

# From Market Liberalism to Public Intervention: Digital Sovereignty and Changing European Union Digital Single Market Governance

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## Abstract

Against the backdrop of the ever-increasing importance of digital services, the European Union (EU) is promoting deepening of its digital single market (DSM). Whilst the single market has often been portrayed as the Trojan horse of neoliberalism, recent rhetoric on digital sovereignty indicates a desire for more control over the digital sphere. A historical case study of key elements of the DSM, namely digital services regulation and data protection, shows that EU governance has become less market-liberal and more public-interventionist. In response to challenges associated with the digital economy, policy goals have been broadened to include further objectives in addition to competitiveness. Stakeholders and public authorities rather than business actors have become more important in governance processes, and more market-correcting instruments have been introduced. These reforms have been made by adding more interventionist elements and also by redirecting the role of the European Commission to overseeing very large online platforms.

**Keywords:** digital policy; institutions; public policy; single market/economic and monetary union

## Introduction

The European Union's (EU) single market has often been portrayed as nothing more than a Trojan horse of neoliberalism plagued by a democratic deficit. However, recent rhetoric by leading European politicians indicates a more interventionist approach in several policy areas. French President Emmanuel Macron sees a consensus emerging to strengthen strategic autonomy, defined as the ability to reduce industrial dependence vis-à-vis the rest of the world, which is seen as aim number 1 by the President of the European Council, Charles Michel (Tamma, 2020). Former German Chancellor Angela Merkel (2019) embraced the term digital sovereignty, and the Internal Market Commissioner, Thierry Breton (2020), has called for a concerted public effort to boost Europe's capabilities in key digital technologies. The President of the European Commission, Ursula von der Leyen (2020), links her institution's digital policy to the aim of pursuing digital sovereignty in order to preserve and promote EU values in a digitised world. Has EU governance become less market-liberal and more public-interventionist?

I focus on selected governance issues in the context of the EU's comprehensive attempt to create and deepen a European digital single market (DSM), particularly digital service regulation and data protection. This article argues that the European Commission's approach has indeed become more public-interventionist. This speaks to recent findings in adjacent areas that report substantial changes from important previous trends like the rise of a European regulatory state (Majone, 1994), exhaustion of the welfare state

(Lodge, 2008, p. 282) and a retreat of the interventionist state (Zohlnhöfer et al., 2018). In trade policy, Schmitz and Seidl (2022) identify an emerging coalition that successfully challenges Europe's neoliberal bias. In energy policy, Siddi and Kustova (2021) find that the EU is changing from being a liberal actor, in the sense of promoting free markets, to being a more strategic actor willing to 'sacrifice' market principles to promote political objectives.

In particular, I contribute to the emerging literature on EU digital policy by analysing key elements of the DSM (Kalyanpur and Newman, 2019; Laurer and Seidl, 2021; Newman, 2020) and to that on policy changes that are accompanying the EU's new rhetoric in terms of digital sovereignty and strategic autonomy (Bellanova et al., 2022; Floridi, 2020; Pohle and Thiel, 2020; Schmitz and Seidl, 2022). I demonstrate that policy aims have been broadened to include further objectives in addition to competitiveness. Stakeholders and public authorities rather than business actors have become more important in governance processes, and more market-correcting instruments have been introduced.

Using a historical institutional theoretical model, I show that changes in key DSM governance elements have occurred gradually as responses to economic, political and social challenges that are associated with the digital economy. In the 2010s, attempts to create more trust in the DSM resulted in more public authority, which, however, remained at the level of the Member States. Building on experience with these structures in the area of data protection, in the 2020s, the EU has added further public elements and redirected the supranational powers of the European Commission, in particular over very large platform companies.

In the light of crucial events, it is noteworthy that the Commission's attempts at more public-interventionist governance predate recent crises like the COVID-19 pandemic and the Russian invasion of Ukraine. But these events undoubtedly provide EU digital policy-making with more salience and raise questions about the role of digital sovereignty in a more hostile geopolitical environment. Knowing whether and how the EU is changing its approach to governing the digital economy is essential to understand its role in the digital age. Before I present my findings, I provide a discussion on the development of EU DSM policy in the light of existing literature, detail my theoretical argument and elaborate on my empirical strategy. The last section concludes.

