

# *Why did the EU engage in the Digital Single Market?*

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## **Abstract**

This thesis centres on the evolution of the EU's strategies dealing with information and communications technologies (ICTs) and examines their characteristics. The question posed in this thesis is *why did the European Commission engage in these digital strategies, and how did the strategies manifest themselves?*

First, relevant theoretical explanations were assessed, and the ideal theoretical school offering the best explanation was identified. Thus, it is argued that neo-functionalism offer the optimal approach for this problem formulation. In particular, the notion of spill-over, a core concept within the theory, provides the best conceptualisation to the problem formulation.

Then, an examination of the timeframe of 2000-2017 was conducted and several key features were identified. It was argued, that the European Commission had an extensive emphasis on ICT infrastructure in the period 2000-2010, and became aware of this by the turn of the decade. However, the weak political support for a European-level approach to dealing with ICT's and their transformative potential, was the main reasoning for the Commission not being able to do take a more user-centric approach, in addition to the general failure of the 'Lisbon Agenda'. Nevertheless, by issuing the Digital Agenda for Europe in 2010, the course was set for an approach that could facilitate a higher level of e-commerce, in addition to creating a new regulatory framework for both telecommunications and data protection. Simultaneously, Member States started supporting the idea of a European approach to the changes posed by ICTs, due to societal pressure mounting for European action, especially after the Edward Snowden scandal in 2013, which had shown the Union's regulatory framework for data protection to be in a terrible shape. This facilitated the far-reaching and all-encompassing data protection reform, which resulted in the General Data Protection Regulation (GDPR) of 2016. Further, it has been proven that the agenda-setting power of the Commission is essential in the management of European issues. It was argued, that the Commission had efficiently identified specific issues of the challenges posed by ICTs and been consistent at putting it on the European agenda. Lastly, it has been discussed, that Member States had a clear interest in letting the Commission issue the different priorities on the EU agenda and subsequently deliver a policy-response, due to the convenience and functionality of said arrangement.

## Content

Introduction.....	3
Problem formulation .....	4
Methods.....	4
Limitations .....	5
Theory .....	6
Neo-functionalism.....	6
Task expansion and the spill-over effect.....	6
Agenda-setting .....	7
Theories of power-maximisation .....	9
Institutions and path dependence .....	9
Principal-agent theory .....	12
The Commission driven by neo-liberal ideology.....	12
Historical Overview .....	15
Definition of ICTs.....	15
Early strategies dealing with ICTs .....	15
ICTs at the centre of the digital strategy .....	19
The Juncker Commission and the Digital Single Market .....	21
Analysis.....	26
Continuation from previous strategies and the start of a user-centric approach.....	26
The Digital Single Market Strategy and consumer-centric measures.....	31
Agenda-setting and the centrality of the Latvian presidency of the Council.....	32
Public funding .....	35
Structural changes .....	36
Policy-making – the GDPR.....	38
Discussion of findings and concluding remarks .....	42
Sources .....	44
Legislation:.....	50

## Introduction

The EU has to date developed an interesting set of policies, affecting the daily lives of over 500 million individuals across the European continent. The collaboration in the EU now exceeds the primarily economic cooperation, which was enacted by a handful of European countries with the Treaty of Rome in 1957. Simultaneously, the digitalisation of society is increasingly affecting the daily lives of people across the globe, and politicians and policy-makers have been compelled to address and deal with this new reality for several decades. EU policy-makers have also addressed the challenges and transformative effects posed by digitalisation in an increasing manner since the turn of the millennium. At the well-known European Council meeting in Lisbon, March 2000, European leaders recognised the “quantum shift” that was provided by the reality of the “new knowledge-based economy”<sup>1</sup>. It was further recognised at the meeting that –

*“The rapid and accelerating pace of change means it is urgent for the Union to act now to harness the full benefits of the opportunities presented. Hence the need for the Union to set a clear strategic goal and agree a challenging programme for building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems.”<sup>2</sup>*

The European Commission has provided the Union with numerous strategies since then, in an attempt to deal with the digitalisation of society. The latest of these is the Digital Single Market strategy, proclaimed by the Juncker Commission in May 2015, which sets out an ambitious set of measures to be undertaken during its mandate. This strategy succeeds the Digital Agenda for Europe proposed by the previous Commission in 2010, and significant legislation has been enacted during these tenures, notably in the realm of data protection and telecommunication. An interesting question arising in relation to these digital strategies is the underlying rationale for the Commission to engage in such digital strategies. Additionally, it is equally puzzling why it took the shape it did and why the results ended up the way they did. Arguably, the reasoning must be found in the political wish to complete the internal market, finalising the overall political goal of the European integration project initiated with the Treaty of Rome and further achieved with the Single European Act from the 1980’s. These considerations have given rise to a problem formulation and a hypothesis, which will be able to be examined and extensively assessed through these following sections.

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<sup>1</sup> European Council (2000, March 24). *Presidency conclusions. Lisbon European Council.*

<sup>2</sup> *Ibid.*

## Problem formulation

This project examines the question of –

*Why did the European Commission engage in these digital single market strategies, and how did the strategies manifest themselves?*

The problem formulation essentially concerns itself with the question of – what drives European integration? – and the question of - why do Member States delegate power to the European level?

It is argued here, that the theoretical paradigms provided by neo-functionalism, particularly the concept of *spill-over*, is beneficial to an examination of this problem formulation. This has led to the hypothesis of –

*The strategies to create a digital single market were the results of functional spill-over from the single market of the EU.*

## Methods

This thesis seeks to map out the evolution of the EU's handling of ICTs in the economy. This thesis argues, that the theoretical school of neo-functionalism provides the most suitable explanation and the proper theoretical paradigm to conceptualise this evolution.

After initially consulting the relevant theoretical literature, it was clear that there are diverging theoretical explanations to the evolution of the EU strategies dealing with the digitalisation of society. These alternative theories centres on the European Commission acting in a more complicit manner, unlike the purely functional explanation of Commission activism offered by the neo-functional school of thought. These alternative theories will be discussed at length in the theory section of this thesis.

Then, it was found necessary to present a historical overview of the relevant timeframe, so that the historical context could be explained. This section of the thesis was made as to simply examine the question of what happened during the timeframe 2000-2017. This section has centred on the European Commission and strategies dealing with ICTs, due to its relevance for the analysis. For this section, official papers from the Commission such as communications and White Papers were examined, in addition to independent reports and relevant literature and articles.

The analysis provides a thorough examination of the policy-making process relating to the legislation enacted during the Digital Single Market strategy. In addition, the analysis provides a comprehensive assessment of policy-entrepreneurship and agenda-setting performed by the Commission in relation to the Digital Single Market strategy. The research was conducted as follows. First, the available official papers from the Commission were collected, specifically White Papers, communications, and reports conducted on the behalf of the Commission. This was done with the purpose of examining the Commission's own official position, and they pertain the benefit of being a non-reactive source of material. These documents have been very informative on the different kinds of emphasis put on the relevant issues, and the way these issues have been framed and addressed by the Commission. Secondly, news-articles, an interview, and relevant literature were examined, as to illuminate the policy-making process that went ahead of the different kinds of legislation. Additionally, Eurobarometers have been included in the analysis. An analysis of selected Flash Eurobarometers have been conducted as to support the claim regarding early legislation facilitating the rise in cross-border internet sales in the selected timeframe. In summary, a vast selection of empirical material have been gathered and analysed, with the purpose of adding empirical evidence to the hypothesis proposed in this thesis.

## Limitations

The scope of this thesis limits itself to the 21<sup>st</sup> century and the events that followed the European Council meeting at Lisbon in March 2000. This is due to the fact that no substantial efforts were made to facilitate a digital strategy before this time. Furthermore, the activism of the European Commission is the focal point of the analysis. This is because of the powers pertained to the Commission in relation to *agenda-setting* and *issue-framing*, which will be discussed further in the analysis. Moreover, the two latest strategies proclaimed by the Commission (the Digital Agenda for Europe and the Digital Single Market, respectively) are the main subjects of the analysis due to their high political priority, compared to previous strategies. Furthermore, the main thrust of the Digital Single Market strategy was in the years 2015-2016, where most of the proposed measures were realised, and therefore the analysis has emphasised this specific time period when examining the Digital Single Market strategy. Of these legislative measures, the Electronic Communications Regulation and the General Data Protection Regulation has been weighted heavily in the analysis due to their argued importance and significance.

## Theory

### Neo-functionalism

The centrality and impact of the neo-functionalist school of thought in the study of European integration is unquestionable, and this ‘grand ole theory’ remains influential and prevalent to this day. The theory of neo-functionalism predicts for the evolution of European political integration to take place incrementally<sup>3</sup>, albeit not necessarily in an uninterrupted line of progression. The concept of spill-over offers a suitable theoretical paradigm for the examination of the Commission’s proposed digital strategies. Previously, the argument of the internal market having to expand into other fields of regulation to keep its functionality have prevailed in different analyses of the EU’s evolution, notably Tranholm-Mikkelsen (1991) and Burley & Mattli (1993). This idea of the evolution of European integration taking place ‘automatically’ and without complicit activism by supranational agents, serves as the theoretical standpoint for the analysis.

### Task expansion and the spill-over effect

Much has been said on the notion of task expansion and its centrality to the neo-functionalist school of thought. The term was coined by Haas (1958) and it describes the idea of an increasing level of integration taking place in regional integration process. A major part of the notion of task expansion is the spill-over effect, also first hypothesised by Haas (1958), which has since become a cornerstone of NF theory. The basic assumption of spill-over is that when states choose to engage in regional cooperation and give authority to a supranational institution, a necessity to engage in more cooperation and expand the scope of the initial authority will arise. Explained in the words of Schmitter (1969) –

*“Spill-over refers... to the process whereby members of integration scheme – agreed on some collective goals for a variety of motives but unequally satisfied with their attainment of these goals – attempt to resolve their dissatisfaction by resorting to collaboration in another related sector (expanding the scope of mutual commitment) or by intensifying their commitment to the original sector (increasing the level of mutual commitment), or both.”<sup>4</sup>*

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<sup>3</sup> Jensen, C. S. (2016). Neo-functionalism. In Cini, M., & Pérez-Solórzano Borrágán, N. European Union Politics (pp. 54-64). Oxford: Oxford University Press.

<sup>4</sup> As cited in Jensen, C. S. (2016). Neo-functionalism. In Cini, M., & Pérez-Solórzano Borrágán, N. European Union Politics (pp. 54-64). Oxford: Oxford University Press, p. 57.

In the NF school of thought, three specific strains of spill-over has been hypothesised: functional- (or technical), political-, and cultivated spill-over. The idea of functional spill-over was first described by Haas with the European Coal and Steel Community (ECSC) as an example, and it denotes the process where the initial decision by a government to put a certain sector under the authority of central institutions will create pressures to advance the competences of those institutions into bordering policy fields, like taxes and wage policies.<sup>5</sup> Therefore, if Member States wants to ensure the functionality of the original agreement they must expand the scope of integration to include other neighbouring sectors. Another strand of the spill-over effect is one identified by George (1991) and named political spill-over. It describes an instance where “...both supranational actors (such as the Commission) and subnational actors (interest groups or others within the same member states) create additional pressures for further integration.”<sup>6</sup> The concept of political spill-over emphasises the role of specific supranational and subnational groups in the functional spill-over process<sup>7</sup> This process is often regarded as being a “more deliberated political process” where the supranational and subnational actors actively promote and enhance the regional integration that is taking place. The third strand of spill-over is the cultivated spill-over. This form of spill-over is similar to the political spill-over effect in that it entails a proactive process. Jensen (2016) has elaborated on this particular kind of spill-over – “Cultivated spill-over refers to situations in which supranational actors – the European Commission in particular - push the process of political integration forward when they mediate between the member states.”<sup>8</sup>

### Agenda-setting

A special characteristic of the Commission is its agenda-setting role within the EU. While political innovation in general may come from a number of different sources (like Member States, the Parliament, international organisations, etc.), the centrality of the Commission in the agenda-setting process is unquestionable, since the Commission has the monopoly on initiating policies in the EU. Sharpf (1996) has found the Commission to primarily produce economic efficiency and welfare and other researchers such as Jachtenfuchs (1996) have also gone into detail with this technocratic nature

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<sup>5</sup> Haas, Ernst B. (1958). *The Uniting of Europe*. Stanford: Stanford University Press.

