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CORE ANALYSIS

The ordoliberal internet? Continuity and change in the EU's approach to the governance of cyberspace

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Abstract

This Article considers the role of ideas in shaping law and policy processes, serving to facilitate certain actions or approaches while curtailing others. Using the development of the EU's governance approach to online service providers and platforms, this Article demonstrates how ordoliberalism as a set of beliefs regarding the regulation of market activity through law have shaped the understanding of appropriate measures for combating hybrid threats such as disinformation. Highlighting the origins of the E-Commerce Directive and the influence of ordoliberalism in the application of a regulated self-regulation model, the Article explores how ordoliberal philosophical ideas have influenced programme and policy level ideas concerning EU cyberspace governance as it relates to online platform activities. Even where there has been discursive change regarding the role of online platforms in contributing to an environment of insecurity, there has nevertheless been ideational continuity in the approach to their regulation, dictating the legal response in the Digital Services Act.

Keywords: ordoliberalism; regulation; institutionalism; internet law; online platforms; cybersecurity

1. Introduction

The dynamics of Internet regulation are currently in a state of flux. Previously accepted norms and understandings of the place of digital communications in both public and private life are subject to increased scrutiny, as are the role of actors involved in both the governance and use of these technologies. Security and protection of users from harm are becoming increasingly prominent in discussions over how online platforms[1] should be regulated, particularly in the EU in the context of deliberations over the Digital Services Act, which has now been enacted as Regulation 2022/2065.[2] Particularly since 2016, cyberspace governance relevant to online platforms in the EU has incorporated an explicit security discourse, which goes beyond the immediate threat to information systems and the integrity of the information stored on those systems, to the spill-over consequences for security in the physical realm.[3] In a Communication on hybrid threats the Commission and High Representative of the Union for Foreign Affairs and Security Policy

[1]Defined by the Commission in European Commission, 'Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe' COM (2016) 288 final, 1 as 'including online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy'.

[2]Regulation 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC.

[3]See H Carrapico and B Farrand, 'When Trust Fades, Facebook Is No Longer a Friend: Shifting Privatisation Dynamics in the Context of Cybersecurity as a Result of Disinformation, Populism and Political Uncertainty' 59 (2021) Journal of Common Market Studies 1160; H Carrapico and B Farrand, 'Discursive Continuity and Change in the Time of Covid-19: The Case of EU Cybersecurity Policy' 42 (2020) Journal of European Integration 1111.

stated that the EU was facing risks from the combination of coercive and subversive activities, using both conventional and non-conventional methods including the use of new technologies, as a means of achieving state or non-state objectives while remaining below the level of open warfare.[4] In particular, the Communication noted, 'massive disinformation campaigns, using social media to control the political narrative or to radicalise, recruit and direct proxy actors can be vehicles for proxy threats'.[5] However, and as this article will expand upon further, despite these grave pronouncements, the policies toward and actions concerning the role of online platforms have been subject to somewhat modest changes. The publication of the proposal for the DSA in 2020 ostensibly constitutes a dramatic shift in regulatory approach to online platforms. Typified by an environment of regulated self-regulation, however, even in the DSA the level of regulatory control exerted appears low given the significant change in discourse and framing of social media platforms. How can this be understood?

The purpose of this article is to explore these developments further, exploring the way in which ideas generated within a particular law and policy sector at a formative stage then serve to influence the trajectory of future legal and policy initiatives. More specifically, the article considers the ways in which the ideational frame of ordoliberalism as a rationale for decision-making has served to shape the EU's cyberspace governance approach, both in terms of processes and the emphasis on regulated self-regulation in governance, through to the choice of legal and non-legal instruments. This is not to suggest that the EU is explicitly ordoliberal, or indeed that the entirety of the EU legal order is the result of a concerted effort by well-placed actors to further an ordoliberal project. Instead, the purpose is to demonstrate how the historical development of the EU's policies concerning online platform governance have been influenced by ordoliberal ideas, and how this has in turn shaped what policy approaches have been considered appropriate in responding to new regulatory challenges in this sector. Using constructivist institutionalism, this article will explore how ideas act as cognitive filters that determine what actions are appropriate and thereby influence future policy choices, including the use of legal instruments, facilitating some options while restricting others. Ordoliberalism as an idea about how law should be used to structure economic activity has served to facilitate an approach to the regulation of the actions of Internet intermediaries such as online platforms that is: heavily based on market principles; deference to regulated self-regulation by private sector actors deemed expert in their area of activity; conducted in an environment of market competition; and the perception of problems with cyberspace governance as being foremost economic ones. This in turn has resulted in law and policy approaches where measures initially adopted to address phenomena identified as economic problems are then applied to security problems, even where this may appear to be an ill-fit for the issues raised.

The relevance of this novel approach to (re)thinking cyberspace governance in the EU using current security concerns[6] as a case study serves several objectives. Firstly, it allows us to consider potential explanations for *why* the EU has taken the approach to online platforms that it has, as well as its choice of instruments, identifying continuity in ideas and actions even where there is change in discourse. The following two objectives make some more generalisable points: the second objective aims to demonstrate that whereas the role of ordoliberalism in influencing the EU's competition, economic and monetary policies has been discussed in the academic literature,[7] the

[4]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Framework on Countering Hybrid Threats' JOIN(2016) 18 1.

[5]Ibid.

[6]For this reason, the focus of this work is on the Digital Services Act, which concerns more security-oriented content moderation obligations for platforms, rather than general competition ones under the Digital Markets Act.

[7]For non-exhaustive consideration of these topics, see J Hien, 'European Integration and the Reconstitution of Socio-Economic Ideologies: Protestant Ordoliberalism vs Social Catholicism' 27 (2020) Journal of European Public Policy 1368; T Warren, 'Explaining the European Central Bank's Limited Reform Ambition: Ordoliberalism and Asymmetric Integration in the

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role of ordoliberal ideas in structuring understanding of public policy problems relating to markets results in a spill-over into other fields of activity. This has not been significantly analysed and is ripe for further exploration. The third objective is to highlight that ideas that are often unspoken or not consciously acknowledged can have real effects on influencing what actions are considered appropriate and inappropriate in a particular law and policy domain, and that by exploring the development of these ideas and how they are communicated, we can better understand how certain law or policy instruments are proposed or discounted during periods of political or social uncertainty. As Wolin has stated, 'the past weighs on the present, shaping alternatives and pressing with a force of its own'.[8]

This article is structured as follows: the first section considers the role of ideas in shaping law and policy, expanding upon the theoretical framework of constructivist institutionalism, and how this can be used to explore how ideas are generated, communicated and then become embedded in institutional set-ups. These ideas can structure understandings of social phenomena, what constitutes a problem, and how best to address that problem, through discourses that legitimise and facilitate policy approaches. This section also expands upon the use of interpretive structuralism as an approach to discourse used to explore these ideas. This then leads into the second section of the paper, which expands upon the concept of ordoliberalism. It outlines the characteristics of the ideational framework and the influence it has had in determining the EU's approach to economic governance, albeit one not uncontested. The subsequent three sections then apply these understandings to the case study of the regulation of Internet intermediaries including online platforms in the context of EU cyberspace governance, demonstrating the influence of ordoliberalism in the foundations of the policy space, and subsequently the legal framework provided for by the E-Commerce Directive; the changing discourses concerning security, radicalisation and disinformation that became prominent, yet with continuity in the regulatory approaches taken to Internet intermediaries as a result of ideational path-dependence; and finally, that while the DSA marks a significant rupture in discourse concerning online platforms, and indeed in setting out what legal obligations exist, the role of ordoliberal ideas in influencing the approach to these intermediaries remains prominent in determining how to regulate these platforms, as well how the obligations laid down by legislation are to be given effect.

Finally, it must be stated that while there are very interesting issues to do with privacy and the protection of personal data under legislative initiatives such as the General Data Protection Regulation, for space constraints they have not been included as part of the current case study but could be explored in further research upon this topic. Instead, the focus will be limited to the consideration of the regulation of platforms in tackling security risks framed as hybrid threats.

2. Ideas, institutions, and how the decisions of the past influence the responses of the future

How do ideas about the way the world works influence the production of laws? Why are some issues perceived as policy problems self-evidently requiring legislative intervention, whereas other issues are instead relegated to the world of self-regulatory mechanisms or voluntary agreements, or indeed, never considered as problems at all? How does the way that previous decisions are made impact the decisions that can be made in the future? These questions can be addressed by

Eurozone' 42 (2020) Journal of European Integration 263; B Young, 'German Ordoliberalism as Agenda Setter for the Euro Crisis: Myth Trumps Reality' 22 (2014) Journal of Contemporary European Studies 276; P Nedergaard, 'The Influence of Ordoliberalism in European Integration Processes – A Framework for Ideational Influence with Competition Policy and the Economic and Monetary Policy as Examples' (2013) MPRA Paper No. 52331; I Maher, 'Re-Imagining the Story of European Competition Law' 20 (2000) Oxford Journal of Legal Studies 155.

[8]SS Wolin, 'Political Theory as a Vocation' 63 (1969) American Political Science Review 1062, 1077.