## **I. The EU DSM Policy and the Move to Digital Sovereignty**

Political science research on digital policy has shown that the EU has aimed for a regulatory approach to internet governance that is somewhere between the United States' laissez-faire approach and China's state-controlled model (Hobbs, 2020). This was reflected in the creation of a DSM, which, according to the Commission, will ensure the free movement of goods, persons, services and capital and will allow individuals and businesses to seamlessly access and participate in online activities (European Commission, 2015a, p. 3). Newman (2020) shows that the Commission has used a dual approach combining policies that tend to be market-correcting, as in the area of consumer protection, and ones that tend to be market-making, like eliminating obstacles that cause market fragmentation. This puts the EU on a 'unique path among advanced economies' (Newman, 2020, p. 289).

Studies that focus on specific policy areas, particularly data protection, but more recently also competition policy, report changes towards stronger regulation. Regarding the General Data Protection Regulation (GDPR), which is sometimes considered the ‘gold standard’ of data protection (Schünemann and Windwehr, 2021), Kalyanpur and Newman (2019) show that its high standards can be explained by the public salience shock caused by the revelations by US whistle-blower Edward Snowden in 2013, which made it necessary for EU politicians to distance themselves from the interests of (mostly) foreign big technology companies. In addition to foreignness and increased public salience, Laurer and Seidl (2021) argue that previously established European institutions in the area of data protection contributed to a stronger GDPR. Regarding competition policy, Cini and Czulno (2022) report significant changes towards a new ‘ex ante’ approach (see below), implemented because of experience with competition infringements by big technology companies and with input from more heterogeneous stakeholders.

These results correspond with findings in studies that centre on EU communications about digital policy that have introduced concepts like digital sovereignty. Studies on digital sovereignty have analysed its discursive dimensions (Bellanova et al., 2022; Pohle and Thiel, 2020) and argue that the concept can also assert European values (Roberts et al., 2021). According to Floridi (2020), the concept should be best understood as control of the digital sphere and its different layers, such as data, software, protocols, infrastructure and the like. However, this leaves the concept still relatively broad and its policy content ambiguous. According to Lambach and Oppermann (2022, p. 1), this ambiguity should be understood ‘not as a bug, but a feature’, because it allows diverse actors to attribute different meanings to it and political actors to promote different policy objectives. For example, Farrand and Carrapico (2022) report a move towards a ‘neo-mercantilist’ regulatory phase in which more interventionist policies in cybersecurity ensure the EU’s digital sovereignty against foreign powers and the non-EU private sector.

Nevertheless, despite the evolving literature on EU digital policy, we do not know whether and how the EU has changed the governance of its DSM into a more public-interventionist approach. This article is amongst the few publications that trace key elements in the historical evolution of EU digital policy-making and amongst the first to shed light on the changes that result from the far-reaching digital policy legislation that was adopted in 2022 (Cini and Czulno, 2022; Cioffi et al., 2022). In this work, I contribute to the debate on EU digital policy and digital sovereignty by showing how and through what processes the EU has become more public-interventionist in key areas of DSM governance.

## II. DSM Governance and Institutional Change

My theoretical argument showing how the EU has changed DSM governance combines three aspects. First, I argue that institutional change of key elements can be interpreted as a reaction to economic, political and social challenges that are associated with big technology companies. Second, I explain that reforms have occurred through gradual processes of incremental institutional change in which sequence matters and previous institutional choices have effects on subsequent decisions. Third, I show that by implementing more public-interventionist elements, reforms of DSM governance increase control of the digital sphere.

### *Big Technology Companies Are Associated with Challenges Requiring a Policy Response*

Studies have shown that institutional change can occur as a result of incremental processes that lead to a gradual transformation or as a response to more abrupt challenges. In the context of the DSM, institutional change is likely to occur as a reaction to problems that are associated with the digital economy and large technology companies in particular. Cioffi et al. (2022) show that these companies are associated with economic, political and social challenges that require policy responses. These include, but are not limited to, challenges to fair competition (Khan, 2016; Pistor, 2020), to democratic discourse through the spread of disinformation and hate speech (Howard, 2020) and to the privacy and fundamental rights of citizens (Zuboff, 2019). Against this background, European policy-makers are confronted with the question of how they should respond. Should they adjust the rules and principles that govern digital economy practices in the EU's single market? If so, what kind of changes are required?

### *Institutional Changes Are Likely Made by Adding New Rules to Existing Structures*

To understand how EU policy-makers have responded to these questions, I use a framework that allows different processes of institutional change to be distinguished and assumptions about under what conditions these processes occur to be derived. Historical institutionalism is well placed for this endeavour, as it explains processes and the effects of institutional change over time (Pierson, 2000). In general terms, the literature agrees that institutions tend to be sticky and subject to path dependency, due to mechanisms like transaction costs and sunk investments. The canonical work by Streeck and Thelen (2005) identified different modes of incremental institutional change, and their framework was subsequently further advanced by also identifying the conditions under which certain modes of institutional change are to be expected (Mahoney and Thelen, 2010).

