for a firm EU data protection regulation. When tabling the proposal for the GDPR in 2012, the Commission argued that an important goal of the regulation is to support the DSM, because “building trust in the online environment is key to economic development” (European Commission, 2012). In many respects, the Juncker Commission presented the GDPR also as a continuation of its market-liberal strategy to create a DSM and referred to the legislation’s capacity to increase trust in digital services (European Commission, 2015, p. 13). On the one hand, the GDPR establishes stronger data protection laws that, for example, give citizens the right to have private information be removed from Internet searches and other directories (right to be forgotten). On

the other hand, the regulation continues the country of origin principle, stating that digital companies are supervised by the national authorities of the country where they are established. However, the GDPR strengthens public authority and sets up a new European Data Protection Board (EDPB), the renamed Article 29 Working Group, consisting of national data protection authorities, with broadened tasks. The establishment of the EDPB as a formalised institution can be interpreted as a new EU institutional layer for data protection, moving the EU towards a reliance on more public interventionist elements.

*c. Layering and Conversion towards more Public Intervention after early 2020*

In the late 2010s and early 2020s, challenges such as the global Covid-19 pandemic underscored the importance of the digital. Against this background, the von der Leyen (VdL) Commission set the goal of making Europe "fit for the digital age" as the second of six priorities. Even before the pandemic, technological and political developments further emphasised the importance of the issue. The alleged involvement of Cambridge Analytica in the 2016 US election campaign (Chen, 2018), the Russian interference in the 2016 US election (Ziegler, 2018, p. 567), and also threats surrounding the 2019 EP election (Plucinska, 2018) all emphasised the political importance of the digital. This is also reflected in adjacent areas like digital infrastructure. In 2019, the question if foreign tech giants should be involved in the setting-up of the 5G technology was discussed controversially, because the Chinese company Huawei is an important competitor to European companies like Nokia or Ericsson. This led to geopolitical questions and also emphasised the continued lag of the EU's digital economy. Against this background, talks about "digital sovereignty" and "strategic autonomy" became frequent among EU officials (Schmitz & Seidl, 2022) and even before the Russian invasion of Ukraine, Commission President Ursula von der Leyen announced her goal of leading a "geopolitical Commission" (von der Leyen, 2019).

Regarding the DSM, the VdL-Commission built upon the progress of the Juncker Commission and established more interventionist elements in important areas. Its work program from early 2020, before the Covid-19 crisis, linked the topic with more interventionist concepts in adjacent policy areas such as industrial policy (European Commission, 2020, p. 4). In this area, the French-German GAIA-X initiative aims to establish a European cloud to encourage “[i]nnovation through digital sovereignty” (Gaia-X, 2022). The Commission, on its side, aims to enhance Europe’s “digital leadership” and its “strategic autonomy” (European Commission, 2020, p. 4). It intends to do so by specifying a set of quantitative measurable indicators in the context of a program introduced in March 2021, labelled the “2030 Digital Compass” (European Commission, 2021). The Commission aims to make improvements as part of the already existing soft-governance instrument developed by the Juncker Commission, the DESI. It will be enhanced by transforming it into an official and concerted EU governance instrument (ibid, 14).

In the area of e-commerce, the Commission addressed the increasing power of large online platforms. Already the DSM Strategy of the Juncker Commission envisaged a comprehensive assessment of the role of platforms regarding issues like transparency, usage of data, relations between platforms and suppliers, constraints to moving from one platform to another, and the tackling of illegal content (European Commission, 2015, pp. 11-12). The Commission saw the role of large platforms as increasingly problematic because they can leverage significant economies of scale to become “gatekeepers” that eventually distort competition and hamper fair business practices. To investigate the issue, the Commission also set up an EU Observatory on the Online Platform Economy through a decision in April 2018, which was already a sign of a potential departure from the traditional market-liberal approach.

Building on these steps and public consultations, on 15 December 2020, the Commission presented a digital services package to intervene in digital markets and in particular to address

problems of large online platforms. The Commission argued that these platforms possess powerful positions in digital markets which they frequently create themselves – thus also determining the rules and conditions of these markets. Because they benefit from significant economies of scale at very low marginal costs, they often evolve into entire ecosystems offering all kinds of products and services. According to the Commission, their dominant position in the market harbours risks of abuse, for example in relation to fair competition and data protection, which could disadvantage competitors and customers. The package consists of two regulations, the DSA and the DMA. An agreement on both was reached between the EP and the Council during the French Council Presidency in April 2022.