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considering the institutions involved in setting the rules and creating the laws, and the ideas that shape them. For the purposes of this article, an 'institution' is defined as:

> a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations. Such practices and rules are grounded in structures of meaning and schemes of interpretation that explain and legitimize particular identities and the practices and rules associated with them.[9]

Institutionalist theories explore how particular institutional features come into existence, and why they persist.[10] The chosen framework of discursive institutionalism[11] maintains that in order to understand institutional continuity and change, it is necessary to consider the ways in which they are constituted by actors 'through the subjective and inter-subjective understandings they develop to make sense of their experiences and to orient themselves towards their environment'.[12] Constructivist accounts of institutions consider the relationship between structure and agency to be fluid and iterative. As such, it focuses upon the processes and practices of institutionalisation rather than on the structure of those institutions, treating them as dynamic rather than static.[13] Central to these processes is the role of ideas in mediating between actors and institutions, serving to give meaning to their process and practices. Ideas are 'beliefs held by individuals or adopted by institutions that influence their attitudes and actions'.[14] In comparison to rationalist accounts based on the interests of actors, constructivist analysis of ideas seeks to understand how interests are *constituted* by ideas. This means that preferences concerning the real world are determined by the ideas or beliefs about that world that influence actors' decision-making processes. Ontologically, this approach considers interests as constructed and contingent, rather than material and self-evident. Ideas shape the preferences of actors, which then serve to inform policy processes. Saurugger states that this happens in three specific ways: 'first, they help to construct the problems and issues that enter the policy agenda; second, they frame the basic assumptions that influence the content of reform proposals; finally, ideas can act as discursive tools that shape reform imperatives'.[15] Discursive institutionalism operates through analysing 'the discourse in which actors engage in the process of generating, deliberating, and/or legitimising ideas about political action in institutional context'.[16] For the purpose of this Article, the discourse focused on in this analysis is 'coordinative discourse', which emphasises the role of policy makers in constructing policy ideas.[17] Following Schmidt's approach, this is done by exploring the interplay

[9]JG March and JP Olsen, 'The Institutional Dynamics of International Political Orders' 52 (1998) International Organization 943, 948.

[10]D Diermeier, 'Formal Models of Legislatures' in S Martin, T Saalfeld and KW Strom (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2016) 34.

[11]Drawing on both the work of Hay, in particular C Hay, 'Constructivist Institutionalism' in RAW Rhodes, SA Binder and BA Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press 2006) 56; and VA Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' 11 (2008) Annual Review of Political Science 303 – while Hay refers to the approach as 'constructivist' and Schmidt as 'discursive', the approaches share sufficient similarity that for the purposes of this article, they are being treated as part of a cohesive framework for analysis.

[12]C Hay, 'Good in a Crisis: The Ontological Institutionalism of Social Constructivism' 21 (2016) New Political Economy 520, 525.

[13]Ibid., 526; VA Schmidt, 'Reconciling Ideas and Institutions through Discursive Institutionalism' in D Beland and RH Cox (eds), *Ideas and Politics in Social Science Research* (Oxford University Press 2010) 49.

[14]L Emmerij, R Jolly and TG Weiss, 'Economic and Social Thinking at the UN in Historical Perspective' 36 (2005) Development and Change 211, 214.

[15]S Saurugger, 'Constructivism and Public Policy Approaches in the EU: From Ideas to Power Games' 20 (2013) Journal of European Public Policy 888, 891.

[16]Schmidt, 'Reconciling Ideas and Institutions through Discursive Institutionalism' (n 13) 47.

[17]VA Schmidt, 'Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"' 2 (2010) European Political Science Review 1, 3.

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between the philosophical, programmatic and policy levels of discourse,[18] drawing from the work of scholars such as Kingdon, Hall and Campbell.[19] This allows for consideration of the ideational content constituted by the philosophies underlying programmes of activity and policy proposals, and how they are coordinated with other policy actors. For Schmidt, philosophical ideas are deep-level concepts, ideologies or accepted interpretations that can act as a global frame of reference, which serve to construct programmes and policies through relation 'to a deeper core of organising ideas, values, and principles of knowledge'.[20] As will be discussed in the next section, ordoliberalism broadly defined can constitute a philosophical idea that can act as such a frame of reference. In comparison, programmatic ideas are the paradigms, problem definitions and analytical frameworks that mediate between philosophies and policies.[21] They go beyond being 'just' frames, instead setting out policy prescriptions, instruments, and goals of within a given policy sector; the regulatory state,[22] for example, can constitute a paradigm, representing a move from a neo-Keynesian philosophy to one that is more liberal in positioning, in which the role of the state is not that of *dirigiste* central planner, but instead provides the foundations in which private sector activity will be responsible for the running of the economy under principles dictated by the state. It is important to note that these programmes can be subject to change – rather than representing the conscious operationalisation of unified philosophies, they are changeable and adaptable as the result of events that challenge existing understandings. Nevertheless, within a specific paradigm, a problem can be identified, such as high unemployment rates, which then have policy level ideas planned to address those problems. These policy ideas are at the most 'superficial' level of ideas, constituting the specific policies and responses to identified problems applied in a specific context.[23] Using unemployment as an example, the policies enacted may be very different, depending on the programmatic and philosophical underpinnings. Under one philosophical approach, unemployment could be seen as a failure of markets that requires intervention by states to prevent human suffering. This could be represented at the programme level as an identification of a problem of precarity in the workforce, remedied through specific policy actions such as maximising labour protections and guaranteeing universal basic income in order to mitigate the negative impacts of unemployment on individuals. Alternatively, a philosophical approach may instead see unemployment as a moral failure, and laziness on the part of the unemployed. Programmes could identify excessive labour protection and lack of flexibility as the problem, which is then addressed through policies minimising the economic 'benefits' of being out of work, while making it easier for employers to hire and fire staff. Therefore, the very same 'problem' can be conceptualised and acted upon in very different ways, depending on the underlying philosophies and policy implementations. The coordinative discourse analysis performed in the remainder of this article will therefore analyse texts to explore the philosophies represented by their generated programmes, and how this then serves to shape the policies adopted in response to the problems identified through these processes of discursive generation. Methodologically, the documents used for this analysis are predominantly those created by the European Commission and its Directorates General (DGs), to assess their coordinative discourses. The analysis starts with the foundational documents for the EU's technology policies from the 1970s and then 1990s, then focusing on the phases of consolidation, transition and explicit security-logics

[18]Ibid.

[19]JW Kingdon, *Agendas, Alternatives, and Public Policies* (Harper Collins 1984); PA Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' 25 (1993) Comparative Politics 275; JL Campbell, *Institutional Change and Globalization* (Princeton University Press 2004).

[20]VA Schmidt, 'Speaking of Change: Why Discourse Is Key to the Dynamics of Policy Transformation' 5 (2011) Critical Policy Studies 106, 111.

[21]VA Schmidt, 'Speaking to the Markets or to the People? A Discursive Institutionalist Analysis of the EU's Sovereign Debt Crisis' 16 (2014) British Journal of Politics and International Relations 188, 196.

[22]G Majone, 'The Rise of the Regulatory State in Europe' 17 (1994) West European Politics 77.

[23]Schmidt, 'Speaking to the Markets or to the People?' (n 21) 197–8.

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(as discussed in Section 4 of this article), in which all Commission documents pertaining to the governance of online platforms as they relate to security are scrutinised.

Important to the approach to discursive institutionalism is the understanding of path-dependence. Strategic choices made at a particular moment eliminate whole ranges of possibilities from later choices while serving as the very condition for the existence of others. However, this path-dependence is also ideational in nature, insofar as it is the ideas on which institutions 'are predicated and which inform their design and development that exert constraints on political autonomy'.[24] To put it another way, the ideas that influence the construction of a particular institution also set the limitations for how that institution operates, as well as the opportunities that structure affords. Furthermore, those ideas that have been accepted and set the parameters for institutional function then work as cognitive frames for assessing the validity and appropriateness of policies, as well as which ideas for policy formulation lie outside the bounds of 'accepted' solutions to identified problems. As such, actors can be 'locked in' to a particular course of action, as choices made at a particular moment, and justified using certain language then eliminate whole ranges of possibilities from later choices. With abstract concepts, such as the relationship between state and market (as will be discussed further), ideas regarding how the world works can 'blind' us to alternatives, such as following one economic policy despite it achieving the opposite of the intended result,[25] or using one type of economic model despite its apparent weaknesses or applicability.[26] As this work is constructivist in approach, it is important to state that this is not intended to demonstrate positivist causality in the form of 'X deterministically caused Y'.[27] It is instead intended to demonstrate the contingency of ideas, and how they make certain outcomes possible.[28] In this way, as Parsons argues, we can think of casual mechanisms as situations in which 'certain people faced an indeterminate set of 'real' conditions – at least across some range of options – and only arrived at a course of action when they adopted certain social constructs'.[29] In other words, the 'real' conditions are interpreted by the actor, who then, based on that internalisation or understanding of the issue, takes a certain action – the relationship between the 'material' and the 'ideational' in this respect is learned through processes of observation, interpretation and action. Constructivism still seeks to identify causes but does so through the analysis of meaning that gives rise to causes, rather than focusing on the causes of effects alone.[30] It is for this reason that the exploration of the role of ideas can be useful in understanding the direction in which EU policies concerning online platform regulation have developed.