Mahoney and Thelen (2010) highlight the importance of the characteristics of the targeted institution (a high/low level of discretion in interpretation/enforcement) and the political context (strong/weak veto possibilities) in which institutional change occurs. They expect that in situations in which the political context offers defenders of the status quo strong veto possibilities and the targeted institution offers actors opportunities to exercise discretion in interpretation or enforcement, institutional change will be most likely to take the form of adding new rules to existing institutions ('layering') rather than deliberately letting their impact change due to a different institutional environment ('drift'), replacing them with new ones ('displacement') or redirecting their application towards new aims ('conversion').

In the context of historical institutionalism, institutions can be formal (e.g., EU institutional structures such as the Commission and formal rules like EU legislation) or informal (e.g., norms and practices). In my analysis, I will focus on the formal mechanisms and rules on designing, implementing, applying and enforcing the DSM. The institutional framework of the DSM has a long market-liberal tradition, which is supported by decisions of the Court of Justice, which makes 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 et al., 2021), the institutional environment is characterised by little discretion and strong veto players. Therefore, institutional change of DSM governance institutions should

result from adding new rules to existing institutions (layering) rather than outright displacements or far-reaching changes in existing structures.

Given the prominence of layering in my analysis, it is important to note that the concept has attracted much scholarly attention (van der Heijden, 2011) and has sometimes been criticised as a generic concept with little explanatory power (Capano, 2019). I therefore focus on its specific features and ask if changes occur by *adding new elements* to existing institutions, which distinguishes layering from other modes of institutional changes like conversion, in which political actors are able to *redirect existing institutions* to purposes beyond those originally intended.

### *Shifts Towards More Public-Interventionism Can Be Identified at the Levels of Aims, Actors and Instruments*

Many of the challenges associated with large technology companies can be interpreted as resulting from governance that is too liberal and too lacking in interventionism (Cioffi et al., 2022). In contrast, the various rhetorical moves towards digital sovereignty share the notion of increasing control (Floridi, 2020). To assess if the EU has increased control of the digital sphere, I apply an analytical distinction between more market-liberal and more public-interventionist governance. My distinction shares similarities with canonical concepts in the EU integration literature, like Hooghe and Marks's (1999) distinction between a neoliberal project and a more regulated capitalist project. However, my analytical concepts are intellectual constructs rather than coherent empirical phenomena. They allow me to define indicators at the levels of aims, actors and instruments to trace changes in DSM governance.

I use the term market-liberal for governance elements that are associated with neoliberal ideas and that can be analytically separated from other forms of liberalism. In general terms, neoliberal ideas rest on the assumption of the superiority of market-based competition to other modes of organisation (Mudge, 2008). Their key aim can be defined as to create low prices for customers and to achieve competitiveness (van Apeldoorn, 2002, p. 161). They trust private actors in competitive markets more than other forms of organisation, so that private actors are strategically included in governance processes, as in their role as private plaintiffs to enforce competition policy in the United States (Wigger and Nölke, 2007) and reliance on business to achieve cybersecurity (Farrand and Carrapico, 2022). Neoliberal ideology considers attempts to correct market results to be illegitimate (Amable, 2011), and it promotes policy instruments that are geared to reducing obstacles to free and private market competition. Whilst market-making can in principle also be achieved by harmonising of laws at the supranational level, market-liberal governance tends to use 'negative integration' policies, like mutual recognition and the country-of-origin principle, which are considered to be efficient in producing liberalising effects (Höpner and Schäfer, 2012).

In contrast to market-liberal governance, more public-interventionist governance can be informed by many ideas and take different forms. Most interventionist ideas, like German ordoliberalism, regulatory capitalist ideas and social democratic traditions (Hooghe and Marks, 1999), share the assumption that markets are not self-regulatory but subject to 'market failures' such as abuse of excessive market power, restrictive business practices and collusive agreements between corporate actors (Wigger and Nölke, 2007, p. 491).



Alongside the aims of achieving low prices and competitiveness, there are different aims, like to protect small- and medium-sized companies, to co-operate on research and development and, in line with the EU treaties, to protect the environment and fundamental rights.