<sup>6</sup> As cited in Pollack, M. A. (2005). *Theorizing EU Policy-Making*. In H. Wallace, W. Wallace, & M. A. Pollack, *Policy-Making in the European Union* (pp. 15-17). Oxford: Oxford University Press, p. 15.

<sup>7</sup> Pollack, M. A. (1994). *Creeping Competence: The Expanding Agenda of the European Community*. 14, 95–145, p. 99.

<sup>8</sup> Jensen, C. S. (2016). *Neo-functionalism*. In Cini, M., & Pérez-Solórzano Borragán, N. *European Union Politics* (pp. 54-64). Oxford: Oxford University Press, pp. 57-58.



of the Commission<sup>9</sup>. Therefore, we can expect the Commission to promote and produce economically sound policies, but maybe be more reluctant to pursue more conflict-intensive policies, which are typically the characteristics of social policies. However, the multilevel structure of the EU creates dynamics that can produce progressive policy results. The Commission needs to take account of the Member States positions in the policy-making process, but this does not entail that the resulting policy will be of the ‘lowest common denominator’. This is because that “*national interest constellations in new policy areas may be so diffuse and complex that they leave some scope to find winning coalitions by introducing innovative proposals*”<sup>10</sup> However, There also exists an informal way of agenda-setting for Member States in the EU. Countries can be expected to defend their national interests, and an effective way to do this is to try to export their domestic policies to the supranational level. This can both prevent some foreseen disadvantages, or it can open up for new markets for the given Member State’s national industries. Therefore, there exists a ‘first mover’ benefit for those Member States that can successfully promote their policy model to the Commission and get them to initiate policies on that basis. Due to the different mechanisms that might be at play (be it competition, technocracy or coalition building) the Commission can be regarded as a sort of marketplace for innovative approaches.<sup>11</sup> Because of the heterogeneity of all the different Member States, their arguments and ideas represent a large array of different opinions and positions. Writing at a time with only 12 Member States, Peterson (1995) expanded on the assumption that Member States always provide several legitimate alternatives for the Commission. “*The presence of twelve different systemic agendas in the twelve different member countries presents policy entrepreneurs within the EC itself with the opportunity to select issues that have already been legitimated in one or more national contexts.*”<sup>12</sup> However, institutional constraints also exist for the Commission regarding agenda-setting. Because of its institutional role, the Commission must make sure that all legislative proposals are compatible with the internal market programme. The Commission also has a relative low level of control over the decision-making process, and this limited control of the outcome of a legislative

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<sup>9</sup> As cited in Hey, C. (2002). Why does environmental policy integration fail? The case of environmental taxation for heavy goods vehicles . In A. Lenschow, Environmental Policy Integration: Greening Sectoral Policies in Europe (pp. 127-152). Routledge, p. 130.

<sup>10</sup> As cited in Hey, C. (2002). Why does environmental policy integration fail? The case of environmental taxation for heavy goods vehicles . In A. Lenschow, Environmental Policy Integration: Greening Sectoral Policies in Europe (pp. 127-152). Routledge.

<sup>11</sup> Chalmers, D., Davies, G., & Monti, G. (2010). European Union law: cases and materials (2nd ed). Cambridge, UK ; New York: Cambridge University Press, p. 77.

<sup>12</sup> Peterson, J. (1995). Decision-making in the European Union: Towards a framework for analysis. Journal of European Public Policy, 2(1), 69–93, p. 19.

proposal arguably causes the Commission to be rather cautious, since it anticipates decision-making constraints in the process.

## Theories of power-maximisation

Looking at the long-term development of several EU policies, studies have shown signs of what Citi (2014) has named ‘creeping competences’. These studies include Sandholtz (1992, 1993) on telecommunications and information technology, Pollack (2000) on common market regulation, and Citi (2014) on research and development in the area of security technology. These empirical studies all show evidence of the gradual extension of supranational competences to policy-areas that were not mandated through the original treaties, typically by the employment of secondary legislation. Arguably, the digital domain does not constitute a new policy-area per se, and the question of the Commission expanding its power into the digital sphere is perhaps more an instance of competence-utilisation rather than expansion. Nevertheless, during the initial phases of the research conducted in this thesis it was considered if the strategies to realise a digital single market were the results of power-maximising efforts undertaken by the European Commission. However, this was dismissed on several criteria, which will be discussed in the following section. The research, which proved most convincingly in taking such an approach, was that of Mansell (2014), who provided an interesting account and critical assessment of how policy initiatives in the area of the digital single market have been framed by the Commission. She argues that institutional constraints were evident in the EU’s approach to create a digital single market. These constraints are understood as individual preferences governed by cultural, political, social and economic values. She argues that these constraints limits the options for the actors, which leads to path-dependence, which makes it “*very difficult to rebalance policy actions, even if the policy discourses change over time.*”<sup>13</sup> In order to fully comprehend this argument, a definition of institutions followed by an explanation of the notion of path-dependency will be presented.

## Institutions and path dependence

What are institutions? The centrality of this question within institutionalism is obvious, but there are numerous answers to this conundrum within the overall school of institutionalism. North (2010) has provided a short, but precise definition, proposing that “*Institutions are the structure that humans*

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<sup>13</sup> Mansell, R. (2014). Here Comes the Revolution — the European Digital Agenda. In K. Donders, C. Pauwels, & J. Loisen (Eds.), *The Palgrave Handbook of European Media Policy* (pp. 202–217), p. 203.

*impose on that landscape in order to produce the desired outcome.*"<sup>14</sup> Other authors have defined institutions as being everything from legislature and electoral law to social classes, thereby accepting a comprehensive set of structures to examine in the researched institutional apparatus. Arguably, the theoretical strand that operates with the vaguest definition of institutions is historical institutionalism.<sup>15</sup> Here, the definition of institutions often include ideas, or rather, the role of ideas in defining institutions are more evident within this branch of institutionalism.<sup>16</sup> However, the focus for historical institutionalists seems to be on the more commonplace concepts of formal institutions like bureaucracies and legislatures, as also seen in other strands of institutionalism.

It is proposed by North (2010) that we, in an institutional approach, will benefit from looking at the EU as scaffold or as a complex institutional structure in which actors interact with each other. The formal and informal rules are the restrictions, which limits the actors that operate within it. In this sense, the formal treaties of the EU form the basic foundation for the EU-scaffolding. Similar to a state constitution, the EU treaties form the legal foundation for all EU action. Secondary legislation, like regulations and directives, are additions to this structure. They further define the framework for the EU actors, be it Member States, the Commission, interest groups, etc. Moreover, the norms and specific procedures in the policy-process further define the political structure, and can be seen as extra poles and trestles in the EU-scaffold. The actors in the political system will be expected to primarily act in their own self-interest, focussing on power-maximising and furthering their influence within and outside of the system. In this way, the Commission is seen as the main driver for European integration, in that its self-interest lies in the centralisation of political power at the European level. According to Hix (2005), we must try to figure out the 'optimal policy strategy' of the actors in the political system and the institutional changes they try to implement in their efforts to realize their goals.

To comprehend the notion of path-dependency we must acknowledge the EU as an institutional framework not unlike that of a regular state, in that it "*consists of the political structure that specifies the way we develop and aggregate political choices, the property rights structure that defines the formal economic incentives, and the social structure – norms and conventions – that defines the*

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<sup>14</sup> North, D. C. (2010). *Understanding the process of economic change* (10. print., and 1. paperback print). Princeton, NJ: Princeton Univ. Press, p. 49.

<sup>15</sup> Peters, B. G. (2005). *Institutional theory in political science: the 'new institutionalism'* (2nd ed). London ; New York: Continuum.

<sup>16</sup> *Ibid.* p. 75.

*informal incentives in the economy.*"<sup>17</sup> The institutional structure of the EU reflects the accumulated beliefs of the society over time, and change in the institutional framework is usually an incremental process reflecting the constraints that the past imposes on the present and the future. It is also a prerequisite that the actors operating within the institutional structure constantly try to manipulate and 'bend' this framework for their own benefit and future self-interest. However, the institutions and rules put in place by actors with changing interests also create limitations and boundaries down the line. In a rather simplistic explanation, path dependence is the idea that the choices of today are constrained by the heritage of institutions accumulated from the past.<sup>18</sup> In a more in-depth explanation of the notion of path-dependence, North (2010) has proclaimed that -

*"A step toward a more comprehensive understanding of the term is to recognize that the institutions that have accumulated give rise to organizations whose survival depends on the perpetuation of those institutions and which hence will devote resources to preventing any alteration that threatens their survival. A great deal of path dependence can be usefully understood in that context ... The interaction of beliefs, institutions, and organizations in the total artifactual structure makes path dependence a fundamental factor in the continuity of a society ... Path dependence is not "inertia," rather it is the constraints on the choice set in the present that are derived from historical experiences of the past. Understanding the process of change entails confronting directly the nature of path dependence in order to determine the nature of the limits to change that it imposes in various settings."*<sup>19</sup>

Path dependence concerns itself with the persistency of institutions in a given political structure, and institutional change is therefore something that can be regarded as a bit of an Achilles' heel within historical institutionalism. The analytical framework of historical institutionalism seemingly rests upon the enduring effects of institutional and policy choices made at the beginning of the political structure<sup>20</sup> Therefore, the approach has an easier time explaining the persistence of patterns but a harder time explaining how these patterns might change.<sup>21</sup>

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<sup>17</sup> North, D. C. (2010). *Understanding the process of economic change* (10. print., and 1. paperback print). Princeton, NJ: Princeton Univ. Press, p. 49.

<sup>18</sup> North, D. C. (2010). *Understanding the process of economic change* (10. print., and 1. paperback print). Princeton, NJ: Princeton Univ. Press.

<sup>19</sup> *Ibid.* pp. 51-52.

<sup>20</sup> Peters, B. G. (2005). *Institutional theory in political science: the 'new institutionalism'* (2nd ed). London ; New York: Continuum, pp. 76-77.

<sup>21</sup> *Ibid.*

## Principal-agent theory

Another central part of the institutionalism, especially rational choice institutionalism, is the principal-agent theory. It seeks to comprehend and explain the relationship between actors in an organisation and why they choose to delegate power to institutions or other actors. Peters (2005) has provided a more telling explanation –

*“Interactions among institutions, and between individuals and institutions, can be considered from the perspective of principal-agent models. This perspective can be applied within organizations as well as serving as a means of understanding interactions among groups of institutions within the public sector. For example, within a public organization the leader of that organization (whether minister or administrator) may operate as the agent for his or her fellow employees.”*<sup>22</sup>

In the case of the EU, the theory provides a framework for the examination of the question – why do Member States give authority to supranational institutions like the Commission? An important factor underlines this theoretical model. It entails the existence of an asymmetry of information within the relationship of the principal and the actor, which can be exploited by the agent. Due to the power-maximising nature of actors, the agent will always try to utilise this asymmetry to its advantage<sup>23</sup>, and in the case of the EU, this means that the Commission will always try to influence policy-making to its own benefit, by means of superior information to that of the Member States. Therefore, a degree of ‘policy-drift’, where the agent moves the final policy outcome closer to its own preference, is always present in a principal-agent model.<sup>24</sup>

## The Commission driven by neo-liberal ideology

Another theoretical strand of the theoretical literature concerns the idea of the Commission driven by neo-liberal ideology rather than power-maximisation. This hypothesis has also been examined in empirical-based research, notably Bartle (2005) in his examination of the *neo-liberal transformation of telecommunications and electricity*, Mansell (2014) on the prevailing values and priorities of the EU’s *digital agenda*, and Giannone & Santaniello (2018) on the political aspect of measurements in the EU’s evaluation of its digital policies. It is argued here, that this hypothesis bears resemblance to the hypothesis of the Commission driven by self-interest, in that the actions of the Commission in

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<sup>22</sup> Peters, B. G. (2005). *Institutional theory in political science: the ‘new institutionalism’* (2nd ed). London ; New York: Continuum, pp. 55-56.