The arguments this article makes in this respect are as follows:

1. Ordoliberal ideas have acted at the philosophical level to influence the approach taken to the regulation of digital technologies in the EU as the result of their embedding within the institutional practices of the EU (albeit, not as a sole philosophical underpinning, as discussed in the next section).

[24]Hay (n 11) 64.

[25]See for example M Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013) on the adherence to policies of fiscal consolidation during financial crises despite frequent demonstrations of their limited success.

[26]A Yalcintas, *Intellectual Path Dependence in Economics: Why Economists Do Not Reject Refuted Theories* (Routledge 2016).

[27]See for example D Beach and RB Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press 2012).

[28]F Kratochwil, 'Constructivism: What It Is (Not) and How It Matters' in D Della Porta and M Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (Cambridge University Press 2008) 98.

[29]C Parsons, 'Constructivism and Interpretive Theory' in D Marsh and G Stoker (eds), *Theory and Methods in Political Science* (3rd edition, Palgrave Macmillan 2010) 88.

[30]M Finnemore and K Sikkink, 'TAKING STOCK: The Constructivist Research Program in International Relations and Comparative Politics' 4 (2001) Annual Review of Political Science 391, 394.

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2. These philosophical ideas, based in the initial approach taken to regulating these technologies at the programmatic level which dictates that market operators are best placed to oversee their activities without market distorting interference from states, have acted as an ideational grounding for the establishment of a legislatively-based 'regulated self-regulation' model enacted at the policy level.
3. This 'regulated self-regulation' model has been challenged by a series of exogenous shocks over the past decade, with the result that market-led regulated self-regulation is now being increasingly scrutinised by the EU, resulting in potential changes at the programmatic level.
4. However, despite a discourse that emphasises the importance of binding rules, due to the underlying influence of philosophical ideas that can be characterised as ordoliberal, the proposals for reform demonstrate a certain ideational 'lock-in' at the programmatic level that means that the nature of those reforms is rather modest and maintains the 'regulated self-regulation' model at the policy level, albeit with heightened levels of scrutiny.

In the next section, this analytical framework will be used to explore the development of ordoliberal philosophy and its embedding within the EU's institutional framework. It will lay down the foundations for exploring how the EU's programmatic approach to Internet regulation was developed, and how the resulting policies were facilitated certain institutional actions, narratives and policy choices concerning how to regulate the Internet, while limiting the ability to take different approaches.

3. 'The role of competition in the market economy is to be mainspring and regulator at one and the same time':[31] the influence of ordoliberal ideas in EU law-making processes

How do we best regulate the relationship between state and market? Indeed, how do we best regulate markets, or the state? Such questions are at the basis of the understanding of contemporary political and economic processes, and function as the starting point for legal interventions intended to bring about those desired structures. The answers to those questions ultimately rest in the realm of philosophical ideas, which at the macro-level serve as frameworks within which micro-level narratives concerning specific issues of governance and regulation play out. In the context of the institutional development of the EU, one set of ideas concerning state, market and the relationship between both that influences the bloc's law and policy processes are those coming under the heading of ordoliberalism. Ordoliberalism is a school of thought that places economic order at the centre of decision making.[32] The Freiburg School, representing the preeminent theorists of ordoliberalism, held that markets are a constitutional order, defined by its institutional framework and therefore subject to constitutional choices.[33] For this reason, state and market are not indivisible entities, but inherently interrelated and interdependent through their embeddedness in the judicial, political and social spheres. The market is not a naturally occurring phenomenon, but an actively constructed order, in which law plays a central role.[34]

[31]W Röpke, *A Humane Economy: The Social Framework of the Free Market* (Henry Regnery Company 1960) 95.

[32]F Böhm, W Eucken and H Grossmann-Doerth, 'The Ordo Manifesto of 1936' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Macmillan 1989) 24–5.

[33]W Eucken, 'What Kind of Economic and Social System?' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Macmillan 1989) 31–2; see also VJ Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism* (2004) (Freiburger Diskussionspapiere zur Ordnungsökonomik, 04/11), 5.

[34]Eucken (n 33); F Böhm, 'Rule of Law in a Market Economy' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Macmillan 1989) 66–67; see also William Davies, *The Limits of Neoliberalism* (Sage 2016) 80–81.

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For ordoliberals, the economic constitution is both descriptive of a given sociological reality and normative of a desired legal order.[35] This privileged place of law is understandable given that Walter Eucken, an economist, and Franz Böhm, a jurist, were two academics central to the theory's development.[36] In their view, the state ought not to pick winners or losers in the economy, or to intervene directly in market functions or influence outcomes; instead, it should create a system of undistorted market competition protected through strong *legal* institutions that could break up the concentration of economic power of cartels or monopolies.[37] Interventions, where they came, should be in the form of laws used as ways of setting up markets, and then resolving disputes through legal means as ways of 'correcting' when those markets became distorted. For this reason, law had to be somewhat insulated from the grittiness of everyday politics and required active depoliticisation. Eucken was critical of the democratisation efforts that followed the Great War, and which were part of the Weimar Constitution, and fellow ordoliberal Rüstow (not a member of the Freiburg School, yet influential in the further development of ordoliberalism) argued that 'vested interests' and 'horse-trading' weakened both the state and the market through interventionism legitimated by parliamentary democracy.[38] A strong state, insulated from the pressures and demands of representative democracy, should create a functioning economic order within society underscored by law.[39] This could be achieved, as stated in their Ordo manifesto, through acting on the understanding that 'the treatment of all practical politico-legal and politico-economic questions must be keyed to the idea of the economic constitution'.[40] In other words, the ordoliberals proposed a political economy based on adherence to rules,[41] which recognised that 'the free economy is fundamentally a practice of government'[42] rather than something naturally occurring. Laws, then, should be designed in such a way as to achieve these market ordering ideals. Such a philosophy of state–market relations underscored by law can serve to facilitate 'regulated self-regulation' as a model of governance. Böhm states, for example, that 'the private law society complements the functions of the sovereign body even if only to a modest extent and even if merely to allow the natural development of their activities',[43] continuing that 'people are not supplied with a prescription of the behaviour expected of them [.. .] rather it is left to their discretion'.[44] Similarly, Röpke, a strong proponent of competition as both market activity and as market regulator, argued that 'individual independence and responsibility [.. .] depends upon a satisfactory average degree of personal integrity and, at the margin, upon a system of law which counteracts the natural tendency to slip back into less-than-average integrity'.[45] Röpke argued that all who

[35]Eucken (n 33) 32; Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 210–1.

[36]ME Streit, 'Economic Order, Private Law and Public Policy The Freiburg School of Law and Economics in Perspective' 148 (1992) Journal of Institutional and Theoretical Economics 675.

[37]See FA Lutz, 'Observations on the Problem of Monopolies' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Macmillan 1989) 152; see also Hien (n 7) 1373.

[38]R Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in P Mirowski and D Plehwe (eds), *The Road from Mont Pèlerin the Making of the Neoliberal thought Collective* (Harvard University Press 2009) 111.

[39]G Schnyder and M Siems, 'The "Ordoliberal" Variety of Neo-Liberalism' in SJ Konzelmann and M Fovargue-Davies (eds), *Banking Systems in the Crisis: The Faces of Liberal Capitalism* (Routledge 2012) 252–3.

[40]F Böhm, W Eucken and H Grossmann-Doerth, 'The Ordo Manifesto of 1936' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave MacMillan 1989) 23.

[41]JA Morrison and JL Cardoso, 'Postscript: The Intellectual Origins of European Integration' in AM Cunha and CE Suprinyak (eds), *Political Economy and International Order in Interwar Europe* (Springer 2021) 410.

[42]W Bonefeld, 'Freedom and the Strong State: On German Ordoliberalism' 17 (2012) New Political Economy 633, 635.

[43]Böhm (n 34) 51.

[44]Ibid.

[45]W Röpke, *A Humane Economy: The Social Framework of the Free Market* (n 31) 125–6.

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'take part in economic life must make a constant moral effort of self-discipline, leaving as little as possible to an otherwise indispensable government-imposed compulsory discipline'.[46] Röpke later wrote in *Economics of the Free Society*[47] that mutual confidence and security could only be guaranteed by 'an efficiently administered legal system and an unwritten but generally accepted code of minimum moral precepts'.[48] In other words, Röpke argued that while a system of legal regulation was required to deal with non-compliance, compliance was and should ultimately be dictated by abiding by standards of best practice (identified as minimum moral precepts) that served as a form of 'self-discipline', analogous to a system prescribing conduct through legislation (regulation), but leaving as to the private actors the means by which these regulatory standards were to be given effect (regulated self-regulation). '*Laissez-faire*, yes, but within a framework laid down by a permanent and clear-sighted market police'.[49] It is not the self-regulation of *markets*, but the regulated self-regulation of *market participants*.