According to EU scholarship, alternatives to market-liberal projects are driven by a heterogeneous coalition of actors, and in general, these are sceptical about the integration of market actors in governance processes. Instead, private actors are often treated as something that has to be overseen and controlled (Farrand and Carrapico, 2022). Whilst public-interventionist governance can include private actors like auditors in governance processes, typically a broader group of stakeholders like non-commercial actors is involved and supervised by public institutions. At the level of instruments, depending on their political objectives, different actors can promote and refer to a whole range of policies that are meant to interfere in market processes or to correct for market outcomes. A standard indicator used in the literature is total government expenditure as a percentage of GDP (Zohlhöfer et al., 2018), but interventionist instruments can also imply more regulatory market-correcting instruments, like stronger competition policy (Cini and Czulno, 2022; Meunier and Mickus, 2020). See Table 1 for an overview.

### III. Empirical Strategy

This article is a historical case study of key DSM elements focusing on the areas of e-commerce regulation and data protection. E-commerce regulation is the most influential legal area for digital services, and data protection has always been intended to accompany the creation of the DSM by fostering trust amongst citizens in digital products and services. In particular, I examine variations in the aims, actors and instruments, interpreted as defining elements of DSM governance institutions. I use both primary and secondary sources. The documents I use include all the digital strategies and initiatives of the Commission since 1999, the year of the launch of the eEurope strategy, and official EU reports evaluating these strategies. A qualitative analysis of these documents confirmed an originally more market-liberal approach to the DSM, so I used further documents (a) when they were legal predecessors of important subsequent horizontal legislation in the areas of digital services and data protection and (b) when Commission strategies indicated that they entailed more public-interventionist elements in accordance with the categories defined above. See Table 2 for an overview. I further triangulated the evidence derived from these documents with official statements in the form of published interviews with EU officials and press releases, and I also conducted two expert interviews with high-level EU legislators to explore the plausibility of the narrative presented in this article.

Table 1: Indicators of More Market-Liberal and More Public-Interventionist Governance.

	<i>Indicators of market-liberal governance</i>	<i>Indicators of public-interventionist governance</i>
Aims	Low prices and competitiveness	Competitiveness or other aims (like small and medium-sized enterprises [SME] protection and fundamental rights)
Actors	Market actors	Stakeholders
Instruments	Market-making instruments	Market-correcting instruments

Table 2: Main Official Documents Considered in the Analysis.

Document title	Document type	Year of adoption	Mostly market-liberal or public-interventionist elements
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	Market-liberal
Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data	Directive	1995	Public-interventionist
Lisbon European Council 23 and 24 March 2000 presidency conclusions, Lisbon strategy	Strategy	2000	Market-liberal
Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')	Directive	2000	Market-liberal
eEurope 2002. An information society for all	Strategy	2000	Market-liberal
Facing the challenge. The Lisbon strategy for growth and employment. Report from the high-level group chaired by Wim Kok	Report	2004	Market-liberal
i2010 – A European Information Society for growth and employment	Strategy	2005	Market-liberal
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	Market-liberal
A Digital Agenda for Europe	Strategy	2010	Market-liberal
Regulation on online dispute resolution for consumer disputes	Regulation	2013	Market-liberal
Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth	Report	2014	Market-liberal
A digital single market strategy for Europe	Strategy	2015	Market-liberal + public-interventionist
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	Public-interventionist
Mid-term review on the implementation of the digital single market strategy. A connected digital single market for all	Report	2017	Market-liberal + public-interventionist
Regulation on promoting fairness and transparency for business users of online intermediation services	Regulation	2019	Ambiguous
Shaping Europe's digital future	Strategy	2020	Public-interventionist
Regulation on contestable and fair markets in the digital sector (Digital Markets Act)	Regulation	2022	Public-interventionist
Regulation on a single market for digital services (Digital Services Act)	Regulation	2022	Public-interventionist

#### IV. Continuity and Change in European DSM Integration

In the following, I illustrate in three steps how the EU's governance shifted in the areas of digital service regulation and personal data protection towards more public intervention. First, I demonstrate the market-liberal character of the 1990s and 2000s. Second, I show that these choices explain subsequent reactions to challenges posed by the digital economy in the 2010s. Third, I argue that these processes resulted in gradual but comprehensive institutional changes in DSM governance in the 2020s. Whilst the periods correspond with official Commission strategies (DSM strategies in 2010–2020; the digital transformation from 2020), they remain, however, an analytical separation. Empirical phenomena, like consultations, run across different periods.