<sup>23</sup> Hix, S. (2005). *The political system of the European Union* (2nd ed). Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan.

<sup>24</sup> Ibid.

both hypotheses entails a level of intent, which goes beyond what might be expected from the Commission. However, neo-liberalism is an illusive concept and must be thoroughly defined in order to conceptualise it.

So what is neo-liberalism? Neo-liberalism is a major idea in economics, which, essentially, involves the prioritising of the market over the state, and prioritising of market efficiency over other policy objectives. The neo-liberal school of economics is a revival of the economic liberalism of the nineteenth-century. A major part of the liberal economic school of thought centres on the proposed dichotomy between the market and the state. Neo-liberalists view markets as natural phenomena, and any social or political interference on a given market is regarded as having a highly distortive effect on the efficiency and net economic benefit. The ideal market is therefore one with minimal state regulation, thereby letting the supply and demand aspect of the market be the dominant factor that regulates the market. The theory prerequisites that individuals are ‘benefit-maximisers’ because they will always strive for the highest possible benefit in their market activity. A similar explanation is provided by Bartle (2005), who writes “*supply, demand, and price levels are determined by individuals striving to maximise their own benefit, which results in the maximisation of overall social benefit.*”<sup>25</sup> The importance of free trade in economic development is also stressed by neo-liberalists. The argument is that the global economy will benefit from unrestricted trade in the long run. Trade barriers between states are therefore seen as not only detrimental to the individual states but to the global economy as well, restricting the possible total output and income of the global economy. This idea of unrestricted and free trade also provides the fundamental reasoning for the internal market of the EU, where a customs union ensures a certain level of free trade between the Member States. In classic liberalism, the idea of deregulation is seen as a positive thing, in that it signifies a shift from state intervention to an unrestricted market. However, this is not necessarily the case in the neo-liberal school of thought, according to some critiques.<sup>26</sup> Arguably, regulation is needed to overcome market failures and to foster competitiveness. Historically, the trend has been for market liberalisation to be accompanied by an upsurge in regulations.<sup>27</sup> Quoting a statement made by the OECD, Bartle (2005) supports this point, writing that “*A Common myth is that we live in an age of deregulation ... in fact, market liberalisation usually requires new and sophisticated regulatory regimes. Privatisation*

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<sup>25</sup> Bartle, I. (2005). *Globalisation and EU policy-making: the neo-liberal transformation of telecommunications and electricity* (1. ed). Manchester: Manchester Univ. Press, p. 153.

<sup>26</sup> Estrup, H., Jespersen, J., & Nielsen, P. (2013). *Den økonomiske teoris historie: en introduktion*. Kbh.: Jurist- og Økonomforbundets Forlag.

<sup>27</sup> Vogel, S. K. (1998). *Freer markets, more rules: regulatory reform in advanced industrial countries* (1. print., Cornell paperbacks). Ithaca, NY: Cornell Univ. Press.

*commonly means more regulation, not less.*”<sup>28</sup> The goal for neo-liberalists is therefore not necessarily deregulation in itself, but more the facilitation of ‘good regulation’ that enables prime conditions for the market and lead to quintessential goal of economic growth.<sup>29</sup>

Examining the rationale of the Commission from an ideational standpoint would emphasise other aspects, focussing more on the level of intent in the Commissions activism. The idea of neo-liberalism as the primary factor in determining the output from the Commission would be the focal point for this particular approach.

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<sup>28</sup> As cited in Bartle, I. (2005). *Globalisation and EU policy-making: the neo-liberal transformation of telecommunications and electricity* (1. ed). Manchester: Manchester Univ. Press, p. 154.

<sup>29</sup> Estrup, H., Jespersen, J., & Nielsen, P. (2013). *Den økonomiske teoris historie: en introduktion*. Kbh.: Jurist- og Økonomforbundets Forlag.

## Historical Overview

### Definition of ICTs

Before the historical overview is presented, a definition of the term ICTs will be given in the following section.

Information and communications technologies (ICTs) at the broadest definition would include the vast set of technological utilities that underline the operation of the internet as a whole, in addition to information technologies in general. This would include TV- and phone-cable networks, optic-fibre and Ethernet networks, mobile phone networks, etc. The term would particularly apply to modern technologies like cloud-computing, smartphones, advanced network applications and Internet of Things (IoT), and the term has increasingly been applied to define the multiple set of technologies that facilitate life in the 21<sup>st</sup> century. The term has been in use since the 1980's, although initially confined to academia, and in many ways, its use has followed the evolution of the internet. Mărcuț (2017) has summarised the increasing importance of ICT's, writing that –

*“Ever since information and communication technologies (ICTs) have exited the research laboratories and entered the lives of citizens, there has been extended debate on their socioeconomic, political, educational, or cultural effects. The science is clear on the first conclusion to be observed on the deployment of ICTs in society, economy. They have a transformative quality, sometimes their effects being hailed as revolutionary. The extent to which their transformative effect changes our lives is under debate, almost mirroring the debate on globalization.”*<sup>30</sup>

In an EU context, the term was increasingly used in describing the ‘information society’ that was envisaged by the Commission<sup>31</sup>, in addition to other political elites and policy-makers.

### Early strategies dealing with ICTs

#### **The Lisbon strategy**

At the EU level, attempts to address the increasing digitalization of society were made as early as year 2000. It was acknowledged, that globalization and the transition into a knowledge-driven economy would bring about a “quantum shift” for the EU, which would affect every aspect of

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<sup>30</sup> Mărcuț, M. (2017). Crystalizing the EU digital policy: an exploration into the Digital Single Market. Cham: Springer, p. 2.

<sup>31</sup> European Commission, Communication ‘i2010 – A European Information Society for growth and employment’, COM(2005) 229 final.



people's lives and would “*require a radical transformation of the European economy*”<sup>32</sup>. In the Lisbon Strategy of 2000, the EU put forward a new strategic goal to be realised within the decade, which would see the Union becoming “*the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion*”<sup>33</sup>. This was to be done within an overall strategy of, among other things, preparing the transition to a knowledge-based economy and society by better policies for the information society and R&D<sup>34</sup>. Further specifications of the strategy was made under the title of “*An information society for all*”, and the emphasis was on making the internet itself more accessible to people and businesses in addition to an overall liberalisation of the telecommunications markets<sup>35</sup>.

### **The Barroso I Commission and the i2010 Strategy**

By the time of the Barroso Commission I, progress on the Lisbon strategy was insufficient, with some observers stating that the strategy had been too all-encompassing, thereby making it rather difficult to make sense of the political priorities<sup>36</sup>. Similarly, the KOK-Report of November 2004 noted that “*the initial strategy was overambitious and too complex with respect to the number of goals envisaged*”.<sup>37</sup> Therefore, the report called on the EU to re-emphasise its priorities, focussing on R&D and education and human capital formation, in addition to a regulatory framework for e-communications that would stimulate the expansion of ICTs<sup>38</sup>.

The Commission recognised that the strategy needed “*a restart*”, and that future success would require “*an explicit user-orientated focus if potential economic, social and environmental gains were to be achieved*”.<sup>39</sup> Therefore, in June 2005, the Commission launched a new strategy called “i2010 – A European Information Society for Growth and Employment”, which was an updated version of the Lisbon strategy, seemingly conforming to the points put forward in the KOK-Report. The Commission now pledged to – develop proposals that would update the regulatory frameworks for e-

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<sup>32</sup> European Council (2000, March 24). *Presidency conclusions. Lisbon European Council*.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> European Voice, 2004, as cited in Mansell, R. (2014). Here Comes the Revolution — the European Digital Agenda. In K. Donders, C. Pauwels, & J. Loisen (Eds.), *The Palgrave Handbook of European Media Policy* (pp. 202–217).

<sup>37</sup> The Lisbon strategy for growth and employment : report from the High Level Group chaired by Wim Kok, November 2004. Corporate author(s): Secretariat-General (European Commission).

<sup>38</sup> *Ibid.*

<sup>39</sup> European Commission, 2005, as cited in Mansell, R. (2014). Here Comes the Revolution — the European Digital Agenda. In K. Donders, C. Pauwels, & J. Loisen (Eds.), *The Palgrave Handbook of European Media Policy* (pp. 202–217).

communication; use Community financial instruments to stimulate investment in R&D; and to support policies that would address e-inclusion and quality of life<sup>40</sup>. However, real efforts were modest<sup>41</sup>, and by 2010 “it was clear that aspirations for the European information society were still proving illusive”<sup>42</sup>. The most disruptive piece of legislation (and one with a significant amount of public support<sup>43</sup>) was the Regulation No. 717/2007 or the “Regulation on roaming charges in the European Union”. This regulation was the brainchild of Vivian Redding, Commissioner for Information Society & Media, and it effectively put a cap on roaming charges for calls made from mobile phones used in other EU member countries. The regulation was approved by parliament in April 2007, and has consecutively been amended, resulting in the Regulation 2017/920, which saw a complete abolition of all roaming charges within the EEA.

### **The Barroso II Commission**

When the Barroso Commission II took office in 2010, the financial crisis had taken its toll on the global economy and, naturally, a lot of political will was directed at battling the consequences of this economic disaster. A “European Economic Recovery Plan” had already been issued by the previous Commission in November 2008, in an attempt to address the financial crash and serious recession. It recognised the innovative potential of ICTs and the importance of high-speed internet access in relation to the economic recovery of Europe, writing that “*Equipping Europe with this modern infrastructure is as important as building the railways in the nineteenth century*”<sup>44</sup>. It further called on Member States and stakeholders to develop a specific “*broadband strategy*” that would extend and upgrade existing networks, with the aim of reaching complete coverage of high-speed internet in the Union by 2010. The Commission pledged to support this endeavour by funnelling an additional EUR 1 billion to such network investments, with the intention of providing “*broadband access to under-served and high cost areas where the market cannot deliver*”<sup>45</sup>.

In 2009, the Commission issued a report on the achievements of the i2010 strategy, called “Europe’s Digital Competitiveness Report – Main achievements of the i2010 strategy 2005-2009”. With the

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<sup>40</sup> European Commission, Communication ‘i2010 – A European Information Society for growth and employment’, COM(2005) 229 final, p. 11.

<sup>41</sup> Adamski (2018) going as far as calling the efforts made in the years 2000-2010 a failure.

<sup>42</sup> Mansell, R. (2014). Here Comes the Revolution — the European Digital Agenda. In K. Donders, C. Pauwels, & J. Loisen (Eds.), *The Palgrave Handbook of European Media Policy* (pp. 202–217).

<sup>43</sup> Laitner, Sarah; Tobias Buck (16 May 2007). "EU agrees to slash 'roaming' charges". *Financial Times*. Retrieved 2007-11-23.

<sup>44</sup> European Commission, Communication ‘A European Economic Recovery Plan’, COM(2008) 800 final, p. 16.

<sup>45</sup> *Ibid.* pp. 16-17.

i2010 strategy having outlined the concrete policy measures of – boosting the single market for business and users; stimulating ICT research and innovation; and to ensure that all citizens benefit from Europe’s lead in ICT<sup>46</sup>, the 2009 report confirmed “*many tangible results*”. The report stated that the “*pro-competition and pro-consumer policy drive led by i2010*” had succeeded in increasing penetration rates for both broadband internet and mobile phones, making Europe the world leader in connectivity penetration for both<sup>47</sup>. Moreover, progress had been made in the realm of eGovernment and EU-funded ICT research, and the report further stated that ICT policies “*have been increasingly mainstreamed*”, with many Member States having integrated similar ICT strategies to those of the initial i2010 strategy<sup>48</sup>. However, the report also stated the Europe was at risk of losing its competitive edge, and therefore the Commission asserted that “*Europe needs a new digital agenda to meet the emerging challenges, to create a world beating infrastructure and unlock the potential of the internet as a driver of growth and the basis for open innovation, creativity and participation*”<sup>49</sup>.