The ordoliberal understanding of the relation between law, market and society is an idea that has influenced the structure of the EU at an institutional level.[50] Of particular importance here for promoting ordoliberal philosophy within the programme of EU integration was Müller-Armack. Müller-Armack was involved in developing the founding principles of ordoliberalism with Eucken and Böhm during the 1930s and 1940s, but was also leader of the policy department in Erhard's Economics Ministry in 1952.[51] Müller-Armack, characterised as 'probably the most influential German at Brussels',[52] was then seconded to work on the committee responsible for concluding the negotiations on the Treaty of Rome that began in 1956. Ordoliberal ideas concerning the social market economy and competition regulation became enshrined in the Treaty of 1957. This conception of state-market relations in the then-EC as a 'supranationally anchored competitive market based on law, was decisive in the construction and evolution of the European Community'.[53] Ideas concerning the importance of free movement to the private law society and the market constitution can be found in Böhm's work, such as regulatory moves to facilitate free movement of all those involved in economic activity.[54]

It is important to state that ordoliberalism is not the only philosophy that influenced the institutional design of the EU, and not its sole philosophical basis. Indeed, much of European integration entails conflict, compromise and adaptation between more 'German' ordoliberal philosophies and 'French' dirigisme,[55] and indeed particularly post-Maastricht, an increased 'neoliberalisation' of policies concerning the internal market.[56] Furthermore, ordoliberalism as a system of thought has adapted and changed over this period as the result of an increased focus on

[46]Ibid., 124.

[47]W Röpke, *Economics of the Free Society* (Henry Regnery Company 1963).

[48]Ibid., 48.

[49]W Röpke, *The Social Crisis of Our Time* (University of Chicago Press 1949) 238.

[50]For detailed accounts, see VK Fouskas, 'Placing Austerity in Context: The Greek Case Between Neo-Liberal Globalisation and an Ordoliberal EU' in LS Talani and R Roccu (eds), *The Dark Side of Globalisation* (Springer 2019) 147; K Dyson and K Featherstone, *The Road To Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999).

[51]Slobodian (n 35) 189–90.

[52]BH Moss, 'The European Community as Monetarist Construction: A Critique of Moravcsik' 8 (2000) Journal of European Area Studies 247, 258.

[53]W Bonefeld, 'European Integration: The Market, the Political and Class' 26 (2002) Capital & Class 117, 124.

[54]Böhm (n 34) 55.

[55]See L Warlouzet, 'The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism (1957–1995)' 57 (2019) Journal of Common Market Studies 77.

[56]See for example M Thatcher, 'Supranational Neo-Liberalisation: The EU's Regulatory Model of Economic Markets' in VA Schmidt and M Thatcher (eds), *Resilient Liberalism in Europe's Political Economy* (Cambridge University Press 2013) 171.

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European integration and the global economy, as well as in response to conflicts with neoliberal economic thought that was becoming more prominent in the late 1970s, resulting in the incorporation of Hayekian and 'law and economics' features.[57] What has remained consistent, however, is the emphasis on market ordering and regulated self-regulation in line with best practices, with a view to avoiding distortion of the market, particularly by the state. In this respect, ordoliberalism has had 'partial influence'[58] on the development of the EU, which has been argued specifically in aftermath of the EU policrisis.[59] As discussed earlier, the ordoliberals were highly sceptical of leaving policy in the domain of politics, beholden as they saw it to the vested interests of politicians wishing for re-election and willing to make economically deleterious decisions in order to curry favour with a voting public. Rules and laws intended to regulate the market were to be devised by 'an "extra-democratic" authority, which in the name of technical efficiency and expertise, wields political power'.[60] As such, they were strongly in favour not of a dictatorial or authoritarian state control, but technocracy as a form of government.[61] Generally understood as 'rule by experts', one definition of technocracy comes from Burris, who states that it constitutes 'a synthetic type of organisational control [(...) incorporating] technical control, bureaucracy, and professionalism'.[62] Röpke in particular promoted technocracy as an effective governance form, arguing that decision-making was best left to a 'natural aristocracy of virtues and talents'.[63] Technocracy is based on a belief that rational analysis and knowledge produces efficient solutions, and that by removing decision-making from the realm of contentious politics and into the realm of depoliticised policy formulation on the basis of evidence, optimal outcomes can be ensured.[64] While this may have negative implications for input legitimacy, technocracy instead makes claims to legitimacy on the basis of throughput and output legitimacy – so long as decisions are made using the right processes and achieving the right outcomes, usually framed in terms of efficient responses to technical problems, then technocratic government is legitimate.[65] The 'expert' has a preeminent position in the EU's law-making processes, whether through early agenda-setting, participation in expert committees or working groups.[66] This technocratic form of governance and ordoliberalism as part of the broader philosophical frame in which law-making takes place are mutually constitutive in the institutional design of the EU. Ideas for programs that identify specific problems to be addressed, and therefore the policies adopted to confront those problems, are underscored by the power of a philosophy that promotes this form of decision-making. In the next Section of this Article, it will be demonstrated how in the context of Internet regulation, it is possible to uncover the influence of ordoliberalism in a program of market

[57]See W Callison, 'The Historical Context of Ordoliberalism's Theoretical Development' in T Biebricher, P Nedergaard and W Bonefeld (eds), *The Oxford Handbook of Ordoliberalism* (Oxford University Press 2022) 40, for more on this.

[58]A Küsters, 'In Search of Ordoliberalism: Evidence from the Annual Reports of the German Council of Economic Experts, 1964–2017' Research Paper Series of the Max Planck Institute for Legal History and Legal Theory No. 2019-12 <https://papers.ssrn.com/abstract=3377993> accessed 6 August 2022.

[59]See for example Schmidt, 'Speaking to the Markets or to the People?' (n 21); PJ Cardwell and H Snaith, '"There's a Brand New Talk, but It's Not Very Clear": Can the Contemporary EU Really Be Characterized as Ordoliberal?' 56 (2018) Journal of Common Market Studies 1053; see also KK Patel and H Schweitzer, *Historical Foundations of EU Competition Law* (Oxford University Press 2013) for arguments that competition policy is a mix of different philosophies, including but not limited to Ordoliberalism.

[60]Bonefeld (n 53) 124.

[61]T Krarup, 'German Political and Economic Ideology in the Twentieth Century and Its Theological Problems: The Lutheran Genealogy of Ordoliberalism' 6 (2019) European Journal of Cultural and Political Sociology 317.

[62]BH Burris, *Technocracy at Work* (SUNY Press 1993) 2.

[63]W Röpke, *A Humane Economy* (n 31) 133.

[64]See for example CM Radaelli, 'The Public Policy of the European Union: Whither Politics of Expertise?' 6 (1999) Journal of European Public Policy 757.

[65]For an excellent account and critique of this position, see VA Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020).

[66]B Farrand, 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' 35 (2015) Oxford Journal of Legal Studies 487.

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development through market-ordering and, to an extent, a commitment to undistorted competition.[67] This has resulted in specific policies of Internet 'regulated self-regulation', leaving it to market participants to determine the best practices and procedures for that self-regulation in an environment of competition, rather than one of state interference. In doing so, we can then explore how this has created ideational path-dependencies that favour specific forms of regulated self-regulatory governance within that structure.

4. The ordoliberal internet: a case study in the role of ideas in shaping law and policy

The formative years of the EU saw the market integration process largely governed through processes of negative integration.[68] A 'depoliticised' (or rather, politically insulated) Court was actively engaged in removing barriers to trade between Member States, pursuing an effectively (but not exclusively) ordoliberal competition policy as devised by the German-led Competition DG under von der Groeben, who had also been a civil servant in Erbhard's Economics Ministry with Müller-Armack.[69] During this period, largely from the 1960s to the 1980s, the ordoliberal law-making/market-shaping frame became ingrained in the way the European Commission understood the way in which the world worked, and their role as lawmakers within it. As this period of market integration was predominantly concerned with seeking resolutions to pre-existing problems,[70] such as non-tariff barriers to trade, anti-competitive business practices and cross-border sales of works covered by intellectual property rights, there was ideational continuity in the approach taken. While negative integration appears to be more naturally ordoliberally inclined,[71] steps towards positive integration through codification of the principles of free movement (viewed with approval in ordoliberal writings)[72] also have some basis in ordoliberal philosophy. Similarly, the codification of measures to integrate the internal market, as done through what is now Article 114 TFEU, may not be solely ordoliberal, particularly given the consideration it affords to issues such as consumer protection, but is a contested space, into which ordoliberal values can be read.[73] Protocol 27 on the internal market and competition appears to support such a view, stating that the creation of the internal market under Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.[74] While competition law and policy may have been more ordoliberally inclined during this period, academics have noted that more neoliberal practices became influential in the 1980s, with significant market concentration even as a discursive commitment to undistorted market competition was maintained.[75] Towards the end of the 1980s, Europe began to see a significant upheaval in the field

[67]Joerges, 'Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation' 10 (2009) German Law Journal 335, 340.

[68]F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

[69]F Scharpf, 'De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe' 23 (2017) European Law Journal 315.

[70]At least, as perceived by the EU.

[71]See generally M Kenny, 'Globalization, Interlegality and Europeanized Contract Law' 21 (2002) Penn State International Law Review 569.

[72]Böhm (n 34) 55.

[73]D Adamski, 'The Faustian Bargain. How Evolving Economic and Political Beliefs Have Redefined the European Economic Constitution' in HCH Hofmann, K Pantazatou and G Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019) 25–57; J Hien and C Joerges, 'Dead Man Walking? Current European Interest in the Ordoliberal Tradition' 24 (2018) European Law Journal 142.

[74]P Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and Its Impact on Article 102 TFEU' in F Di Porta and R Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar 2018) 5.