##### *The Historical Background to DSM Governance*

Against the backdrop of the rise of the 'new economy' in the 1990s and commercialisation of the internet, European leaders and the Delors Commission became concerned about the strong position of US digital companies and increasing European dependence on them. To address this issue, German Commissioner Martin Bangemann (European Council, 1994) prepared a report that promoted 'a market-driven revolution' to achieve European competitiveness in a global information society. It argued that '[t]he prime task of government is to safeguard competitive forces' (European Council, 1994, p. 13) and called for only 'the minimum of regulation needed' (European Council, 1994, p. 17). In the 2000 Lisbon strategy, European leaders maintained many of the previously outlined principles and set out the aim of making Europe 'the most competitive and dynamic knowledge-based economy in the world...' (European Council, 2000). The corresponding eEurope initiative of the Prodi Commission argued that '[in] general terms, e-commerce regulation should be limited' (European Commission, 1999, p. 9) and promoted a 'flexible regulatory approach' (European Commission, 2000, p. 19). The Commission embraced the idea of market actors having a capacity for private self-governance and encouraged the development of 'alternative' (e.g., private) dispute resolution systems, (business) trust marks and effective codes of conduct (European Commission 2000, p. 19).

The 1990s and early 2000s were also the period in which important regulatory instruments in the area of digital services and data protection were institutionalised. The e-commerce directive of 2000 set the path for more than two decades. It is based on three important principles. (1) The 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 that of the state in which the service is offered. This promotes economies of scale but may lead to regulatory competition and so-called race to the bottom dynamics. (2) The principle of limited liability of intermediaries (Article 12) ensures that service providers are not responsible for illegal content on their platforms, although they should remove it or disable access to it once notified. The principle of limited liability was designed to ensure the functioning of the internet ecosystem and was intended to avoid ex ante screenings of uploads. Finally, (3) the ban on a general monitoring obligation principle (Article 15) ensures that service providers do not have to check all the



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.

In parallel with this market-liberal approach to digital services, national data protection authorities (DPAs) raised concerns over the right of citizens to privacy online. In principle, online privacy can be complementary to market-making, because, as the Bangemann Report argued, a ‘lack of consumer confidence will certainly undermine rapid development of the information society’ (European Council, 1994, p. 2). However, national DPAs, notably in high-regulation countries like Germany and France, had to push the Commission to develop a European approach, which was more concerned with liberalising the internal market than with adopting EU data privacy rules (Newman, 2008). The result was the Personal Data Protection Directive of 1995. It included provisions on consumer notification of data collection, rights relating to consent to such collection, provisions enabling consumers to amend or correct data and restrictions on the transfer of data to other companies and other countries. The directive made it compulsory to create DPAs in all Member States and formalised their co-operation in a new European institution, the so-called Article 29 Working Party.

### *Gradual Change from Mid-2010 to Early 2020*

During the 2010s, the political dimensions of digital policy, which was sometimes perceived to be a relatively technical policy area, became apparent and triggered legislative action. The so-called Arab Spring started in December 2010 and often involved a widespread use of social media and messenger services (Farrell, 2012, pp. 43–47). Revelations by Edward Snowden in 2013 highlighted the problematic practices of many big US technology companies and intelligence services. Infringements of personal data privacy caused a salience shock over issues of digital policy and data protection in particular and threw a spotlight on the political dimensions of the area (Kalyanpur and Newman, 2019). Furthermore, EU leaders recognised that the EU’s digital economy was lagging behind US competitors and problems of (inter-)dependence (Farrell and Newman, 2016).

Against this background, the second Barroso Commission, which was inaugurated in 2009, considered the territorial fragmentation of the internal market to be an important obstacle to the EU digital economy and promised to ‘reap the benefits of a digital single market’ as a solution (European Commission, 2010b). The corresponding ‘Digital Agenda’ was built in particular on inputs from a Commission report of 2009 that set out the promotion of ‘Europe’s competitiveness in the digital economy’ (European Commission, 2010a, p. 7) as a key aim. However, during the Juncker Commission in 2014–2019, which was inaugurated a year after the Snowden revelations, the rhetoric changed towards concepts that stressed broader aims. For example, the EU Commissioner for the Digital Economy Günther Oettinger, indirectly addressing the United States, argued that the EU had to regain the ‘digital sovereignty’, which it had forfeited and reassert its digital independence (Traynor, 2015).

In the area of DSM policy, the Commission maintained market-liberal elements like the reliance on self-governance by market actors and the country-of-origin principle. In consultation with stakeholders, it pushed the idea of an EU online trustmark (European Commission, 2010a, p. 13), which culminated in the e-commerce trustmark being issued from 2015 by the European association of e-commerce businesses (Ecommerce-Europe)

and their national associations. This was linked to a 2013 regulation that established ‘alternative’, that is, out of court, dispute settlement schemes (Regulation [EU] No. 524/2013). These rely on so-called online dispute resolution bodies, often entities founded by business associations, that are less expensive and quicker for consumers than public courts.