### **Lack of progress**

Despite the progress mentioned in the previous reports by the Commission, the state of the Digital Single Market was not living up to its full economic potential. As noted in other independent studies at the time, the EU lacked the proper foundation for a real Digital Single Market, with large differences across Europe in terms of access to digital infrastructure and the capability to use digital technology<sup>50</sup>. Moreover, legal barriers still existed in the areas of – privacy and data protection; content and copyright; e-payments; net neutrality; and dispute resolution and self-regulation, amongst other things<sup>51</sup>.

The proof of this mediocre state of the Digital Single Market was, according to both the Commission and other sources, evident in the lack of global EU digital economy firms (e.g. no EU equivalent of Google had emerged within the past decade), perhaps being an indicator of the European economy’s lack of ability to foster innovation in the digital realm<sup>52</sup>. Other Indicators were the lack of price convergence between Member states with the highest level of e-commerce, and the overall lack of

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<sup>46</sup> European Commission, Communication ‘Europe’s Digital Competitiveness Report – Main achievements of the i2010 strategy 2005-2009’, COM(2009) 390 final, p. 3.

<sup>47</sup> Ibid. p. 4.

<sup>48</sup> Ibid. p. 4.

<sup>49</sup> Ibid. p. 9.

<sup>50</sup> Copenhagen Economics, Final Report ‘The Economic Impact of a European Digital Single Market’, European Policy Centre, 2010, p. 5.

<sup>51</sup> Ibid. p. 5.

<sup>52</sup> Ibid. p. 25.

cross-border online trade in the Union. Surprisingly, the level of cross-border online trade in the EU had stagnated, despite of the fact that the level of Europeans who had made an online purchase had gone up significantly from 2006 to 2008<sup>53</sup>.

### ICTs at the centre of the digital strategy

#### **The Digital Agenda for Europe**

The Commission launched the overarching strategy of “Europe 2020” where the main objective was getting Europe back on track after the devastating financial crisis, and the Digital Agenda for Europe was one of seven flagship initiatives by the Commission for this strategy. The Agenda stated that “*the overall aim of the Digital Agenda is to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications*”<sup>54</sup>. Moreover, the Commission stated that the objective was to chart a course to maximize the social and economic potential of ICTs, given that these were now a vital part of everyday life, affecting everything from “*doing business, working playing, communicating and expressing ourselves freely.*”<sup>55</sup>

The Commission identified the seven most significant obstacles for the full utilization of ICTs in the EU. These were – The fragmented nature of the current digital markets; lack of interoperability; rising cybercrime and risk of low trust in networks; lack of investment in networks; insufficient research and innovation efforts; lack of digital literacy and skills; and the missed opportunities in addressing societal challenges<sup>56</sup>. The Commission therefore called on a more comprehensive and united policy response at the European level, and it presented a set of legislative action to be undertaken during its mandate, with the majority of the planned legislative proposals relating to “*A vibrant digital single market*”.

Furthermore, the Agenda postulated that a successful level of implementation would require “*shared determination*” and a “*meticulous execution of its comprehensive set of actions*”. Therefore, the Commission intended, amongst other things, to set up an internal coordination mechanism under a Commissioner to “*ensure effective policy coordination across the different policy areas*”<sup>57</sup>, and to cooperate closely with the Parliament, Member States and stakeholders. A “High Level Group” would conduct the cooperation with Member States, and “*action-oriented platforms*” would be established

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<sup>53</sup> European Commission, ‘Report on cross-border e-commerce in the EU’, SEC(2009) 283 Final.

<sup>54</sup> European Commission, Communication ‘A Digital Agenda for Europe’, COM(2010) 245 final.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

with stakeholders on each of the seven specific action areas. Additionally, the Commission intended on charting the progress of the Digital Agenda with an annual publication of a scoreboard, which would also serve as the foundation of further evaluation. This scoreboard would include both socio-economic development and an update on *“the progress on the full set of policy actions identified in the Digital Agenda”*<sup>58</sup>.

### **An update to the strategy**

In November 2012, changes were made to the Digital Agenda, with the EU issuing a “Digital to-do list”, updating the initial seven priorities of the strategy, thereby setting new digital priorities for 2013-2014<sup>59</sup>. The background for this update on priorities was founded in the call for a strengthening of *“European digital leadership and completion of the Digital Single Market by 2015”* by both the European Parliament and the Council<sup>60</sup>. Moreover, the Communication stated that the Digital Agenda had been successful so far and was *“broadly on target”*, but that the strategy needed to re-emphasise and focus on *“the most transformative elements”* of the initial strategy. The significance of ICTs in this update was also evident in the opening lines of this Communication, where the Commission specified *“Europe’s future sustainable growth and competitiveness depends to a large extent on its ability to embrace the digital transformation in all its complexity. Information and communication technology (ICT) is increasingly impacting all segments of society and the economy”*<sup>61</sup>. The new priorities of the Digital Agenda were also supposed. Another vital part of the update was the creation of a new and more efficient broadband regulatory environment. The Commission saw this as their *“top digital priority for 2013”*, and it intended on proposing a package of ten specific actions during 2013 which would include *“recommendations on stronger non-discriminatory network access and new costing methodology for wholesale access to broadband networks, net neutrality, universal service and mechanisms for reducing the civil engineering costs of broadband roll-out”*<sup>62</sup>. Furthermore, Commissioner Neelie Kroes commented on this top priority of the Commission, saying that *“2013 will be the busiest year yet for the Digital Agenda. My top priorities are to increase broadband investment and to maximise the digital sector’s contribution to Europe’s recovery”*<sup>63</sup>.

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<sup>58</sup> European Commission, Communication ‘A Digital Agenda for Europe’, COM(2010) 245 final, p. 36.

<sup>59</sup> European Commission (2012, December 18). *Digital “to-do” list: new digital priorities for 2013-2014*.

<sup>60</sup> European Commission, Communication ‘The Digital Agenda for Europe – Driving European growth digitally’, COM (2012) 784 final, p. 3.

<sup>61</sup> Ibid.

<sup>62</sup> European Commission (2012, December 18). *Digital “to-do” list: new digital priorities for 2013-2014*.

<sup>63</sup> Ibid.

## The Juncker Commission and the Digital Single Market

The tenure of the second Barroso Commission was coming to an end in 2014. Jean Claude Juncker was nominated as the new president of the Commission, and he campaigned on the promise of restoring Europe, which had “*suffered the worst financial and economic crisis since World War II*”<sup>64</sup>. In July 2014, Juncker announced ten set of priorities for his would-be Commission, with the goal of “*A new boost for jobs, growth and investment*” highest on that list of priorities. The goal of “*A connected Digital Single Market*” came in second on that list of priorities. It stated that an additional growth of up to EUR 250 billion could be generated during the mandate of the up-coming Commission, if a connected digital single market would be realised<sup>65</sup>. In particular, problems were identified in the areas of telecoms regulation, copyright and data protection legislation, management of radio waves, and application of competition law, where national silos were still present. On the priorities list, Juncker further stated that to achieve this connected digital single market he intended, within the first six months of his mandate, to conclude negotiations on common European data protection rules; to add more ambition to the ongoing reform of telecom rules; and to modernise copyright rules and consumer rules<sup>66</sup>. Furthermore, Juncker stated that these things should go “*hand-in-hand with efforts to boost digital skills and learning across society and to facilitate the creation of innovative start-ups*”<sup>67</sup>.

### Changes to the hierarchical structure within the Commission

The Juncker Commission introduced a new intra-institutional concept, where the commissioners would be grouped in certain project teams under the responsibility of the vice-presidents, who would each be designated a specific policy area. These policy areas were created in relation to the political priorities put forward by Juncker in July. The seven vice-presidents would “*steer and coordinate*” their individual project teams and the remaining 20 commissioners would be designated to one or more teams<sup>68</sup>. The composition of the teams would change in accordance with relevant issues. The reason for this decision by Juncker was given in his statement to the European Parliament plenary session ahead of the vote on his proposed college. He stated –

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<sup>64</sup> Jean-Claude Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political guidelines for the next European Commission. Opening statement in the European Parliament plenary session’, 2014.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Politico (2014, October 9). *Vice-presidents to lead teams of commissioners*.

*“Everyone had told me that the Commission needed to operate more effectively. Everyone, or almost everyone, had complained that with one Commissioner per country, with the College consisting of 28 Commissioners, there were too many of them ... So the issue is simple: you can either have 28 Commissioners, each working in their own little corner ... or you can have Commissioners spreading their wings under the friendly aegis of Vice-Presidents who will coordinate their work”<sup>69</sup>.*

Additionally, Juncker had specifically asked former prime ministers to take the role as vice presidents, on the reasoning that they would have the necessary expertise in high-level, political coordination<sup>70</sup>. The vice-president chosen by Juncker to fulfil the political priorities relating to the digital single market was Andrus Ansip (ALDE), former Prime Minister of Estonia. Ansip was thereby in charge of a group consisting of (but not limited to) - Günther Oettinger (EPP), Commissioner for Digital Economy and Society; Elzbieta Bienkowska (EPP), Commissioner for Internal Market, Industry, Entrepreneurship and SMEs; Marianne Thyssen (EPP), Commissioner for Employment, Social Affairs, Skills and Labour Mobility; and Vera Jourová (ALDE), Commissioner for Justice, Consumers and Gender Equality. On this proposed hierarchical dynamic between the Vice-President and the Commissioners, Ansip himself detailed that *“I will handle this just as I did as Prime Minister. I will lead, coordinate and guide”<sup>71</sup>*. Additionally, Ansip stated that Commissioners working with the political priorities relating to the digital single market, like Commissioner Oettinger, would primarily be responsible for organisation and day-to-day management within the particular DG’s.

### **Commissioners appointed for DSM and Digital Economy and Society**

Regarding the specifics of the political priorities relating to the digital single market, Ansip also echoed the statements put forward by Juncker in his Political Guidelines, highlighting the importance of *“dismantling barriers in electronic trade”* and harmonising legal framework, which he proposed could create 900.000 new jobs in Europe by 2020, and boost Europe’s economic growth by 1.7% per year<sup>72</sup>. Speaking at his hearing before the parliament on October 6<sup>th</sup> (before being formally approved by Parliament later in November), Ansip stressed the importance of consumer-protection in this political project, saying that *“Trust is a must... We must protect everyone’s privacy. Data protection will be an important cornerstone of the Digital Internal Market. The citizens must have trust in this*

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<sup>69</sup> Jean-Claude Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political guidelines for the next European Commission. Opening statement in the European Parliament plenary session’, 2014, p. 30.

<sup>70</sup> Ibid., p. 29.

<sup>71</sup> Sarmadi, D. (2015 January 8). *Ansip threatens to suspend Safe Harbour data agreement with US.*

<sup>72</sup> Ibid.

*project*”<sup>73</sup>. In line with the priorities proclaimed by Juncker, Ansip promoted the revision of the Data Protection Directive (Directive 95/46/EC) and saw it as an utmost priority to finish work on this major piece of legislation, which had been underway since January 2012<sup>74</sup>. The Commission did manage to successfully mediate between the Parliament and the 28 heads of state and government in the Council, leading to a joint proposal at a formal trilogue meeting on December 15<sup>th</sup> 2015. The result was the extensive General Data Protection Regulation (Commonly known as the GDPR), which was formally approved in April 2016 and came into effect in May 2018, and it is arguably the pinnacle of achievements by the Commission in regards to digital consumer protection to this date.