[75]SM Ramírez Pérez and S van de Scheur, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and Its Keynesian Challenge' in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 19; Angela Wigger, 'Competition Laws and Their Enforcement in

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of telecommunications technologies in the form of the Internet as a high-volume, somewhat decentralised communications system. While the development of an 'information society' was recognised as early as 1979 in a Commission Communication on the challenge of new information technologies,[76] the report does not make mention of the Internet, instead focusing on the use of computers and 'terminals' more generally. What *is* clear from the document, however, is the Commission's preoccupation with the economic implications of new technologies, and how they can be exploited within an environment of competition to promote European growth in response to unemployment and economic stagnation.[77]

A. Phase one: an ordoliberal framework from new information technologies to the E-commerce directive

Reflecting the underlying ordoliberal philosophy that served to shape understanding of the problems posed by digitisation as being market-based ones, the Commission considered that in the context of these new digital technologies, 'what matters for the companies is to operate profitably in the market and to promote their own development under whatever conditions the public authorities lay down. It is essential that these conditions be as favourable as possible.'[78] The next time these issues were specifically addressed in the context of the Internet (referred to in the document through terms such as Information & Communications Technologies and 'electronic mail'), was in the 1993 Communication on Growth and Competitiveness.[79] Developed during a time of positive integration through regulation, in which a newly empowered and invigorated Commission under President Delors and the Maastricht Treaty, this Communication reiterated that these developments should be pursued as a means of securing Europe's competitiveness, with measures proposed including the liberalisation of telecommunications. Regarding ICTs specifically, the Commission stated that 'creation of a common information area will depend primarily on private sector investment. It is therefore essential to create a legal environment which will stimulate the development of such investments'.[80] The measures proposed in that document included opening up telecommunications markets to competition, guarantees of universal service, standardisation, the protection of personal data and providing security for information systems,[81] in order to secure these economic goals. However, if the ordoliberal philosophies indicated in this document were not clear enough, the near-contemporaneous release of the Bangemann Report only serves to demonstrate how these philosophical ideas shaped the programmatic framework for Internet regulation in the EU.

The Bangemann Report[82] was a report compiled by the Bangemann Group, named after the Commissioner for the internal market and industrial affairs under Delors. The Group was comprised of experts from the private sector, ranging from telecommunications providers to analytics companies to consumer electronics sellers focused on the economic benefits of new technologies, as opposed to their potential security implications.[83] Starting from the same premise as the Competitiveness Communication, the Bangemann Report highlighted the need for regulatory frameworks to be designed for private sector operators to take advantage of the benefits created by the information

the Project of European Integration: An Artefact of Ordoliberal Influence?' in Thomas Biebricher, Peter Nedergaard and Werner Bonefeld (eds), *The Oxford Handbook of Ordoliberalism* (Oxford University Press 2022) 405.

[76]European Commission, 'European Society Faced with the Challenge of New Information Technologies: A Community Response' COM(79) 650.

[77]Ibid., 13–7.

[78]Ibid., 14.

[79]European Commission, 'Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century' COM(93) 700 final.

[80]Ibid., 112.

[81]Ibid., 113.

[82]European Commission, 'Europe and the global information society: Recommendations of the high-level group on the information society to the Corfu European Council (Bangemann group),' Bulletin of the European Union, Supplement 2/94, 5.

[83]Ibid., 6.

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society. However, the language of the Report is much stronger; 'the market will drive, it will decide on winners and losers [.. .] the prime task of government is to safeguard competitive forces'.[84] In its recommendations for creating the information society in Europe, the Bangemann Report made it clear that this role 'should be entrusted to the private sector and to market forces',[85] rather than to the state, which should instead dedicate its time to setting the regulatory framework in which these private sector experts could develop the information society. In this respect, the Bangemann Report exhibits significant power *through* ideas – by being closely aligned with the ordoliberal ideational frame, the policy proposals and approach made by the Bangemann group were both descriptively and normatively persuasive in their communication to a receptive Commission audience.

Indeed, the Bangemann Report was hugely influential in setting the agenda[86] for the EU's Internet regulation efforts, and the Commission's 1997 Communication on an Initiative in E-Commerce[87] largely reiterated the Report in its identification of the problems facing the EU in this area, as well as its proposed solutions. The role of the Commission, according to the Communication, was to provide the regulatory framework necessary to promote a favourable business environment.[88] More precisely, echoing Bangemann, 'the expansion of electronic commerce will be market driven'.[89] Perhaps most revealingly, rather than the E-Commerce portfolio being assigned to the Information Society DG, it was instead given to the Internal Market DG under Mario Monti. Despite being an Italian-trained economist, Monti was sympathetic to ordoliberal ideas,[90] and the E-Commerce Directive[91] that resulted was an indication of the influence of ordoliberal philosophy within the Commission, building on the programmatic ideas in the Bangemann Report to draft a Directive that was the legislative enactment of those ideas.[92] Legally based on Article 95 EC (now Article 114 TFEU) concerning internal market harmonisation, indicating the approach to these principles as being ones of market facilitation, Articles 12–15 of the Directive set up the framework for intermediary liability for the use of the information society services they provided, granting a general immunity from liability insofar as these private sector actors moved judiciously to remove illegal or right infringing content cached or hosted on their services that was brought to their attention. These measures were not overtly concerned with facilitating competition, but instead the mitigation of traditional offences such as copyright infringement and the dissemination of illegal content moving from the offline to online environments. Nevertheless, the immunities provided were based in the idea that by allowing for a form of regulated self-regulation of commercial activity, a negative externality of increased telecommunications activity could be countered in a way that permitted EU-based commercial activity to flourish, establishing the form of private sector cooperation that would become the norm.[93]

The interpretation of the obligations within this regulated self-regulatory framework for intermediaries operating online was considered by the Court of Justice in cases concerning copyright infringements online, which in the late 2000s were the prime focus of E-Commerce Directive cases. The cases of *Scarlet v SABAM*[94] and *SABAM v Netlog*[95] were ostensibly concerned with the

[84]Ibid., 13.

[85]Ibid., 34.

[86]See for example G Christou and S Simpson, 'Emerging Patterns of E-Commerce Governance in Europe: The European Union's Directive on E-Commerce' in *32nd Telecommunications Policy Research Conference: Communication, Information and Internet Policy. George Mason University Law School, Arlington, Virginia, U.S., October 1–3, 2004* (2004).

[87]European Commission, 'A European Initiative in Electronic Commerce' COM(97) 157.

[88]Ibid., 5–6.

[89]Ibid., 1.

[90]J Hien, 'The Ordoliberalism That Never Was' 12 (2013) Contemporary Political Theory 349, 352.

[91]Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[92]Indeed, the fact that the Directive that was concerned with Internet regulation focused on it in terms of laying the foundations for structuring its 'commerce' dimension is indicative of the Ordoliberal approach.

[93]Carrapico and Farrand, 'Discursive Continuity and Change in the Time of Covid-19' (n 3).

[94]Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771

[95]Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* EU:C:2012:85.

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balancing of the protection of intellectual property rights with rights to privacy, which has been a key focus of much of the literature concerning copyright infringement online.[96] However, an interesting dimension to these cases that has not received quite as much scrutiny is the Court's argument that the obligations to protect copyright must be balanced with the freedom of a company to conduct its business.[97] While discussed as an obligation arising from Article 16 of the European Charter of Fundamental Rights, as O'Sullivan states, this right in full is the freedom to conduct business in accordance with Community and national laws and therefore qualified rather than absolute,[98] which the Court does not emphasise. In the context of this paper, the reference is more relevant as a reflection of ordoliberal philosophy that interference in market activity should be limited, deferring to the Internet intermediary self-regulatory regime, underscored in the *UPC Telekabel*[99] case where the Court inferred that any obligations to implement measures such as website blocking granted under an injunction should leave the addressee free 'to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him'.[100] Subsequently to these rulings, the European Commission did not respond to increased concerns on the part of right-holders regarding the protection of intellectual property online by significantly altering the obligations of online intermediaries, or by providing greater oversight to their practices, but instead by facilitating non-binding cooperative measures such as Memoranda of Understanding,[101] leaving to intermediaries the ability to determine the most effective way of implementing the obligations voluntarily assumed.[102] As the next subsection of this Article will demonstrate, while the regime for Internet intermediary self-regulation was not designed with security in mind, the nature of the initial obligations and governance structures have nevertheless established ideational path-dependencies that have served to limit approaches to security issues in which the role of online service providers are directly implicated. This has been summarised in Table 1.

B. Phase two: ideational rupture? Concerns over platform power and heightened insecurity

A key purpose of ordoliberalism as originally conceived was to ensure depoliticisation through a rules and order-based approach to market structuring by means of decisions made by experts, thereby shielding economic decision-making from the whims of politics and politicians.[103] As discussed in the previous section, where the governance of cyberspace was concerned, these ideas fit effectively with the construction of e-commerce markets, in which legal frameworks were laid down in which market operators could flourish. Intermediaries such as online platforms were tasked with self-regulation of their services within those frameworks, as a means of ensuring that those considered as having technical knowledge and expertise were responsible for governing the

[96]See for example P Gardiner and G Abbotts, 'Scarlet Extended Reprieve from Content Filtering' 23 (3) (2012) Entertainment Law Review 75; E Psychogiopoulou, 'Copyright Enforcement, Human Rights Protection and the Responsibilities of Internet Service Providers after Scarlet' 34 (2012) European Intellectual Property Review 552; KP O'Sullivan, 'Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Human Rights' 36 (2014) European Intellectual Property Review 577.