However, the Juncker Commission also promised to undertake a comprehensive assessment of the social and economic effects of large online platforms in its 2015 DSM Strategy (European Commission, 2015b). As a result, a 2016 report identified challenges in particular regarding fair competition, content moderation, transparency and trust (European Commission, 2016). In response, on 26 April 2018, the Commission issued a regulation aimed at increasing transparency for smaller businesses and traders on online platforms (Regulation [EU] No. 2019/1150) and on the same day set up an Observatory on the Online Platform Economy composed of independent experts to assist the Commission in policy-making on the online platform economy. Although its activities are advisory and so not binding, this was a new institutional element that was added to the existing EU digital governance structure (layering), and it indicated a gradual shift towards more public-interventionist governance. For example, broader stakeholders are included, like platform business users that are invited to flag important issues and concerns that they experience.

Furthermore, the early years of the decade were also the period in which the EU’s legal instrument to protect personal data was formulated. The GDPR replaced the 1995 Data Protection Directive. Data protection is one of the rights in the EU’s Charter of Fundamental Rights (CFR), which was proclaimed in 2000 and became legally binding with the entry into force of the Lisbon Treaty in 2009. Building on the CFR, Article 16 of the Treaty on the Functioning of the European Union (TFEU) provided a strong treaty basis for a firm EU data protection regulation. Whilst the 1995 directive resulted from a call from national DPAs for harmonised EU rules in the field (Newman, 2008), it was the Commission that initiated work on the GDPR (Laurer and Seidl, 2021, p. 265). Already institutionalised features within the Commission promoted data protection developments. For example, the GDPR team was headed by the same Directorate-General who had provided the secretariat for the Article 29 Working Party (WP), which was established by the 1995 Data Protection Directive and which was to advise the Commission ‘on any proposed amendment of the directive’ (Article 30).

When tabling the proposal for the GDPR in 2012, the Commission stated that the regulation would benefit digital markets and argued that ‘building trust in the online environment is key to economic development’ (European Commission, 2012). However, its rhetoric and policy approach significantly changed over the period, being influenced by growing public awareness of the negative consequences of the digital economy (Kalyanpur and Newman, 2019; Laurer and Seidl, 2021). In 2016, the GDPR was adopted by adding new institutional elements to the already existing data protection structure, moving data protection regulatory instruments towards more public-interventionist governance. These include stronger rules to protect fundamental rights, such as the ‘right to be forgotten’, which allows citizens to delete personal data (Newman, 2015). The GDPR strengthened public supervision by giving public actors more competences in the form of compulsory DPAs, and it set up a new European Data Protection Board, which is the Article 29 Working Party consisting of national DPAs renamed and with broadened tasks.

Besides these changes towards public-interventionist governance (in the form of layering), the GDPR maintained the more market-liberal country-of-origin principle, stating that digital companies are supervised by the national authorities of the Member State where they are established. This laid the ground for future enforcement bottlenecks (see below), leading to further institutional responses.

### *Comprehensive Change in the 2020s*

The involvement of Cambridge Analytica in the 2016 US election campaign (Chen 2018) and Russian interference in the 2016 US election (Ziegler, 2018, p. 567) were seen as examples of political involvement that could threaten the European elections in 2019 (Plucinska, 2018). In the early 2020s, the COVID-19 pandemic highlighted the importance of the digital sphere, and EU leaders problematised the EU's digital vulnerabilities. In this context, many EU policy-makers realised dependence on foreign companies, which were increasingly perceived as security threats (Farrand and Carrapico, 2022). After a new commission president was elected in 2019, Ursula von der Leyen (2019) announced her aim of leading a 'geopolitical Commission' and spoke of the need to achieve digital sovereignty (von der Leyen, 2020).

To achieve this aim, the von der Leyen Commission built on consultations and reports initiated by the Juncker Commission. These identified a need to increase transparency, which was addressed in a 2019 regulation. Furthermore, challenges posed by large platform companies in the areas of content moderation and fair competition were problematised but not solved (European Commission, 2016). The Commission aimed to address the issue and argued for the importance to 'rebalance the power of private companies and European citizens in line with European values' (European Commission, 2022). To achieve this broader aim, on 15 December 2020, it proposed new regulatory instruments in the form of a digital services package to intervene in digital markets and in particular to address problems related to large online platforms. An agreement was reached during the French Council Presidency in April 2022.