### **Public funding and net neutrality**

Günther Oettinger (EPP), Commissioner for Digital Economy and Society, also gave his opinion on political priorities. Viewing the digital infrastructure in the EU as being in a non-optimal position, he called for a rapid expansion of high-speed internet access (like the kind typically provided by fibre-optic solutions), and he expressed support for the idea of mobilising public funds to co-finance a fast and effective enlargements of existing fibre-optic networks<sup>75</sup>. Speaking after a meeting with the Network Alliance for a Digital Germany in January 2015 in Berlin, Oettinger went into detail with his ideas of increasing investment in the digitally vital infrastructure of high-speed internet. “*In the end, this is a task for the private economy*”, Oettinger stated, but he also spoke of his intention of utilising the structural funds available at the EU level “*which we would like to employ for co-financing, to a greater extent than had been done previously*”<sup>76</sup>. Oettinger expressed concern at what he saw as an investment gap in the digital infrastructure, and he was of the belief that the economy alone would not be able to close the existing investment gap in time, saying that “*It is a case of catch-up in the digital economy and in the digital infrastructure*”<sup>77</sup>. On the adjacent topic of net-neutrality<sup>78</sup>, the opinions of Vice-President Ansip and Commissioner Oettinger seemed to be at odds with each other. In October 2014, then Commissioner-designate Ansip proclaimed that “*All internet traffic must*

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<sup>73</sup> Sarmadi, D. (2015 January 8). *Ansip threatens to suspend Safe Harbour data agreement with US*.

<sup>74</sup> European Commission, Communication ‘Proposal for a Regulation of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)’, COM(2012) 11 final.

<sup>75</sup> Tost, D. (2015, January 23). *Oettinger playing ‘catch-up’ on EU digital infrastructure*.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Net neutrality is the concept of internet access free of regulation by internet service-providers. The principle of net neutrality provides that internet service-providers should not be allowed to discriminate between users of their services, for instance with slower speeds or restricted capacity. Some content-providers would like to do this, because they believe bandwidth access should be adjusted based on how much of it is used. For instance, video-streaming sites use large amounts of bandwidth.



*be handled equally. Nobody has the right to exploit a dominant market position*<sup>79</sup>. However, later on he seemed to make concessions to the idea of ‘two-speed internet’ (the opposite of net-neutrality), where internet broadband speed is regulated by internet service providers, enabling major private actors to pay for better access and higher speeds at the cost of other users. At the Startup Europe Summit in Berlin on the 12<sup>th</sup> of February 2015, Ansip was asked about his view on net neutrality and he proclaimed that he supported the idea of a two-speed internet, thereby diverting from his previous statement as well as that of Commissioner Oettinger, who was also present at the same event<sup>80</sup>. At an event in Munich the month before in January 2015, Oettinger had even contrastively stated that “*we need net neutrality*”, dismissing the idea of a two-speed internet<sup>81</sup>. Ansip also defended the position of the Council, who in March 2015 agreed on a position that would allow some “*reasonable traffic management*” from the internet service providers on the grounds of “*the freedom of internet access service-providers to conduct a business*”<sup>82</sup>. Ansip found that the Latvian Presidency of the first half of 2015 had done a good job in working towards this common position of the Council, and that he found this to be a decent compromise on net neutrality. Oettinger seemed more consistent in his discourse on net neutrality. Talking to Euractiv in January 2015, Oettinger expressed clear support for the principle of net neutrality, however with the exception of possible traffic management for the sake of public interest, which would provide more broadband for special services like health and disaster protection, thereby still excluding traffic management for commercial interests<sup>83</sup>.

### **The announcement of the DSM strategy**

Launched in May 2015, the goal of the strategy was to move from the prevailing fragmented regulatory frameworks to a common one that would offer “*consumers and businesses better access to digital goods and services, create the conditions in which digital networks and services could flourish and enhance the growth potential of the digital economy*”<sup>84</sup>. In the Commission Staff Working Document, a reference was made to the Annual Growth Survey for 2015 (published November 2014), which stated that the Digital Single Market was essential to the Commission’s top political priority of creating “*Jobs, Growth, Fairness and Democratic Change*”<sup>85</sup>. Furthermore, the

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<sup>79</sup> Sarmadi, D. (2015 January 8). *Ansip threatens to suspend Safe Harbour data agreement with US*.

<sup>80</sup> Sagener, N. (2015, October 15). *Oettinger: IT sector needs new ‘generation of Shakespeares’*.

<sup>81</sup> Ibid.

<sup>82</sup> Keating, D. (2015, April 4). *EU and US in tune on net neutrality*.

<sup>83</sup> Tost, D. (2015, January 23). *Oettinger playing ‘catch-up’ on EU digital infrastructure*.

<sup>84</sup> European Commission, ‘A Digital Single Market Strategy for Europe - Analysis and Evidence’, SWD(2015) 100 final.

<sup>85</sup> European Commission, Communication ‘Annual Growth Survey 2015’, COM(2014) 902 final.

Commission stated that a completed Digital Single Market would offer opportunities to citizens that would go “*beyond their economic activity*”. These opportunities included better access to information and culture, and new opportunities for engagement in society and democratic participation<sup>86</sup>. However, the emphasis was on the economic benefits, as stated by the Commission –

*“Europe has the capabilities to lead in the global digital economy but we are currently not making the most of them. Fragmentation and barriers that do not exist in the physical Single Market are holding the EU back. Bringing down these barriers within Europe could contribute an additional EUR 415 billion to European GDP. The digital economy can expand markets and foster better services at better prices, offer more choice and create new sources of employment. A Digital Single Market can create opportunities for new start-ups and allow existing companies to grow and profit from the scale of a market of over 500 million people.”<sup>87</sup>*

In the communication by the Commission, it was further stated that after “*input and dialogue with Member States, the European Parliament and stakeholders*”, the realization of the digital single market could be conducted during the mandate of the present Commission.

Going into details, the Digital Single Market Strategy was to be build on three pillars –

1. Better Access for consumers and businesses to online goods and services across Europe
2. Creating the right conditions for digital networks and services to flourish
3. Maximising the growth potential of our European Digital Economy<sup>88</sup>

Furthermore, the strategy set out 16 key actions within the three pillars. These key actions included measures to simplify cross-border rules, improve consumer protection for online services and transactions and prevent discrimination based on nationality or residence; reforms of copyright, audiovisual services and telecom rules; initiatives on e-government, data protection and cybersecurity, etc. The majority of these measures were to be undertaken throughout 2015 and 2016.

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<sup>86</sup> European Commission, ‘A Digital Single Market Strategy for Europe - Analysis and Evidence’, SWD(2015) 100 final.

<sup>87</sup> European Commission, Communication ‘A digital single market strategy for Europe’, COM(2015) 192 final.

<sup>88</sup> Ibid.

## Analysis

### Continuation from previous strategies and the start of a user-centric approach

It was evident in the Digital Agenda for Europe strategy from 2010, that there was a level of continuation from previous EU strategies evolving ICTs and digitalisation. However, it is argued here that the Digital Agenda for Europe strategy marks a divide in the EU's approach to dealing with ICTs and digitalisation. This is due to the failure of the Lisbon Agenda from 2000 and the weak level of support from Member States for a European-level strategy. This argument goes against that of Marcuț (2017) who has found, that starting from the EU's Fifth Framework Programme (1998-2002) there has been an increasingly greater orientation towards the European citizen, as signified by the discourse used in describing the 'information society' that was envisaged for the Union's future. He argues, that not just the Frameworks Programmes but also the subsequent strategies dealing with the digital single market saw the Commission take a more user-centred approach, because the Commission acknowledged "*the advent of a new type of society, where technology supports all domains, like transport, education, etc.*"<sup>89</sup> In the following, a thorough examination of the Digital Agenda for Europe will be conducted.

Like previous Commission strategies, the Digital Agenda for Europe strategy had a large emphasis on broadband investment, which was the top priority for the Commission after the proclamation of the Digital 'to-do' list from 2012, which updated the initial priorities of the Digital Agenda for Europe strategy from 2010. The Commission succeeding in cutting the costs for broadband installation costs with the legislation proposed in 2013 and agreed on by Parliament and the Council the year after, which was estimated to save broadband companies 40 – 60 billion Euros<sup>90</sup>. A vital part of the strategy was bridging the high-speed broadband connectivity-gap across Europe, which was still quite substantial at the time and significantly below the level of other G20 countries in terms of *fibre to the home penetration*<sup>91</sup>. The rolling out of the older, regular broadband cable-networks had also been a major priority during the previous digital strategies<sup>92</sup> and the measures enacted during the i2010 strategy had brought Europe to the forefront of broadband connectivity, taking the global lead in broadband connectivity with 93% of the then EU25 population having access to broadband internet

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<sup>89</sup> Mărcuț, M. (2017). *Crystalizing the EU digital policy: an exploration into the Digital Single Market*. Cham: Springer, p. 43.

<sup>90</sup> European Commission (2014, February 28). *Neelie Kroes welcomes political agreement on EU rules to slash broadband installation costs*.

<sup>91</sup> European Commission, Communication 'A Digital Agenda for Europe', COM(2010) 245 final, p. 20.

<sup>92</sup> European Commission, Communication 'i2010 – A European Information Society for growth and employment', COM(2005) 229 final.

in 2009<sup>93</sup>. The 2009 Digital Competiveness Report further showed the correlation between having a high rate of internet connectivity and an increase in the use of “*advanced services*” in the digital realm, thereby facilitating the supply of more comprehensive online public services<sup>94</sup>. This was an important lesson for the Commission. Equally important however, was the lesson of not having overly ambitious political goals for the future of Europe, as was the case with Lisbon Strategy of 2000. The strategy set out the political goals for the timeframe 2000-2010, and even though the above-mentioned goal relating to broadband connectivity in itself was a success, it was a minor part of the 2010 vision and of the i2010 strategy from 2005. The EU itself already recognised the failure of the Lisbon Strategy in 2005<sup>95</sup>, and subsequent progress reports on the strategy recognised the need for a refocus towards “*an explicit user orientated focus if potential economic, social and environmental gains were to be achieved*”<sup>96</sup>. This prompted the Commission to make more concentrated efforts, avoiding a digital strategy that was too broad in scope like the Lisbon Strategy and, most importantly, take a more user-centric approach to the establishment of the digital single market.

It is argued here that, starting from the 2010 Digital Agenda for Europe, the Commission recognised the importance of having a more consumer-centric approach to the creation of a single market in the online sphere. With consumer protection in general varying significantly across the different Member States both in regards to rules and enforcement, the Commission was aware that an important aspect of a new digital market strategy would be to enhance the regulatory framework for users rights’ in the digital realm. Prior the Digital Agenda for Europe, the *acquis communautaire* only provided a very limited amount of consumer protection in regards to e-commerce and the online sphere in general. The Consumer Sales Directive<sup>97</sup> from 1999 regards the quality of goods sold both online and in physical stores but does not guarantee any rights concerning digital goods and services. This led to an extensive review by the EU under the Digital Single Market strategy, which resulted in a legislative proposal that would extended the consumers’ rights to include digital goods and services. This will be discussed later in the analysis. Other parts of the *acquis* providing some sort of

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<sup>93</sup> European Commission, Communication ‘Europe’s Digital Competiveness Report – Main achievements of the i2010 strategy 2005-2009’, COM(2009) 390 final, p. 4.

<sup>94</sup> *Ibid.*

<sup>95</sup> European Commission, Presidency Conclusions of the Brussels European Council, 22 and 23 March 2005, Brussels: 7619/1/05 REV 1.

<sup>96</sup> European Commission, 2005, p. 89, as cited in Mansell, R. (2014). Here Comes the Revolution — the European Digital Agenda. In K. Donders, C. Pauwels, & J. Loisen (Eds.), *The Palgrave Handbook of European Media Policy* (pp. 202–217).

<sup>97</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, O.J. 1999, L 171.

consumers' rights relevant to the online realm is the Unfair Contract Terms Directive<sup>98</sup>, which provides that an unfair term in a standardised terms and conditions contract between consumer and business will be considered invalid. It is clearly evident that these directives only provided a bare minimum of consumer protection in the online sphere, in addition to weak, non-harmonised regulatory framework. The Commission acknowledged the need for a more consumer-centric approach to the digital single market, and updating the Unions consumer protection for a 21<sup>st</sup> century environment was a great way to start. One of the drafted proposals, which later got enacted during the Digital Single Market strategy, was the Payment Services Directive II<sup>99</sup>, concerning the facilitation of e-commerce payments by, amongst other things, banning the use of surcharging in many payment forms and requesting strong customer authentication for all electronic payment transactions. The Digital Agenda for Europe also called for a swift adoption of the Consumer Rights Directive<sup>100</sup> in an effort to enhance consumer's rights, and because the lack of trust in the online environment by consumers was seen as seriously hampering cross-border trade.<sup>101</sup> The Consumer's Rights Directive made clear the consumers' rights in relation to cross-border sales in the Union in an effort to boost confidence for consumers in online trading. It is argued here, that this legislation supported the rise in online purchased goods in the Union in the timeframe 2010-2013, which saw an extensive increase in many aspects of internet sales, including cross-border sales, as seen in the table below:

The evolution of internet sales in the EU, 2010-2013

Consumers who:	2010	2011	2012	2013
Purchased from online market in own country	33%	33%	42%	47%
Purchased from intra-community space	8%	7%	10%	15%
Purchased from extra-community space	4%	4%	6%	8%

<sup>98</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. 1993, L 95/29.