[97]*Scarlet v SABAM* (n 94) para 53, *SABAM v Netlog* (n 95) para 51.

[98]O'Sullivan (n 96) 581.

[99]Case C-314/12 UPC *Telekabel Wien GmbH v Constantin Film Verleih GmbH* EU:C:2014:192.

[100]Ibid., para 52.

[101]European Commission, 'Report on the Functioning of the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet' COM(2013) 209.

[102]B Farrand, 'The Future of Copyright Enforcement Online: Intermediaries Caught between Formal and Informal Governance in the EU' in I Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer 2016) 397.

[103]For more on this, see MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 118–26.

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Table 1. Continuity and change in philosophies, programmes, and policies in first phase of Internet regulation developments applicable to online intermediaries[104]

Level of idea	Forms of idea in discourse	Continuity or change?
Philosophical	Ordoliberal principles of law as creating market conditions instead of interventionist approach to market creation, comprehensive regulatory requirements, and picking 'champions'	Continuity – ideas influence programme and policy-level decisions
Programme	Market players best placed to oversee development of market and services in environment of competition, with Commission only providing for minimum legal framework	Continuity – programme follows trajectory of law as creating conditions for private activity seen in other related policy fields
Policy	Regulated self-regulation, on basis of principles of competition and harmonisation of internal market, using voluntary methods such as codes of conduct and light-touch regulation instead of maximum harmonisation of legal obligations	Change – a 'new' policy area, meaning that specific approaches taken while based on continuity in philosophy and programme nevertheless have change in policy formulation.

use of their services, free of political interference (and immunity from liability so long as conduct explicitly prohibited by law was dealt with upon being informed of it). Where market failures were considered to arise, such as in effective tackling of intellectual property rights infringements, the use of codes of conduct and voluntary agreements between stakeholders were introduced to address those market failures, helping to avoid market distortions online. This did not necessitate a rethinking of state-market relations, as the role of the Commission within this was a facilitative one, bringing actors together rather than rewriting economic rules with direct state intervention.

With the Global Financial Crisis that began in the late 2000s, however, and the contagion that resulted in the Eurozone Crisis, ordoliberalism-influenced approaches to economic policymaking became increasingly challenged, and indeed, contested.[105] Fairly or not, the EU was blamed by anti-system parties across the political spectrum for taking an approach to macroeconomic policy that exacerbated the negative impacts of the fiscal contraction on individuals, with austerity serving as the focal point for a populist-led charge against the institutions of the Union.[106] The rise in 'radicalised' anti-EU sentiment and prominence of 'populist' parties throughout the EU was perceived by the Commission in particular as a challenge to its legitimacy, as well as the legitimacy of the economic constitution.[107] Furthermore, from the 2014 invasion of the Crimea, the EU increasingly saw itself as the subject of Russian-based disinformation campaigns operated through the Internet, which by this time had gone beyond its offline and online efforts within its own territory

[104]Adapted from table in Schmidt, 'Speaking to the Markets or to the People?' (n 21) 195.

[105]While important, this is not expanded upon here as it has been considered in significant detail in other sources. See, for example B Farrand and M Rizzi, 'There Is No (Legal) Alternative: Codifying Economic Ideology into Law' in E Nanopoulos and F Vergis (eds), *The Crisis behind the Eurocrisis* (Cambridge University Press 2019) 23; D Chalmers, 'Crisis Reconfiguration of the European Constitutional State' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 266; Sara B Hobolt and Catherine de Vries, 'Turning against the Union? The Impact of the Crisis on the Eurosceptic Vote in the 2014 European Parliament Elections' 44 (2016) Electoral Studies 504; A Verdun, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis' 22 (2015) Journal of European Public Policy 219.

[106]See J Hopkin, *Anti-System Politics: The Crisis of Market Liberalism in Rich Democracies* (Oxford University Press 2020); J Hays, J Lim and J-J Spoon, 'The Path from Trade to Right-Wing Populism in Europe' 60 (2019) Electoral Studies 102038; J Hopkin and M Blyth, 'The Global Economics of European Populism: Growth Regimes and Party System Change in Europe (The Government and Opposition/Leonard Schapiro Lecture 2017)' 54 (2019) Government and Opposition 193; B Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' 50 (2015) Government and Opposition 189.

[107]See for example J-C Juncker, 'State of the Union Address 2016: Towards a Better Europe' (2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3042, accessed 25 May 2023.

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and immediate neighbours to target 'the West' more broadly.[108] The relevance of this for Internet intermediaries such as online platforms is the way in which these exogenous shocks on the EU as a system influenced the ideas concerning cyberspace, and the dynamics of its governance. With the establishment of the Juncker Commission in 2014, a palpable shift in the perceived role of these intermediaries could be identified in the official discourse of the EU. This changing position, however, nevertheless remained within the ordoliberal ideational frame discussed in previous sections. The problem with intermediaries was conceptualised as one of competition; in the Digital Single Market Strategy (DSMS), the Commission indicated that 'the market power of some online platforms potentially raises concerns, particularly in relation to the most powerful platforms whose importance for other market participants is becoming increasingly critical'.[109] The growth of certain online platforms was framed in terms of market concentration and the impact upon distortion of markets,[110] and particularly as it related to the topic of illegal content, the lack of transparency of these platforms was highlighted as a reason for possible regulatory reform.[111] The DSMS was followed in 2016 by a Communication on Online Platforms, which, while highlighting the benefits these platforms brought, nevertheless stated that they posed new regulatory challenges, which required consideration of new 'principles based, self-regulatory/co-regulatory measures',[112] which were again framed in competition terms. At the same time, as discussed in the introduction, the EU increasingly viewed online platforms as contributing to insecurity in the context of hybrid threats. In 2018, the Commission published a Communication on disinformation, in which online platforms were characterised as playing a key role in the dissemination of disinformation, having 'failed to act proportionately, falling short of the challenges posed'.[113] For these reasons, the role of online platforms in the digital marketplace was no longer considered as being an assumed and unqualified good, but something that required greater scrutiny, and potentially oversight.

Ultimately, the Juncker Commission did not implement binding regulatory controls over intermediaries, save in the field of copyright enforcement under the Copyright in the Digital Single Market Directive,[114] instead providing for soft law mechanisms such as a Recommendation on tackling illegal content online[115] and the facilitation of further codes of practice, such as that on countering online disinformation.[116] The language in these actions is instructive; dealing with video-on-demand platforms in Article 17, the Copyright Directive requires platforms to put in place measures to ensure the unavailability of infringing content, and the removal of that content expeditiously where it is made available without authorisation.[117] Under Article 17(10), however, it is noteworthy that rather than be prescriptive in how this should be achieved, the Commission instead limited its role to organising stakeholder dialogues, in which platforms and rightholders could determine best practices that the Commission would then publish as guidance. This facilitative role, in which mechanisms are set up allowing actors identified as experts to share practices and develop their own self-regulatory regimes, were also central to the

[108]See Carrapico and Farrand, 'When Trust Fades, Facebook Is No Longer a Friend' (n 3); GF Treverton and Others, 'Addressing Hybrid Threats' (Center for Asymmetric Threat Studies; The European Centre of Excellence for Countering Hybrid Threats 2018).

[109]European Commission, 'A Digital Single Market Strategy for Europe' COM (2015) 192 final, 9.

[110]Ibid., 11.

[111]Ibid., 12.

[112]European Commission, 'Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe' (n 1) 4–5.

[113]European Commission, 'Tackling Online Disinformation: A European Approach' COM (2018) 236 final, 2.

[114]Directive 2019/790 on copyright and related rights in the Digital Single Market, OJ L 130, 17.5.2019, 92–125.

[115]Recommendation 2018/334 on measures to effectively tackle illegal content online, OJ L 63, 6.3.2018, 50–61.

[116]European Commission, 'EU Code of Practice on Online Disinformation' (2018), https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation, accessed 25 May 2023.

[117]For more on these obligations see S Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' 57 (2020) Common Market Law Review 979; G Colangelo and M Maggiolino, 'ISPs' Copyright Liability in the EU Digital Single Market Strategy' 26 (2018) International Journal of Law and Information Technology 142.

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Recommendation,[118] as well as the Code of Practice on Disinformation, which throughout the text provides guidance on what the Commission hoped to achieve, leaving the choice of how to achieve those objectives to the platforms and other interested stakeholders. Radicalisation in the form of hate speech was tackled in a similar way, with the introduction of a Code of Conduct that relied upon measures being taken by social media platforms including the expeditious removal of content, identification of best practices in combating illegal content and promoting transparency and accountability.[119] These measures appear to be influenced by the ordoliberal frame, with the programme of activity also demonstrating a significant level of continuity. The philosophy can be seen in the descriptive account of platforms as increasingly significant market players with the ability to distort markets with knock-on social implications (as in the case of disinformation), with the normative account that therefore there must be increased transparency, accountability and action taken by those actors to address their conduct. While discursively there is an identification of the need to tackle the power of platforms in the context of a Digital Single Market as a priority of the Juncker Commission, pointing towards adaptation of the rationale at programme level, and serving as one of the Commission's key priorities. Rather than taking an approach where a security concern was addressed in the context of (for example) policy initiatives under the auspices of the Area of Freedom, Security and Justice however, market-based solutions were continued, indicative of the impact of previous path-dependencies, and a spillover of ordoliberal philosophy and resulting programmes into the field of security, and thereby policy spillover. The conceptualisation of the issues arising in regulating online platforms is characterised by thinking of problems in terms of competition (or lack of it), with discourse concerning market power and size, as well as the need for an approach to process in which the Commission lays out general frameworks, not intervening directly and being responsible for state-facilitated market distortion, but putting in place mechanisms for identification and implementation of industry-identified best practices. This has been summarised in Table 2.