The package consists of two regulations. The Digital Services Act (DSA) deals predominantly with content moderation issues, and the Digital Markets Act (DMA) aims to ensure fair competition. The DSA implements stronger rules, which can be read as a response to the social and political challenges that were identified by the Commission as being caused by online platform business models. According to the Commission, their dominant position in the market entails risks of abuse, for example, in relation to data protection, illegal content proliferation and fair business practices. The DSA updates the 2000 e-commerce directive, turning it into a directly applicable EU-wide regulation. The Commission's proposal maintained some of the key market-liberal principles of the directive, like continuing of the avoidance of general monitoring, the internal market clause and the principle of limited liability of intermediaries for illegal content. However, by adding new elements, the DSA moved digital services regulation towards more public-interventionist governance. For example, the DSA contains far-reaching elements that intervene in platform business practices, like a prohibition of misleading tricks that manipulate users ('dark patterns'), a prohibition of behavioral advertising targeted at minors and a prohibition of ones based on profiling that depends on sensitive personal data.

The gradual shift to more public-interventionist governance is also manifested in a change in the treatment of private actors in the governance of digital services. Whereas previous attempts relied on private actors' self-regulating, the DSA moves the balance towards the involvement of broader stakeholders and public institutions in risk assessments and content moderation. An example is that the DSA makes it compulsory for very large online platforms, defined as those reaching 45 million users monthly, to be externally audited by independent organisations to assess risks that stem from the design and use of their service, like cyber violence and harm to minors (Laux et al., 2021). To ensure the consistency and quality of these audits, the DSA also empowers the Commission to adopt delegated acts to refine these procedures. Another example is the reliance on so-called trusted flaggers, meaning private law entities with certain expertise in the relevant fields to deal with illegal content. The use of trusted flaggers was tested with the Code of Conduct on countering illegal hate speech, which the Commission encouraged in 2016. The DSA moves this approach towards more public intervention. Its Article 22 foresees the status of trusted flaggers no longer being awarded by the platforms themselves but by a new layer of national public governance bodies called Digital Services Coordinators (DSC), which are to be established.

Stronger enforcement mechanisms shift DSM governance further towards public intervention. Enforcement became very controversial in the negotiations on the DSA. The original Commission proposal maintained the supervisory path followed for e-commerce and entrusted national DSCs with enforcing the DSA. This approach of giving Member States authority was adopted in the GDPR and created enforcement bottlenecks (Vinocur, 2019). Most big technology companies have their EU headquarters in Ireland, and a report published in 2021 by an Irish non-governmental organisation (NGO) found that 98% of large EU cases had not been decided by the Irish authority (Ryan and Toner, 2021). Whilst the French government argued for a change from the country-of-origin principle to a country-of-destination principle (Bertuzzi, 2021b), a coalition of smaller Member States announced their aim to defend the country-of-origin principle (D9+, 2019). Following a move by the French government to find a compromise, the DSA shifted the supervisory power over very large online platforms to the EU Commission (Bertuzzi, 2021a).

Thus, the DSA is a new layer of rules that shift digital policy towards stronger public intervention. For the first time, the rules empower the Commission to directly enforce fines of up to 6% of companies' global revenue, which is 2% higher than the maximum fines in the area of data protection, beyond competition policy. Alternatives to empowering the Commission were discussed: not only reliance on Member State authorities but also setting up a new European agency. I therefore interpret the final agreement on the DSA as a layering of new rules on the DSM governance structure and also as a conversion of the role of an already existing European institution, the EU Commission, the powers of which were redirected beyond its original purpose.

The second regulation of the digital services package, the DMA, aims to resolve the lack of contestability in the digital economy that, according to the Commission, arises from the dominant position of a few very large online platforms. The DMA defines platforms that have a size that impacts the internal market and control of important connections for business users with final consumers as 'gatekeepers'. The DMA defines a full catalogue of dos and don'ts for these gatekeepers, like allowing third parties to

inter-operate with the gatekeepers' own services and a prohibition on presenting services and products offered by the gatekeepers themselves more favourably than similar services or products offered by third parties. In this regard, the DMA shifts traditional *ex post* competition policy, which relies on acting after uncompetitive practices have been proved to be harmful to customers, mostly in terms of higher prices, towards *ex ante* regulation. This allows regulators to define rules that prevent market failures before they occur. This changes competition policy substantially from the minimalist interventionist tradition to *ex ante* regulation that no longer focuses only on low prices but also on market structure.