Elements of the digital services package continue some market-liberal principles of EU governance for the DSM, but also add a new layer and redirect policy instruments towards a more interventionist governance approach. The DSA updates the 2000 e-commerce directive, taking key principles from the directive and transforming them into an EU-wide, directly applicable regulation. Key principles include the continuation of the avoidance of general monitoring, the internal market clause, and the principle of limited liability of intermediaries for illegal content. For tackling the problem of illegal content, the proposal continues the principles of self-regulation, however, by redirecting the scope of involved stakeholders. To fight illegal content, the DSA relies on so-called trusted flaggers, meaning private law entities with certain expertise in the respective field. The inclusion of private protagonists in DSM governance was already envisaged in the e-commerce directive of 2000, whose Article 16 encouraged the member states and the Commission to the drawing up of Codes of Conduct, by trade, professional, and consumer organisations. The use of trusted flaggers was then tested with the Code of Conduct on countering illegal hate speech encouraged by the Commission in 2016. However, while this specific kind of governance through private sector involvement seems to continue the market-liberal logic, the DSA moves towards more public oversight. Its

Article 22 provides that trusted flaggers are no longer selected by the platforms themselves, but by a new layer of national public governance bodies to be established, so-called Digital Services Coordinators (DSC).

DSCs are tasked with applying and enforcing the regulation, including imposing fines for misconduct, which can amount to up to six percent of the company's annual revenue. The DSCs will be independent in carrying out their duties and shall be shielded from any external influences, including those of other public bodies. The member states' digital services coordinators form a European Digital Services Board to contribute to the application of the regulation and to support the national coordinators and the Commission in overseeing very large online platforms. This structure is similar to the governance established by the GDPR, specifically the establishment of independent supervisory authorities responsible for overseeing the application and enforcement of the regulation, which also form a European Data Protection Board. The Commission's original proposal for the DSA continued the market-liberal country of origin principle of the e-commerce directive, which was also applied in the area of data protection.

However, during the negotiations of the DSA, it became clear that the market-liberal approach carries the risk of duplicating the enforcement problems known from the GDPR (Vinocur 2019). In particular, the country of origin principle in the GDPR implies that the Irish Data Protection Authority is competent for most data protection inquiries, which produced a significant enforcement bottleneck<sup>2</sup>. A report published in 2021 by the Irish Council for Civil Liberties (Ryan & Toner, 2021), an NGO, found that 98 per cent of large EU cases have not yet been decided by the Irish authority. As a response, and in line with the EP's negotiating position,

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<sup>2</sup> While lead Data Protection Authorities (DPA) are actually responsible for handling cases affecting companies that have their headquarters on their territory, the Court of Justice of the EU clarified in a judgment of June 15, 2021 that in some exceptional cases a deviation from the so-called "one stop shop" principle is possible and in particular to what extent a non-lead DPA remains entitled under the GDPR to bring an action against a multinational company in the courts of its own Member State (e.g. see Waem & Verschaeve, 2021)

the new DSA compromise delegates supervisory powers over very large online platforms to the Commission. This converges the Commission's role and shall, given the problems known from GDPR enforcement, ensure effective and coherent market intervention. This empowerment to directly monitor and sanction very large online platforms is a significant step and the first time the Commission has been given these powers beyond the area of competition policy.

The second regulation of the digital services package, the DMA, aims to solve the lack of contestability in the digital economy that arises from the dominant position of a few very large online platforms. The regulation defines platforms with a strong economic position, a strong intermediary position, and a permanent market position as so-called "gatekeepers". For these gatekeepers, the DMA defines a full catalogue of unfair anti-competitive behaviours, for example, presenting services and products offered by the gatekeeper itself more favourably than similar services or products offered by third parties on the gatekeeper's platform. The DMA also provides a list of activities that gatekeepers must allow, including access to data generated by businesses through their use of the gatekeeper's platform. This approach constitutes a conversion of the market-liberal logic towards more public intervention. In particular, the rules set out in the DMA shift the previous approach of ex-post competition interventions of the Commission to a new ex-ante approach.