C. Phase three: ideational continuity and change in the context of shaping Europe's digital future

The remit of the von der Leyen Commission commenced in 2019, in the context of a polarised and fractious geopolitics. Trade wars between the US and China, along with allegations of increased Russian interference in domestic politics throughout Europe and Asia, have led to the emergence of a sense of vulnerability on the part of the EU regarding itself and its place in the world.[120] This was evident from von der Leyen's political guidelines, which highlighted an unsettled world, divided global powers, with unease and anxiety in many communities throughout Europe.[121] One of the proposals for dealing with the new challenges being faced by Europe was to ensure that Europe was 'fit for the digital age',[122] which required achieving 'technological sovereignty',[123] including through the upgrading of the liability and safety rules for digital platforms under a DSA.[124] These political guidelines were translated into a policy agenda called 'Shaping

[118]Recommendation (n 115), in particular recitals 28–31.

[119]European Commission, 'Code of Conduct on Countering Illegal Hate Speech Online' (2016), available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en, accessed 25 May 2023.

[120]On this see CS Browning, 'Geostrategies, Geopolitics and Ontological Security in the Eastern Neighbourhood: The European Union and the "New Cold War"' 62 (2018) Political Geography 106; N Tocci, 'Resilience and the Role of the European Union in the World' 41 (2020) Contemporary Security Policy 176.

[121]U von der Leyen, 'A Europe That Strives for More: My Agenda for Europe', Political Guidelines for the Next European Commission 2019–2024 (2019) 1–42. https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf, accesed 25 May 2023.

[122]Ibid.

[123]Ibid., 13.

[124]Ibid.

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Table 2. Continuity and change in philosophies, programmes, and policies in second phase of Internet regulation developments applicable to online intermediaries

Level of idea	Forms of idea in discourse	Continuity or change?
Philosophical	Ordoliberal principles of law as creating market conditions instead of interventionist approach to market creation, comprehensive regulatory requirements, and picking 'champions'	Continuity – ideas continue to influence programme and policy-level decisions, despite addition of security rationale
Programme	Market players best placed to oversee development of best practices and responses to new security concerns, but within environment of competition, with Commission only providing for minimum legal frameworks and guaranteeing competition	Continuity – programme follows trajectory of law as creating conditions for private activity seen in other related policy fields, and despite new security dimension, programme level of ideas remains broadly consistent with initial market approach
Policy	Regulated self-regulation, on basis of principles of competition and harmonisation of internal market, using voluntary methods such as codes of conduct and standards of best practice, as well as light-touch regulation instead of maximum harmonisation of legal obligations	Continuity – while new policies have been developed, there is continuity insofar as existing governance model and policy ideas spill over into security-focused areas, which are still framed in market terms. Specific interventions on the basis of AFSJ logics not pursued

Europe's Digital Future',[125] which were published shortly before the impact of COVID-19 was felt in Europe. The Communication emphasised the need to control the uses of digital technologies, which 'do not come without risks and costs [.. .] malicious cyberactivity may threaten our personal wellbeing or disrupt our critical infrastructures and wider security interests'.[126] The Communication represents a significant change in the discourse of the Commission concerning the opportunities and threats in the digital sphere, in which security and resilience (considered the ability to 'bounce back' and restore normal operations as quickly as possible in the event of an attack, whether on information systems,[127] or the information contained within them by means such as disinformation[128]) are given equal discursive weighting to market goals. On technological sovereignty, the Commission stated that it was essential to ensure 'the integrity of our data infrastructure, networks and communications [.. .defining our] own rules and values'.[129] On online platforms, the Communication stated that European values and ethical rules should also apply in the digital space, in order to promote a trustworthy digital society.[130] The DSA would serve this goal through 'increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU'.[131]

The period between 2016 and 2019 can be seen as a critical juncture in world politics, as well as in the transformation of European perceptions of its place in the world, which has led to a more threat-oriented approach to global relations on the part of the Commission. Another divergence in historical discourse is in the prominence of the Internet and the companies operating on it as contributing to the geopolitical tensions, being included in the EU's cybersecurity agenda[132] and Democracy Action Plan.[133] Here, then, we can see that there is change in the discourse concerning online platforms, in

[125]European Commission, 'Shaping Europe's Digital Future' (2020), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/shaping-europes-digital-future_en, accessed 25 May 2023.

[126]Ibid., 1.

[127]G Christou, 'The Collective Securitisation of Cyberspace in the European Union' 42 (2019) West European Politics 278.

[128]Carrapico and Farrand, 'When Trust Fades, Facebook Is No Longer a Friend' (n 3).

[129]European Commission, 'Shaping Europe's Digital Future' (n 125) 2.

[130]Ibid., 10.

[131]Ibid., 12.

[132]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'The EU's Cybersecurity Strategy for the Digital Decade' JOIN(2020) 18 2.

[133]European Commission, 'Communication on the European Democracy Action Plan' COM(2020) 790 2.

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which they have moved from being seen in terms of their market-facilitating function to being seen in terms of their security-threatening behaviours. Events since 2020 would only appear to reinforce these concerns, as well as the security discourse. Disinformation, particularly relating to vaccines and governmental vaccination programmes in the context of COVID-19, was identified as a key cyberthreat with 'real world' implications by Europol,[134] with 5G-related conspiracy theories in particular appearing to be disseminated most widely through Facebook.[135] Similarly, explosive leaks and testimony from former Meta employee Frances Haugen regarding the company's reticence (and indeed, on occasion outright unwillingness) to combat harmful content disseminated through their Facebook platform[136] reinforced the belief that self-regulatory mechanisms applied by online platforms were inconsistently applied if applied at all, with Haugen stating that 'Facebook has been unwilling to accept even a little sliver of profit being sacrificed for safety'.[137] Given scepticism over the effectiveness of the Code of Practice on disinformation, the EU had indicated in 2019 that it would consider further initiatives, 'including of a regulatory nature'.[138]

Given this discursive change, as well as the significant evidence suggesting that self-regulatory mechanisms were not sufficient for mitigating the security threats posed by online platforms, it could have been possible to see a distinct philosophical rupture resulting in new programme and policy prescriptions providing for express and comprehensive regulatory requirements that leave no discretion to private actors. However, it is here that the impact of ordoliberal ideas on the range of potential policy options, as well as the collective weight of previous decisions and actions, becomes clear. Strong path-dependencies in which market operators are considered best-placed to regulate their own activities, with the Commission performing more of a market structuring role than performing direct interventions have informed the obligations set down in the DSA, the legal basis of which was, once again, Article 114 TFEU. As the Democracy Action Plan made clear, the Commission intended to create through the Act 'a horizontal framework for regulatory oversight, accountability and transparency of the online space in response to the emerging risks [.. .it would] establish a co-regulatory backstop for the measures which would be included in a revised and strengthened code on disinformation'.[139] This code was published in June 2022,[140] with its preamble stating that actions taken under the Code will complement and be aligned with the regulatory requirements and overall objectives contained in the DSA.[141] The measures taken to identify and address system risks are based on the service providers' own risk assessments,[142] suggesting a certain amount of leeway in this activity. This appears to complement the understanding evidenced in the explanatory memorandum to the Act's proposal, where it is stated that online services have become 'the source of new risks and challenges [.. .] and highlighted both the benefits and risks stemming from the current framework'.[143] Interestingly, the explanatory memorandum reiterates several times that the

[134]Europol, 'Catching the Virus: Cybercrime, Disinformation and the COVID-19 Pandemic' (2020), https://www.europol.europa.eu/publications-events/publications/catching-virus-cybercrime-disinformation-and-covid-19-pandemic, accessed 25 May 2023.

[135]A Bruns, S Harrington and E Hurcombe, '"Corona? 5G? Or Both?": The Dynamics of COVID-19/5G Conspiracy Theories on Facebook' 177 (2020) Media International Australia 12.

[136]RBS Sam, '"Facebook Is Closing the Door on Us Being Able to Act", Whistleblower Says in UK Hearing' (*CNBC* 25 October 2021) <https://www.cnbc.com/2021/10/25/facebook-whistleblower-frances-haugen-testifies-in-uk-parliament.html> accessed 25 March 2022.

[137]Ibid.

[138]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Report on the Implementation of the Action Plan Against Disinformation' JOIN(2019) 12 5.

[139]European Commission, 'Communication on the European Democracy Action Plan' (n 133) 22.

[140]European Commission, 'The Strengthened Code of Practice on Disinformation 2022' (2022) 1, https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation, accessed 25 May 2023.

[141]Ibid., 8.

[142]Ibid.

[143]European Commission, 'Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC' (2020) COM(2020) 825 1.