The DMA's governance architecture differs from that of the DSA and the GDPR. The Commission is exclusively granted extensive supervisory powers, which corresponds to EU competition policy in general and differs from the DSA, in which the Commission only oversees very large online platforms, and the GDPR, which is enforced by Member State authorities. Whilst the DMA's aims are essentially similar to those of competition policy, it changes the Commission's powers in substantial application of a new *ex ante* approach. 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 technology companies and realigning their powers with European values.

## Conclusions

Through a qualitative analysis of Commission strategies and important legislation on e-commerce and data protection, I have found that key elements of the EU's DSM governance have become more public-interventionist. In the 1990s, European policy-makers argued that 'the creation of the information society in Europe should be entrusted to the private sector and to market forces' (European Council, 1994) and more recent reforms are in line with broader and more interventionist statements aiming to 'empower people and businesses to seize a human-centred, sustainable and more prosperous digital future' (European Commission, 2021). Whilst the Commission used a pronounced market-liberal approach until the 2010s, it reacted to economic, political and social challenges associated with big technology companies with stronger regulation in the form of the GDPR, the DSA and the DMA. By learning from the weaknesses of the GDPR, the shift to more public intervention led to empowerment of the Commission to supervise very large online platforms in the EU. Whilst my analysis has confirmed the assumption that changes are most likely to occur by attaching new rules to already existing institutional structures (layering), I have also found evidence of a redirection of the purpose of existing institutions (conversion), notably of the European Commission. See Table 3 for an overview.

My findings contribute to the debate on EU policy-making and the policy implications that accompany the EU's ambition to fight for digital sovereignty. Whilst others have found that the EU has moved towards stronger data protection rules (Kalyanpur and Newman, 2019; Laurer and Seidl, 2021) and stronger digital competition policy (Cini and Czulno, 2022), I have particularly revealed more public-interventionist DSM governance by showing that policy aims have been broadened to include further objectives in addition to competitiveness. Stakeholders and public authorities rather than business actors have become more important in governance processes, and more market-correcting



Table 3: Overview and Selected Results.

Period	<i>Selected results and key processes</i>
DSM period from mid-2010 until early 2020	<i>Aims:</i> competitiveness and promotion of EU standards <i>Actors:</i> Commission as a regulatory actor, companies as partners in DSM governance <i>Instruments:</i> country-of-origin principle, stronger public regulation in the area of data protection → <i>Key process of institutional change:</i> some continuity of market-liberal elements and layering of more public-interventionist elements
Digital transformation period from early 2020	<i>Aims:</i> balance business power in line with EU values <i>Actors:</i> Commission as a regulatory actor and supervisor, companies become more accountable to stakeholders <i>Instruments:</i> supranational instead of intergovernmental enforcement, strong socio-economic regulation → <i>Key process of institutional change:</i> layering and conversion towards more public-interventionist governance

instruments have been introduced. Before the DSA was adopted, the Commission was mostly a regulatory actor. Now, for the first time beyond competition policy, it has received market intervention powers in supervising very large online platforms (DSA) and ex ante powers that in some respects resemble economic regulation more than competition policy (DMA).

Against the backdrop of my results, I see in particular three areas for further academic inquiry. First, research should centre on how the Commission uses its new powers. In the context of the GDPR and the DSA, supervisors must carry out their tasks ‘with complete independence, ... and [without taking] instructions from any other public authority or any private party’ (Article 50 DSA and Article 52 GDPR). However, the Commission is also a political body and so has to prove that it can make difficult choices that might require balancing different objectives like preventing online harm and ensuring the protection of fundamental rights online.

Second, further research on the drivers of the empowerment of the Commission in digital policy would contribute to our understanding of the role of supranational institutions in digital policy and of the dynamics of European integration in the digital age. My historical institutional account has suggested the importance of sequence and the reaction to challenges that are mostly associated with big foreign technology companies. Further analysis might explore the factors and mechanisms that lead to further European integration in digital policy as a reaction to processes of learning from past experiences (Kamkhaji and Radaelli, 2022) and from the more recent external threats posed by Russian aggression (Kelemen and McNamara, 2021).

Finally, it will be interesting to see to what extent EU digital policy will balance the need to drive innovation, increase control of the digital sphere and promote EU values. Whilst these objectives might all be desirable, they might well conflict with each other, and one might not be simultaneously achievable with the others. Seeing whether and how the EU integrates and balances these objectives in a coherent policy approach is of academic and political importance.

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## List of Interviews

Interview I, Senior Official European Parliament, Telephone, 4 September 2020.

Interview II, Senior Official European Commission, Not displayed, 22 September 2020.