<sup>99</sup> Directive 2015/2366 of the European Parliament and of the Council of 25 Nov. 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) 1093/2010, and repealing Directive 2007/64/EC, O.J. 2015, L 337/35.

<sup>100</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct. 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. 2011, L 304/64.

<sup>101</sup> European Commission, Communication 'A Digital Agenda for Europe', COM(2010) 245 final, p. 12.

Have not made a purchase on the internet	62%	63%	54%	47%
Did not answer	0%	0%	1%	1%

Sources: Flash Eurobarometer 282; Flash Eurobarometer 299; Flash Eurobarometer 332; Flash Eurobarometer 358.

However, with only 15% of consumers having made a cross-border purchase in the Union by 2013 in relation to 47% of consumers having made a purchase online on a domestic market, there was a long way yet for a true digital single market, and much needed to be done to improve users' confidence in the online environment.

Other significant efforts by the Commission to increase trust in the online environment was undertaken in 2012 with the revising of the Union's data protection legislation<sup>102</sup>, which resulted in the General Data Protection Regulation of 2016. The call for more consumer policy was already made in 2010 by consumer organisations in the public consultations on the new 'Europe 2020' strategy. Here, the European Consumers' Organisation (BEUC) had stressed the importance of a strategy that would "sufficiently acknowledge the role consumers play in driving markets", and other consumer-stakeholders also highlighted "*the value of establishing an integrated retail internal market across the EU, which is only possible if consumers are confident about their rights with regard to cross-border trading.*"<sup>103</sup> In addition, consumer stakeholders underlined the centrality of having the proper legal protection in such an online environment, and the Commission reacted to this by revising the Unions data-protection legislation, thereby laying the groundwork for an extensive revision of consumers' rights in the digital sphere.

In the field of telecommunication, a large user-centric focus was also evident. Major steps were initiated under the Europe 2020 strategy to finally realise a European Single Telecoms Market. The efforts undertaken during the Digital Agenda for Europe, with Vice-President Neelie Kroes (ALDE) at the helm of the Commission's digital portfolio, managed to effectively wrestle European telecommunication companies into submission. This amounted to the cutting for roaming costs for users in both data and voice calls by 93% and 50% respectively<sup>104</sup> during the 2010-2014 timeframe, and eventually leading to the abolishing of roaming costs in the Union by 2017. This marked the

<sup>102</sup> European Commission, Communication 'Proposal for a Regulation of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)', COM(2012) 11 final.

<sup>103</sup> European Commission, 'Europe 2020 – public consultation. Overview of responses', SEC(2010) 246 final, p. 26.

<sup>104</sup> Kroes, N. (2014, November 3). *Main achievements under the Neelie Kroes mandate 2010-2014* [Web log post].

“most ambitious plan in 26 years of telecoms market reform”<sup>105</sup> for the Commission, who had initiated a substantial set of regulations to create a European Single Telecoms Market since the 1990’s<sup>106</sup>, albeit with a smaller user-centric approach. The Commission’s “Connected Continent: Building a Telecoms Single Market” was the legislative package adopted in September 2013 that made this whole ordeal possible. The Commission had simply reacted to the call by Member States to establish a single market in information and telecommunications technology, because the European Council asked the Commission to present concrete measures to do so in March 2013<sup>107</sup>. This argument is supported by the information given by then Deputy Director-General Roberto Viola, who was active during the policy-making process.<sup>108</sup>

In summary, the Digital Agenda for Europe was the beginning of a more user-centric approach by the Commission. This is evident in the nature of the legislation proposed during this timeframe. However, there was a degree of continuation from the previous i2010 strategy, in regards to the emphasis on internet infrastructure, but the Digital Agenda for Europe was much more than just the rolling-out of fibre-optic cable networks. Supporting the argument put forward by Marcuț (2017), it has been argued that about the time of the i2010 strategy, the Commission started to recognise the importance of ‘digital literacy’ in the European economy. He makes a observation, stating that –

*“The evaluation of the strategy showed that the measures to get more people online were successful, while the infrastructure of the Internet was also developed and the digital market increased sharply (Eur-Lex 2009). However, once more people enter the information society, their digital skills must be calibrated to the new reality. The single information space pursued by the strategy fell short of implementation due to fragmentation of the digital economy ... Up to the Digital Agenda for Europe, the digital policies for the new economy were under the umbrella of the Single Market regulation, but they are separate due to the continuous development of the digital economy. The focus has shifted towards a digital market for the European Union, to boosting international competitiveness of the Union in comparison to the USA or other competitors and boosting the digital skills of Europeans.”<sup>109</sup>*

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<sup>105</sup> European Commission (2013, September 11). *Commission proposes major step forward for telecoms single market.*

<sup>106</sup> Bartle, I. (2005). *Globalisation and EU policy-making: the neo-liberal transformation of telecommunications and electricity* (1. ed). Manchester: Manchester Univ. Press, p. 68-73.

<sup>107</sup> European Commission, Communication ‘On the Telecommunications Single Market’, COM(2013) 634 final, p. 2.

<sup>108</sup> Amendola, G. (2014). Interview with Roberto Viola: Deputy Director General: European Commission, DG CNECT.(Interview). *Communications & Strategies*, (93), 125-.

<sup>109</sup> Mărcuț, M. (2017). *Crystalizing the EU digital policy: an exploration into the Digital Single Market*. Cham: Springer, p. 46.

The failure of the Lisbon Strategy, in addition to the serious economic crisis and subsequent Eurocrisis had created a situation where there was a political will to restart the effort to realise a single market in the digital realm. This was now to be done by way of empowering European Citizens, updating and informing them on their digital rights, thereby building confidence and trust in the digital single market project. Additionally, Adamski (2018) has made the point that the political goal of demonstrating to Europeans that they also can benefit from the European project, by allowing them to benefit from more generous terms offered by the same provider in other EU countries, has also certainly played a paramount role in shaping the Commission's digital portfolio.<sup>110</sup>

### The Digital Single Market Strategy and consumer-centric measures

By the time of the Digital Single Market strategy, the groundwork had been laid for an effective strategy that could finally realise a true 'connected Digital Single Market'. Moreover, it was acknowledged by the Commission that it was vital for the average European citizen to have trust and confidence when navigating the digital realm. The strategy was ambitious, but not at all unrealisable. Prior to the proclamation of the strategy, the newly elected Juncker Commission had made it a top priority to finalise the negotiations on the personal data protection regulation and to add more ambition to the ongoing reform on telecoms rules<sup>111</sup>. In addition, there was a clear intent to modernise overall consumer rules relating to the digital sphere, and this was evident in the actions taken by the Juncker Commission at the start of its mandate. In October 2014, the soon-to-be Vice-President and Commissioner for the Digital Single Market Andrus Ansip (ALDE) announced that he would suspend the 'Safe Harbour Agreement', which governed the rules on EU-to-USA data transfers by major U.S. tech companies guaranteeing to uphold the higher-standard EU data privacy laws. The previous Commission had already announced a review of the agreement in November 2013 after the Edward Snowden scandal, which had revealed an extensive U.S. National Security Agency led spy-programme that abused personal data from U.S. tech-giants like Facebook and Google, in addition to eavesdropping on high-profile European politicians like Angela Merkel<sup>112</sup>. Ansip heard the call from the European Parliament where a majority had voted to suspend the agreement in May 2014, and

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<sup>110</sup> Adamski, D., & Adamski. (2018). Lost On The Digital Platform: Europe's Legal Travails With The Digital Single Market. *Common market law review*, 55(3), 719-751, p. 730.

<sup>111</sup> Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political guidelines for the next European Commission. Opening statement in the European Parliament plenary session', 2014.

<sup>112</sup> Fioretti, J. (2014, October 6). *EU Commission nominee moves to reassure lawmakers over U.S. snooping*.



Ansip expressed support for suspending the Agreement if the U.S. government would not make a clear statement on the matter.<sup>113</sup> The European Court of Justice declared the ‘Safe Harbour’ Agreement invalid later in October 2015<sup>114</sup> on the grounds of not providing adequate protection for online consumers, thereby not abiding by the old data protection directive<sup>115</sup> from 1995.

Two things were now certain at the time of the new Juncker Commission getting inaugurated in late 2014. Firstly, the on-going reform of the Union’s old personal-data protection, which had been initiated in early 2012, needed to be finalised as soon as possible as it was now obvious that the rights of European online consumers were in a terrible shape. Secondly, Vice-President Ansip was very well aware of the importance of the European citizens having trust in the Digital Single Market, and he was indeed willing to go against major players in providing this confidence for the European online consumers. Additionally, personal-data protection was now a ‘hot-topic’, and with the Parliament having voted on the soon-to-be General Data Protection Regulation in March 2014 supporting the Commission’s proposal, the Council was the last obstacle in realising this extensive consumer-empowering regulation. The Council did come to agreement on a common statement in the latter days of the Latvian presidency of the Council, thereby making way for the trialogue negotiations, which then resulted in a formal agreement between the EU institutions in December 2015.

#### [Agenda-setting and the centrality of the Latvian presidency of the Council](#)

The measures of the Digital Single Market was truly intended on necessitating a single market in the digital realm, and the speed to which a large part of the proposals were passed through the legislative process was quite remarkable. During 2015, negotiations on several important pieces of legislation were finalised, and the announcement of the Digital Single Market Strategy in May 2015 helped gather more momentum to the process. The Strategy was announced during the time of the Latvian presidency of the Council and already before the end of their presidency on the 30<sup>th</sup> of June, a significant amount of process was made. Vice-President for the Commission’s digital portfolio Andrus Ansip had hoped for an agreement in the Council on a number of issues during this Latvian presidency<sup>116</sup>. This was indeed delivered, albeit at the very last moment with the Council coming to

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<sup>113</sup> Sarmadi, D. (2015 January 8). *Ansip threatens to suspend Safe Harbour data agreement with US*.

<sup>114</sup> Bowcott, O., Traynor, I. (2015, October 6). *Facebook row: US data storage leaves users open to surveillance, court rules*.

<sup>115</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281).

<sup>116</sup> Fleming, J. (2015, October 15). *Ansip: ‘Digital Single Market strategy will be ready in May’*.

an agreement on the General Data Protection Regulation on the 15<sup>th</sup> of June, in addition to an agreement on roaming charges (part of the on-going telecoms reform) made on the 30<sup>th</sup> of June, only hours before the presidency ended. The main priority for the Latvian presidency was clearly on the subject of a “*Digital Europe*”, and it was also in this area that the presidency saw the most concrete results.<sup>117</sup> In terms of policy impact, the Latvian presidency was certainly effective in advancing the EU policy agenda. The Latvian presidency was proof of that even a small country holding the presidency for the first time can advance the EU policy agenda. Latvia successfully brokered a deal on ending mobile phone roaming charges, which was part of the telecoms single market reform initiated during the time of the previous Commission. The deal had been underway in months<sup>118</sup>, and the main sticking-point had been the time for the implementation of the ban on roaming charges to take place, and the final stretch of negotiations supposedly lasted half a day lasting until 2 o’clock in the morning<sup>119</sup>. The European Parliament had wanted the ban to be implemented in April 2016 while the Council wanted April 2017, thereby giving more time for national companies to adjust to the changes. They reached a compromise of an April 2017 ban but with a cap for roaming charges taking effect from April 2016. In addition, Member States had lobbied for the telecoms companies to be able to recover wholesale roaming costs and succeeded in doing so. Nevertheless, this was a victory for both the consumers and the Commission. Significant advances were now made in moving forward the Digital Single Market.