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principles of the e-Commerce Directive remain valid,[144] and that while the DSA repeals Articles 12–15 of the Directive, it reproduces them in the DSA at Articles 4, 5, 6 and 8 of the enacted Regulation. Self-regulatory and voluntary mechanisms for enforcement remain the core approach to cyberspace governance in this field, with Article 7 providing for the facilitation of 'voluntary own-initiative investigations', which would have no impact upon their immunity from liability under Articles 4–6, or where ordered to remove illegal content brought to a service provider's attention under Article 9. Instead, the Commission states its hope for the development of tools for ensuring content once removed does not reappear, suggesting 'such tools could be developed on the basis of voluntary agreements between all parties concerned'.[145] Self-regulatory mechanisms appear in the recitals of the enacted DSA,[146] and appear as obligations, such as that regarding the requirement that very large online platforms and very large online search engines, defined under Article 33 as those with average monthly active recipients of equal to or more than 45 million users, conduct risk assessments in which they must 'diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service [.. .] or from the use made of their services'.[147] Article 45 seeks to 'encourage and facilitate the development of codes of conduct'. Oversight is provided by the establishment of a system of Digital Services Coordinators that coordinate their action through a new European Board for Digital Services under Article 61, with the Board functioning as an independent advisory group. It is tasked with advising the Coordinators and Commission on how to apply the Regulation, ensuring effective cooperation with the Digital Services coordinators with carrying out their tasks, and contributing to guidelines and analysis, thereby assisting in the supervision of very large online platforms. Increased top-down regulation is imposed through the possibility of investigations into very large online platforms and search engines under Article 69 if there is a failure to comply with the obligations regarding risk assessment, mitigation and transparent reporting, with the possibility of imposing fines of 6 per cent of annual worldwide turnover under Article 74, and periodic penalty payments of up to 5 per cent of the average daily income or worldwide annual turnover under Article 76. However, it is worth considering that these measures, such as risk assessment and risk mitigation, are ultimately designed, implemented and reported by the platforms and search engines themselves in the first instance, rather than externally performed by an independent body. While independent audits on an annual basis are provided for under Article 37, this audit is of the self-imposed assessment of the very large online operator, which maintains significant elements of self-regulation, and could indeed risk audit capture as the operators are able to choose their own auditors, replicating governance failures prior to the global financial crisis.[148]

The form of the DSA demonstrates again that ordoliberalism as a philosophy has exercised influence over the trajectory of EU cyberspace governance. Through reiterating that the previously developed E-Commerce rules based in principles of regulated self-regulation were sufficient and describing that the new challenges posed by illegal content online can be tackled most effectively through self-regulatory mechanisms, combining descriptive analysis with normative positioning, the system of the DSA demonstrates the persistence of an ordoliberal understanding of market structuring. The role that Commission Executive Vice President for A Europe Fit for the Digital Age and Competition Vestager has had in devising the DSA reflects ordoliberal principles, with a strong position on the importance of the social market economy and deep suspicion of firms with

[144]Ibid., 1–4.
[145]Ibid., 4.
[146]Recitals 88, 89 and 90 relating to the risk management of very large online platforms and codes of conduct respectively.
[147]Art 34 of the Digital Services Act DSA Art 34.
[148]J Laux, S Wachter and B Mittelstadt, 'Taming the Few: Platform Regulation, Independent Audits, and the Risks of Capture Created by the DMA and DSA' 43 (2021) Computer Law & Security Review Article, https://doi.org/10.1016/j.clsr.2021.105613.

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concentrated market power.[149] At the programme level, this has resulted in an approach to illegal content management by online platforms based in her understandings of competition law and policy. Rather than focusing on defining the types of illegal content, as in the UK's proposed Online Safety Bill,[150] the policy level approach is instead one of identifying best practices in terms of *process* rather than *substance*, applying principles of risk management and incorporating rules on transparency, accountability and reporting on the part of very large online platforms. The DSA sets out requirements for identifying, reporting and mitigating systemic risks,[151] as well as voluntary measures to combat the dissemination of illegal content as discussed above, but leaves to the platforms the ways in which this is to be done, so long as those measures are explained, with the obligation to regularly report. These types of measure, which provide some regulatory oversight for the structuring of these obligations but leave the identification of best approaches to the platforms themselves demonstrates the continuing influence of ordoliberal philosophy in online platform governance, even where it spills into new policy areas such as cybersecurity, and how it has created a certain level of ideational path-dependency for the governance of online platforms. Indeed, while the obligations have become more detailed in terms of the 'what' is to be achieved, the 'how' has been largely left to the market operators, reinforcing the environment of 'regulated self-regulation' that dominates in this field. Here we can see the impact of an approach based in ordoliberal understandings of undistorted competition influencing regulatory design – these specific risk assessment obligations apply only the very large online platforms and search engines, with smaller entities not obliged (but encouraged without obligation in the recitals to the DSA) to carry out the same self-regulatory activities. The fact that very specific requirements are placed on very large platform operators, with the explicit exclusion of micro and small enterprises under Article 19, demonstrates an ordoliberal market competition-influenced approach to governance in this field. This is despite many services that arguably may contribute directly to the facilitation of online harm, disinformation and real-life criminal activity will use platforms that do not meet these criteria.[152] This highlights that despite the change in discourse concerning online service providers and security, there is nevertheless significant ideational continuity in how to regulate them, reflective of the path-dependencies of earlier interventions. This has been summarised in Table 3.

Continuity and change in philosophies, programmes, and policies in third phase of Internet regulation developments applicable to online intermediaries.

4. Conclusions

While it may seem trite to state that ideas are important, the impact of ideas on how we see the world, how we determine what a problem is, and how we go about resolving it, is by no means something we should dismiss. This is particularly the case where some ideas become so fundamental to the regulatory sphere that they work as a form of unspoken, unrecognised assumptions that then dictate the parameters of a legal intervention (or indeed whether to intervene at all), facilitating some actions while limiting others. As this article has demonstrated, ordoliberalism is one such set of idea frames that have had impacts far beyond their initial sphere of competition, economic and monetary policies. The rationality of decision-making that an ordoliberal approach contains instead has the significant ability to spillover into related policy domains, meaning that

[149]See for example N Dunne, 'Fairness and the Challenge of Making Markets Work Better' 84 (2021) Modern Law Review 230.

[150]Which will not be expanded upon here but will be considered in this researcher's future work.

[151]Known as 'Chapter III, Section 5' obligations.

[152]See for example M Atari and Others, 'Morally Homogeneous Networks and Radicalism' 13 (2021) *Social Psychological and Personality Science* 999; G Jasser and Others, '"Welcome to #GabFam": Far-Right Virtual Community on Gab' (2021) *New Media & Society* 1. https://doi.org/10.1177/14614448211024546.

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Table 3. Continuity and change in philosophies, programmes, and policies in third phase of Internet regulation developments applicable to online intermediaries

Level of idea	Forms of idea in discourse	Continuity or change?
Philosophical	Ordoliberal principles of law as creating market conditions instead of interventionist approach to market creation, comprehensive regulatory requirements, and picking 'champions'	Continuity – ideas continue to influence programme and policy-level decisions, despite deepening of security rationale
Programme	Market players best placed to oversee development of best practices and responses to new security concerns, but within environment of competition. Current problems identified as being caused by inadequate levels of competition and resulting market failures.	Adaptation but ultimately continuity – programme level of ideas remains broadly consistent with initial market approach despite increased security rationale, with programme focusing on problems caused by lack of effective competition and security threats this presents, indicating further ideational spillover.
Policy	Regulated self-regulation, on basis of principles of competition and harmonisation of internal market, using voluntary methods such as codes of conduct and standards of best practice, but with imposition of regulatory oversight of risk assessments performed by market participants	Elements of continuity and change – while new policies have been developed, there is continuity insofar as existing governance model and policy ideas spill over into security-focused areas, which are still framed in market terms. Change in terms of language of policy around risk-assessments and requirement for oversight, but policies still largely enacted by private sector.

even where an issue is explicitly seen as a security problem, it is nevertheless implicitly understood and actioned as a market problem.

This can be clearly seen in the development of the EU's governance approach to online service providers. Drawing from an ordoliberal philosophical starting point regarding market structuring, resulting in a programme of private sector expertise and non-interventionist approaches to market order, regulation of the Internet has been typified by forms of regulated self-regulation, in which the market operators are seen as both expert and best placed to regulate their own activities on the Internet. With the diversification of actors, goals and risks associated with hybrid threats, a security logic has effectively penetrated cyberspace governance, yet ideational continuity, and the influence of ordoliberal market-ordering and market-shaping understandings, has meant that the incorporation of security objectives has been treated the same as economic ones. Regulated self-regulation, in which market operators engage in the identification of best practices, transparency and accountability mechanisms, and the pursuit of voluntary measures aimed at tackling the forms of illegal content considered to constitute risks. This is an approach that appears only to have expanded in the context of the Digital Services Act, in which market power, market concentration and economic activity become central to any understanding of regulation of security-related activities in the online environment. The influence of ordoliberal ideas in shaping online platform-focused programmes and policies that has been demonstrated throughout this article, serving to define problems and promote policy solutions, determining which approach to take, and being aligned with the underlying assumptions of how the world works, means that we can consider the EU cyberspace governance model to be strongly aligned with ordoliberal philosophical ideas.

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