The design of this ex-ante approach to the digital economy could build on a change in the Commission's competition policy in general. The Commission was already examining a so-called "New Competition Tool", not only for digital markets, which would make it possible to impose remedies in case of certain market structures or to intervene in case of market failures without having to prove an infringement of competition rules. While this proposal was confronted with a lukewarm response from certain large member states and their competition authorities (Cini & Czulno, 2022, p. 45), the idea informed the discussion of competition policy in digital markets. Building on this idea, the DMA consists of a list of do's and don'ts for online



platforms and allows authorities to act before they have asserted the case that a market has reached a tipping point, defined as a monopoly-like situation. The DMA's governance structure differs from the GDPR and resembles the final compromise of the DSA. The Commission received extensive supervisory powers, which corresponds with the area of EU competition policy in general, making it the sole supervisor and enforcer of the rules laid out in the DMA. In this regard, the DMA is best interpreted as a combination of layering and conversion. It is a new layer of regulation, but one that also redirects an existing institutional governance structure towards additional and new goals, in the sense of tightening control of big tech companies and realigning their powers with European values.

#### **4. Discussion and Conclusion**

My historical analysis of the DSM focused on the EU's governance approach in terms of goals, protagonists, and policy instruments. I illustrated that key elements of a market-liberal governance approach were promoted in the more "neoliberal" era of the 1990s. At the turn of the millennium, the Commission followed the overarching goal of increasing competitiveness, so that its political strategy continued and implemented market-liberal principles in the Lisbon period from 2000 to 2010. The subsequent period of the DSM from 2010 to 2020 continued market-liberal principles to promote competitiveness. However, mainly the Juncker Commission also stressed the geopolitical dimension of the DSM and aimed to promote European standards based on EU fundamental rights. In particular, the GDPR added a new institutional layer for more public intervention by member states' regulators, which continues market-liberal instruments such as the country of origin principle.

Building on the experience and public layers of the GDPR, comprehensive legislative action that addresses the issue of very large online platforms was issued by the VdL-Commission in 2020. The Commission builds on some elements like the DESI and learns from weaknesses of

the GDPR. Its comprehensive digital services package addresses challenges posed by very large online platforms, changing the EU's DSM governance by establishing stronger public interventionist elements. This led ultimately to an empowered Commission to ensure supranational supervision and enforcement. While even the GDPR was presented to boost economic development, the Commission appears to address more recently additional objectives besides competitiveness, such as a rebalance of the “responsibilities of users, platforms, and public authorities [...] according to European values” (European Commission, 2022b). This shift in policy resonates with shifts in rhetoric emphasizing the need for greater control over the digital in the spirit of digital sovereignty. See Table 1 below for an overview of selected important findings.

Table 1: Overview of key developments

<i>Period</i>	<i>Examples of Key Goals, Protagonists and Instruments</i>	<i>Main Development</i>
<i>Lisbon Period from 2000 to mid-2010</i>	<p><i>Goals:</i> promote competitiveness, benefits for citizens as customers</p> <p><i>Protagonists:</i> Commission as a regulatory driver, private companies as self-regulators</p> <p><i>Instruments:</i> internal market clause, limited liability, codes of conduct</p>	Market-liberal continuity
<i>DSM Period from mid-2010 to early 2020</i>	<p><i>Goals:</i> promote competitiveness, benefits for customers, promotion of fundamental rights</p> <p><i>Protagonists:</i> Commission as a regulatory driver, some private company self-regulation, member state public authorities</p> <p><i>Instruments:</i> soft governance tools, codes of conduct, stronger interventionist EU regulation (e.g. GDPR)</p>	Market-liberal continuity and layering of more public interventionist elements
<i>Making the EU fit for the Digital Age after early 2020</i>	<p><i>Goals:</i> competitiveness, European values, more control of the digital</p> <p><i>Protagonists:</i> Commission as key supervisor and enforcer of important digital rules, member state authorities, less involvement of business actors</p> <p><i>Instruments:</i> EU regulation establishing stronger accountability in particular of large platforms</p>	Layering of and conversion towards more public interventionist elements

My results contribute to understanding the evolution of the governance of the DSM in the EU and correspond with recent scholarly findings in adjacent areas like cybersecurity, for which

Ferrand and Carrapico (2022) report a change towards “mercantilism”, and trade policy, for which Schmitz and Seidl (2022) report a more active policy approach in the spirit of strategic autonomy. I illustrated that the EU has traditionally pursued a relatively comprehensive strategy that combined free-market principles with attempts to build consumer confidence. The EU continued key market-liberal elements and added through the GDPR a new institutional layer with stronger public interventionist elements. In the early 2020s, the experience of the GDPR, specifically problems associated with its enforcement, encouraged a conversion of the EU's approach. As regards the distribution of competencies between the national and the supranational level, my discussion reveals that as a reaction to the ever-increasing powers of Big Tech, processes of gradual institutional changes have ultimately resulted in more vertical integration and an empowerment of the EU Commission to supervise very large online platforms.