Another important aspect of the agreement with far greater implications for European citizens in regards to their online activity was the aspect of net neutrality, which the agreement was the first piece of legislative proposal to address. Part of the telecoms reform concerned itself with the issue of net neutrality and prior to this agreement the EU’s stance on net neutrality had by some critics been seen as vague<sup>120</sup>. However, this was in many ways unjustified since the critical argument against the Commission, especially Vice-President Ansip, relied on the fact that he had not taken an ideological stance like that of the Parliament, who was afraid that any concessions to the principle of net neutrality would open the door for exploitation by internet service providers.<sup>121</sup> The actions of both Ansip and Commissioner for Digital Economy and Society Günther Oettinger (EPP) had been pragmatic ever since the beginning of their term, because they knew how contentious the issue was. The Council had

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<sup>117</sup> Auers, D., & Rostoks, T. (2016). The 2015 Latvian Presidency of the Council of the European Union: The 2015 Latvian Presidency. *JCMS: Journal of Common Market Studies*, 54, 83–90.

<sup>118</sup> Sheftalovich, Z. (2016, June 30). *Mobile roaming charges ban in 2017*.

<sup>119</sup> *Ibid*.

<sup>120</sup> Tost, D. (2015, January 23). *Oettinger playing ‘catch-up’ on EU digital infrastructure*.

<sup>121</sup> Keating, D. (2015, April 4). *EU and US in tune on net neutrality*.

favoured a less strict approach to the issue of net neutrality, having come to a common statement already in March 2015 three months prior to agreement. The statement argued that - “*Reasonable traffic management contributes to an effective use of network resources and protects the freedom of internet access service-providers to conduct a business.*”<sup>122</sup> This stance was clearly more pro-competition, and it was also evident that Member States were defending the interests of the national internet service-providers. In the end, a compromise was reached between the Council and the Parliament. This enabled a degree of traffic management from internet service providers but only for the sake of public interest, thereby guaranteeing that future public services, which would be heavily reliant on fast internet access for full functionality, would have priority on the internet network. The agreement reached at the Latvian presidency resulted in the Electronic Communications Regulation<sup>123</sup>, which laid down measures concerning open internet access and users’ rights relating to electronic communications networks and services. The legislation was formally approved in November 2015. This regulation was the first to effectively enshrine binding net neutrality into EU law. The resulting level of net neutrality mirrored the version promoted by Commission, where internet traffic management could only be executed in the sake of public interest. Both Vice-President Ansip and Commissioner Oettinger were pleased with the compromise that had been reached between the commercial interests at stake and the interests of European consumers. Ansip made a fitting statement on the benefits of this compromise at the plenary session in Parliament prior to the formal adoption of the legislation, saying that –

*“The regulation will create the individual and enforceable right for end-users to access and distribute internet content and services of their choice. The net neutrality provisions also lay down rules on non-discriminatory traffic management and on end-users’ free choice of content, applications and services. These provisions cannot be circumvented through commercial agreements and practices. Common rules on net neutrality mean that internet access providers cannot pick winners or losers on the internet, or decide which content and services are available. They mean that the freedom of Europeans to access or distribute internet content will not depend on the country where they are resident. This will increase consumer choice and competition, and strengthen the Digital Single Market.”*<sup>124</sup>

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<sup>122</sup> Keating, D. (2015, April 4). *EU and US in tune on net neutrality.*

<sup>123</sup> Regulation 2015/2120 of the European Parliament and of the Council of 25 Nov. 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union, O.J. 2015, L 310/1.

<sup>124</sup> Ansip, A. (2015, October 27). *Opening statement at European Parliament plenary session on a European single market for electronic communications.*

## Public funding

The Latvian presidency also saw an agreement on the future allocation of resources relating to strategic investments and the digital single market. The Commission was successful in securing an agreement on the European Fund for Strategic Investments (EFSI) also known as the ‘Juncker Plan’, which aimed at mustering private financing for strategic investment in the Union, and was a joint endeavour by the EIB Group and the Commission. The emphasis of the EFSI was providing funding for projects with a higher risk profile than would usually be taken on by banks, including cross-border projects, and it focussed on sectors of key importance for the European economy, like strategic digital infrastructure and renewable energy and resource efficiency. Commissioner Oettinger had already in February<sup>125</sup> discussed the prospect of increasing the available structural funds for the co-financing the expansion of high-speed internet networks. Additionally, the Commission had made it a top priority in the Digital Single Market strategy to foster innovation and establish a supportive investment climate for both digital networks, research and innovative business.<sup>126</sup> A provisional agreement on the matter had been reached with Parliament in the end of May 2015, the same month as the Digital Single Market strategy was proclaimed by the Commission, and the Council adopted the regulation at the end of June, in the last days of the Latvian presidency. The speed to which this legislation was adopted indicated a high level of support from Member States. At this point, the Union had had a significant history in bettering telecoms infrastructure and securing modern internet connections across the continent, and history had shown it to be a fairly uncontentious issue in the policy-making process. In addition, it was common knowledge that there was a high correlation between internet connectivity and populations’ use of advanced services in the digital realm, as shown in the 2009 Digital Competiveness Report. Simultaneously, ICTs had grown ever more important in the economy and for the lives of everyday people, prompting the need for this vital infrastructure. It was therefore no wonder that the EFSI guaranteed a large amount of credit from the EU budget<sup>127</sup>. It was a 26 Billion EUR guarantee, much higher than a similar investment package provided during the previous Commission, the Connecting Europe Facility (CEF), which had only provided one Billion EUR<sup>128</sup> in addition to the seven billion EUR secured under the multi-annual financial framework.

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<sup>125</sup> Tost, D. (2015, January 23). *Oettinger playing ‘catch-up’ on EU digital infrastructure.*

<sup>126</sup> European Commission, Communication ‘A Digital Single Market Strategy for Europe’, COM(2015) 192 final.

<sup>127</sup> Regulation 2015/1017 of The European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments, O.J. 2015, L 169/1.

<sup>128</sup> European Commission (2014, February 26). *Commission welcomes finalisation of digital Connecting Europe Facility; European Parliament endorsement means investment in Europe’s digital future.*

Furthermore, the Juncker Plan received a funding boost and an extension of the original timeline (2015-2018) to 2020 instead<sup>129</sup>. By 2019, the deals approved under the Plan amounted to 72.8 billion EUR in financing and had spurred 393 billion EUR in investment across the Union<sup>130</sup>.

This increase in spending and the level of support from Member States, as evident in the fast pace of the Juncker Plan getting passed through the legislative procedure, is an indicator of the rise in interest for a collective European action on this on tackling the digitalisation issue. The EU providing public funding for ICT-related projects and infrastructure were arguably normalised by this point, and an increase in spending was not a contentious issue, certainly not in the light of the other more comprehensive measures on the political agenda at the time. In addition, it is evident that the Commission had done a high amount successful issue framing not only in relation to the EFSI but also on the digital single market strategy as well. Seen in the light of the strategy as a whole, this investment fund was only a minor and fairly uncontentious part of the strategy.

### Structural changes

Prior to the Europe 2020 Strategy, the Commission had realised the importance of ICTs in the future of the single market, but it was not until the proclamation of the Digital Agenda for Europe (2010) that the Commission reacted with serious administrative changes within its own ranks, to try and better tackle the challenges in creating a digital single market. In July 2012, institutional changes took place with the Directorate-General for Information Society & Media (DG INFSO) being renamed to DG for Communications Networks, Content and Technology (DG CONNECT). The DG was still under the responsibility of the Commissioner for Digital Agenda, Neelie Kroes (ALDE) from the Netherlands, who served as Vice-President and Commissioner for the Digital Agenda portfolio during the second Barroso Commission. The name change signified a change of focus in policy priorities, now focusing more on ICTs specifically, and the mission of the DG was updated as well. The restructuring also meant staff-cuts for the DG, with parts of the previous INFSO agenda being externalised from January 2013. Commenting on the restructuring of the DG, Commissioner Kroes stated that –

*“Those of you who work in ICT will know it’s a fast changing environment. New policy areas emerge and rise in importance – like the cloud or internet security;*

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<sup>129</sup> European Commission (2017, September 13). *Commission welcomes agreement in principle to extend and reinforce Investment Plan's European Fund for Strategic Investments (EFSI)*.

<sup>130</sup> European Commission (2019, May 21). *The Juncker Plan: Getting Europe Investing again*.

*research faces a new framework; and we must increasingly recognise how the Digital Agenda is transforming ever more areas of our lives. So to adapt and face the challenges of the next ten years, we've changed the structure and mission of the DG (directorate general); and we'll be changing the culture too*"<sup>131</sup>

The reorganisation also saw the recruitment of the Italian Roberto Viola as the new deputy director-general of the new DG CONNECT. He would later on, only three years into his stint in the DG, get promoted as the director-general of DG CONNECT, and this was remarkable for a relative newcomer<sup>132</sup>. Prior landing the job as deputy director-general in 2012, he was secretary-general of Italy's regulator for the communication industries and therefore an outsider to the Commission. The promotion of Viola to the top-job within the DG was part of a larger shake-up of the Commission<sup>133</sup>, which saw the previous Director-General Robert Madelin get a new position as special advisor on innovation at the European Political Strategy Centre, allegedly due to clashes with Juncker's chief of staff Martin Selmayr on matters relating to the Electronic Communications Regulation, which was formally approved later in November 2015. Viola was allegedly already 'pulling the strings' in the DG as deputy director-general, and was playing a very active role in the telecoms reform, being an ever-present figure in the negotiations, where then Director-General Madelin was rarely seen.<sup>134</sup> Deputy Director-General Viola had, according to sources, a great relationship with MEPs, and these relationships served him well during the 12-plus-hour negotiation session going on at the last day of the Latvian presidency, where he was seen as a key player<sup>135</sup> in finally realising an agreement on the telecoms reform, which was formalised later in November as the Electronic Communications Regulation. On Viola's importance in the negotiations, the Parliament's rapporteur for the reforms Pilar del Castillo (EPP) recalled that –

*"We went through moments where it seemed there was no way to go through, but he was always showing determination to go on ... He was able to find solutions without losing dominion of the goal to be achieved.... There is no doubt that Viola is one of the main people responsible for this."*<sup>136</sup>

It is evident, that the Commission reacted to the challenges in establishing the digital single market by strengthening its administrative wing, instating an assertive player like Roberto Viola who had

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<sup>131</sup> Kroes, N. (2012, April 25). *The Commission changes to face the future: we launch "DG Connect"* [Web log post].

<sup>132</sup> Vogel, T. (2014, April 23). *Commission recruits Italian regulator*.

<sup>133</sup> Heath, R. (2015, June 25). *Commission shakes up top management*.

<sup>134</sup> Sheftalovich, Z. (2018, January 28) *The Italian who runs European tech*.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

superb knowledge on digital matters, and who could champion the Commission's line, as was seen in negotiations on the Electronic Communications Regulation.

### Policy-making – the GDPR

The most comprehensive effort to realise a digital single market was arguably the data protection reform undertaken by the Commission in January 2012. This was a true effort to realise a new regulatory framework for the protection and handling of personal data, and the proposal consisted of two legislative proposals, one general regulation on data protection and one directive aimed at data protection in the police and justice systems<sup>137</sup>.