Against this background, I wonder whether my findings on shifts from market liberal to more public interventionist elements in the context of selected more horizontal legal provisions of the DSM is also present in more sector-specific regulations. For example, are the frequent references to digital sovereignty only rhetoric or can we also observe policy changes in related areas such as artificial intelligence or data governance (see also Falkner 2022 et al. on this aspect)? Related to this, questions about agency and strategy emerge. Why is the EU now changing its approach, since processes such as digitization and geopoliticisation are longer-term trends rather than short-term events? Furthermore, when pushing forward its new approach, why are EU officials referring to concepts like digital sovereignty, given that alternative discursive strategies like “playing the market card” still proved to be successful in related areas like cybersecurity recently (Brandão & Camisã, 2021)? I believe that addressing these and related questions in the future will improve our understanding of the increasingly important area of EU digital policy and the EU integration process more generally.

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## Annex: Overview of Selected Important Documents

<i>Document Title</i>	<i>Document Type</i>	<i>Year of adoption</i>	<i>Link</i>
Europe and the global information society Recommendations of the high-level group on the information society to the Corfu European Council (Bangemann group)	Report	1994	<a href="https://bit.ly/3ZqLSCO">https://bit.ly/3ZqLSCO</a>
Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data	Directive	1995	<a href="https://bit.ly/3CKUvOX">https://bit.ly/3CKUvOX</a>
Lisbon European Council 23 and 24 March 2000 presidency conclusions, Lisbon strategy	Strategy	2000	<a href="https://bit.ly/3iElyn5">https://bit.ly/3iElyn5</a>
Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')	Directive	2000	<a href="https://bit.ly/3iueB9q">https://bit.ly/3iueB9q</a>
eEurope 2002. An Information Society for All	Strategy	2000	<a href="https://bit.ly/3W7vdRN">https://bit.ly/3W7vdRN</a>
Facing the challenge. The Lisbon strategy for growth and employment Report from the High Level Group chaired by Wim Kok	Report	2004	<a href="https://bit.ly/3IGmwLo">https://bit.ly/3IGmwLo</a>
i2010 – A European Information Society for growth and employment	Strategy	2005	<a href="https://bit.ly/3Gw5LzO">https://bit.ly/3Gw5LzO</a>
A New Strategy for the Single Market: At the Service of Europe's Economy and Society: Report to the President of the European Commission by Mario Monti	Strategy	2010	<a href="https://bit.ly/3w17Pej">https://bit.ly/3w17Pej</a>
A Digital Agenda for Europe	Strategy	2010	<a href="https://bit.ly/3kdbz9Q">https://bit.ly/3kdbz9Q</a>
Regulation on online dispute resolution for consumer disputes	Regulation	2013	<a href="https://bit.ly/3WdUt98">https://bit.ly/3WdUt98</a>
Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth	Report	2014	<a href="https://bit.ly/3iBLOj6">https://bit.ly/3iBLOj6</a>
A Digital Single Market Strategy for Europe	Strategy	2015	<a href="https://bit.ly/3ZARiuW">https://bit.ly/3ZARiuW</a>
Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)	Regulation	2016	<a href="https://bit.ly/3XxKJI5">https://bit.ly/3XxKJI5</a>
Mid-Term Review on the implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All	Report	2017	<a href="https://bit.ly/3QAmSif">https://bit.ly/3QAmSif</a> <a href="https://bit.ly/3GAYDXL">https://bit.ly/3GAYDXL</a>
Regulation on promoting fairness and transparency for business users of online intermediation services	Regulation	2019	<a href="https://bit.ly/3iukNyc">https://bit.ly/3iukNyc</a>
Shaping Europe's digital future	Strategy	2020	<a href="https://bit.ly/3XnJPxw">https://bit.ly/3XnJPxw</a>
Regulation on contestable and fair markets in the digital sector (Digital Markets Act)	Regulation	2022	<a href="https://bit.ly/3H2wm97">https://bit.ly/3H2wm97</a>
Regulation on a Single Market for Digital Services (Digital Services Act)	Regulation	2022	<a href="https://bit.ly/3W3r3dX">https://bit.ly/3W3r3dX</a>