In 2009, as part of the Stockholm Programme<sup>138</sup>, both the European Council and the Parliament had invited the Commission to evaluate the functioning of EU instruments on data protection and welcomed a data protection scheme at the EU level. In addition, large independent economic reports had also stressed for the EU to harmonise its legal framework concerning privacy and protection, if a true single market was to be realised.<sup>139</sup> Moreover, extensive consultations were made with a slew of major stakeholders and several public consultations were made prior the proposal.<sup>140</sup> Simultaneously, the circumstances surrounding the Edward Snowden scandal had created a political climate that called for stricter measures on privacy. Especially, the European politicians in the Parliament called for EU action, since it was clear after the scandal that the Union's personal data legislation needed to address the challenges arising in relating to the growing centrality of data in modern society. Therefore, Parliament voted in March 2014 to support the proposed legislation with a staggering 621 votes in favour, 10 against and 22 abstentions<sup>141</sup>. However, negotiations in the Council was more long drawn, and a common statement was not agreed on until June 15<sup>th</sup> 2015 at the Latvian presidency of the Council, more than three years after the legislation was proposed by the

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<sup>137</sup> Specifically, The Data Protection Law Enforcement Directive protects EU citizens' fundamental right to data protection whenever personal data is used by Member States' law enforcement authorities for law enforcement purposes, either at domestic level or when data is shared between the Member States. It ensures that the personal data of victims, witnesses, and suspects of crime are duly protected, and facilitates cross-border cooperation in the fight against crime and terrorism.

<sup>138</sup> The Stockholm Programme was adopted in December 2009 and provided framework for EU action on the topics of citizenship, security, asylum, immigration and visa policy for the timeframe 2010-2014.

<sup>139</sup> Copenhagen Economics, Final Report 'The Economic Impact of a European Digital Single Market', European Policy Centre, 2010, p. 5.

<sup>140</sup> European Commission, Communication 'Proposal for a Regulation of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)', COM(2012) 11 final.

<sup>141</sup> European Data Protection Supervisor (2019, May 16). *The History of the General Data Protection Regulation*.

Commission<sup>142</sup>. The common statement by the Council made way for the triologue negotiations to take place, and they were set to start on 24<sup>th</sup> of June, only nine days after the common statement was agreed upon. There is no doubt that the Commission was eager to finalise the data protection reform as part of the Digital Single Market strategy, and it is evident that the Latvians were accommodating to the fact that the Commission had proclaimed the strategy in May and saw it as top priorities to not only finish talks on the telecoms reform, as described in the previous section of this analysis, but also the data protection reform, due to the political pressure mounting from the Edward Snowden scandal. The time from when the triologue negotiations on the data protection reform started in late June until an agreement was made on the 15<sup>th</sup> of December was quite hectic, in the sense that major stakeholders and large industry groups were exceptionally active in trying persuade the legislature on ‘toning down’ the language in the legislation on a number of aspects. However, interest groups on the other side of the negotiations, like the consumer rights group BEUC, criticised the clause in the proposal that governed companies’ use of data, because they saw it as giving too much leeway to companies reliant on data.<sup>143</sup> Industry groups complained that the text of the regulation suggested a substantial level of liability for companies violating the protection law and a heavy set of fines in case of violation. In this specific instance, the Parliament had pushed for possible sanctions to be as high as 5% of a given company’s yearly global turnover, while the Commission and the Luxemburg presidency of the Council had suggested a more moderate level of 2% of global turnover.<sup>144</sup> Additionally, the subject of restrictions on data processing was a contentious issue, and industry groups argued that restrictions on data processing would damage businesses and severely affect their advertising revenue.<sup>145</sup> The major industry stakeholders were primarily larger technology-businesses who were reliant on free, global data flows and being able to analyse that data in a non-restricted manner. A group of such companies was the European Data Coalition, which were one of the largest actors in the lobbying process and consisted of 19 major tech companies. This coalition included SAP, Nokia, Ericsson and Volvo, and they consistently argued that restrictions on further data processing had the potential to profoundly damage their businesses. Particularly, it was the extra territorial applicability established in Article 3(2) of the GDPR, which read “*This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not*

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<sup>142</sup> Auers, D., & Rostoks, T. (2016). The 2015 Latvian Presidency of the Council of the European Union: The 2015 Latvian Presidency. *JCMS: Journal of Common Market Studies*, 54, 83–90.

<sup>143</sup> Stupp, C. (2015, June 16). *Council approves data protection reform*.

<sup>144</sup> Euractive (2015, December 2). *Tech industry goes for last minute appeal on data protection*.

<sup>145</sup> Stupp, C. (2015, June 16). *Council approves data protection reform*.



*established in the Union...*"<sup>146</sup> that was a concern for the coalition and major industry actors in general. Therefore, they also called for the provisions that restrict data requests to authorities in other countries to be taken out of the regulation.<sup>147</sup> During the Trialogues, the coalition was persistent in its efforts to reform the impending legislation, and it amped up its effort after European leaders made clear their intentions of reaching a conclusion on the data protection legislation before the end of 2015. A last desperate effort was made on the 1<sup>st</sup> of December 2015, where the coalition sent a letter to several high-ranking EU officials, including Commission President Juncker, Vice-President Ansip, Commissioner Oettinger, and Commissioner Jourova. In the letter, they begged EU leaders to give up on the self-imposed deadline to finalise the trialogues by the end of the year, and to seriously revise the legislation to make it more business-oriented.<sup>148</sup> In addition, on the 27th of November, 12 different organisations representing start-up businesses sent a letter to Member States and MEPs, voicing their concern on the prospect of the data protection reform.<sup>149</sup> The Parliament rapporteur on the data protection package Jan Philipp Albrecht (Greens/EFA) stated that the lobbying done on the GDPR was some of the most extensive he had ever witnessed, and the regulation also saw a near 4000 amendments from several Parliament committees<sup>150</sup>.

The Commission had put forward an enormously ambitious legislation with great implications for consumers and businesses, and major stakes were at play for the very resourceful industry-groups who did their best to defend their interests. On the other side, there were EU politicians who were determined to provide a new regulatory framework for the protection and handling of personal data, a goal, which they had set out years prior, and which had steadily climbed up the priorities list of the Commission's political goals. Additionally, the Commission has early on argued that the new regulatory framework would provide new business opportunities, and that it would have the potential to provide European tech businesses with a boost, due to a relief in bureaucratic burdens. A vital factor in the Commission's rationale was also the fact that European consumers were now, more than ever, interested in privacy matters and wanted to be secure in their online activities. The resulting set

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<sup>146</sup> European Council (2015), Presidency Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Preparation of a general approach, (9565/15). Brussels, 11 June 2015.

<sup>147</sup> Stupp, C. (2015, October 15). *Irked tech companies set out 'red lines' on upcoming privacy law.*

<sup>148</sup> Euractive (2015, December 2). *Tech industry goes for last minute appeal on data protection.*

<sup>149</sup> Ibid.

<sup>150</sup> Stupp, C. (2015, October 15). *Irked tech companies set out 'red lines' on upcoming privacy law.*

of laws, the GDPR<sup>151</sup> and the Data Protection Law Enforcement<sup>152</sup> Directive did indeed provide security for European consumers, being the most comprehensive set of laws in the world governing personal data protection and processing, and arguably some of the most extensive laws that the EU has ever produced.

An important part of the GDPR is that it introduces a new regulatory body at the European level. The European Data Protection Board (EDPB) was established on the same date the GDPR came into force, 25th of May 2018. Article 68 of the GDPR provided the provision for its founding and it was a successor to the old advisory board, the Article 29 Working Party, which was established in relation to the previous Data Protection Directive from 1995. The EDPB consists of a representative from the Commission, representatives of the 28 Member States' national data protection authorities, and lastly the European Data Protection Supervisor (EDPS), which is an independent supervisory authority to the EU institutions. The duties of the EDPB is to issue guidelines on the legal interpretation of core concepts of the GDPR, but it also serves a more executive role due to its extensive power to settle disputes between the national supervisory authorities in matters regarding cross-border processing of personal data. However, the Commission has no voting rights, since it only serves as an observer to the meetings of the EDPB.

It is apparent, that the EDPB was established to ensure consistency in the application of the new data protection laws across the Union. Veale (2018) has described how, prior the GDPR, litigants would abuse that national data protection authorities had so varying approaches to data protection and data protection enforcement. Even though that the EDPB has the status of an EU body with a legal personality, and therefore pertains to a judiciary role at the supranational level, the new regulatory framework provided by the data protection reform can only be described as a case of functional integration.

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<sup>151</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, O.J. 2016, L 119/1.

<sup>152</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, O.J. 2016, L 119/89.

## Discussion of findings and concluding remarks

During the course of this thesis, it has been proven that even though the Commission already at the turn of the millennium recognised the importance of ICTs in the future European economy, it was not until the time of the Digital Agenda for Europe strategy that the Commission took a clear user-centric approach. Furthermore, it was not until the Digital Single Market strategy from 2015 that real user-centric legislation was being enacted. However, this must be seen in the light of the ‘Lisbon Agenda’ (the umbrella strategy setting out the political priorities for the European economy until 2010), which was overly ambitious and proven to bear few actual results. Moreover, the analysis has shown that the Commission had learned a valuable lesson from this experience, and the new overarching political strategy ‘Europe 2020’ took on a more consumer-friendly approach in dealing with socioeconomic issues and driving the European economy forward. Complementary of Marcut (2017), the analysis has proven the importance for the Commission to take a more central role in creating the ideal regulatory framework for realising a digital single market, especially exemplified by the GDPR. It has been argued during the course of this thesis that previous EU strategies dealing with ICTs prioritised the establishment of internet connectivity across the Union. While this succeeded in bridging the internet connectivity gap across the Union in addition to giving Europe a global lead in broadband connectivity by 2009, the Commission learned that other important aspects of the EU’s digitalisation strategy needed to be addressed. This was the need for a more user-centric approach to the digital single market, where Europeans online users’ confidence in the digital realm was just as important as digital infrastructure was. Therefore, beginning with the Digital Agenda for Europe strategy from 2010, actions were taken to strengthen the rights of online consumers and build up trust in the digital realm, as proven by the comprehensive legislation put forward from that time onward. This trend has been on-going and has extended in latitude during the Digital Single Market strategy, and has culminated in major consumer-protection measures regarding online activity, like the GDPR and the Electronic Communications Regulation.

The analysis has shown, that no major institutional changes were introduced under the new regulatory framework realised under the Digital Single Market strategy. The Commission had kept the institutional changes to an absolute minimum. In the case of the Electronic Communications Regulation, the Commission pulled on the existing bodies by only enhancing the role of BEREC to ensure consistency of regulation. In the case of the GDPR, a supranational body was established (EDPB), but can, in the light of the policy-making process, only be described as a case of functional spill-over.

Moreover, the analysis has shown a historical increase in in the scope of the Union's digital strategies. The research on the policy-making process regarding the major legislative measures enacted during the Digital Single Market strategy has proven that Member States have been increasingly interested in addressing the digitalisation of society at the European level. With these digital single market strategies, the Commission has simply reacted to the wishes of Member States to formulate a policy response at the European level. Furthermore, it has been proven that the agenda-setting power of the Commission is central to the European integration process. The Latvian presidency of the Council showed that the EU is able to effectively push forward its agenda, albeit only in an instance where the Parliament and the Council have pushed for an EU-level policy response. The reason for Member States to delegate power to a European authority is, arguably, best described from a functional standpoint. Member States simply see a clear benefit in doing so. Institutions like the EU are attractive and efficient due to the stability they produce, and actors see a benefit in delegating authority to formal institutions like these in order to pursue their own preferences. It is simply more convenient and efficient to let the Commission deal with the issues' priority on the EU agenda, then have the Commission create a policy response and then broker a compromise between Member States.

In sum, it has been found, that the European Commission has reacted to the wish of Member States to formulate a policy-response to the digitalization issue at the European level and to finalise the digital single market. The efforts pursued by the Commission has centred on creating an updated regulatory framework, funding innovative projects and digital infrastructure, building trust in the digital environment, and ensuring consumer-protection in the digital realm. It has been proven that the Commission has only acted to the extent permitted by the EU treaties. With no clear 'digital' competence founded in the treaties, the issues relating to the digital economy have been circumscribed to the EU's Single Market policy. Therefore, the measures proposed under the Commission's Digital Single Market strategy have all pertained to the functioning of the Single Market. This asserts the neo-functionalist notion that the nature of the internal market necessitates a certain degree of expansion in order to maintain full functioning. Consequently, this fully supports the hypothesis examined in this thesis, stating that the digital single market strategies were the results of functional spill-over.

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