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A step back to look ahead: mapping coalitions on data flows and platform regulation in the Council of the EU (2016-2019)

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Abstract: As new legislative battles arise on the EU digital policy front, this article draws on recent EU negotiations related to the making of the Digital Single Market (DSM) to document the main lines of division between member states in this field, as well as coalition patterns in the Council of the EU. This research draws on a novel data set on the policy preferences and salience of member states in key controversial negotiations related to the regulation of data flows and internet platforms. It provides relevant analytical tools to approach future EU digital policy-making processes by investigating recent coalition patterns in the Council and beyond.

Section I: Introduction

The objective of this article is to inform our understanding of upcoming policy developments with novel data on the policy-making process of recent EU Digital Single Market (DSM) legislative files. This study draws on a new data set collected as part of a multi-year research programme on the power of member states in negotiations of the Council of the EU (or “Council”). This novel data set includes information on the initial policy preferences and issue salience of all member states and EU institutions on the main controversial issues of the following legislative negotiations: the regulation on the free flow of non-personal data, the European electronic communication code directive, and the directive on copyright in the DSM.

During these negotiations, member states have discussed extensively the opportunity to (de-)regulate data flows, and introduce new (legal and financial) obligations on internet platforms. These policy controversies will remain at the centre of the EU’s political agenda for years to come, with the launch of negotiations on the Data Governance Act (DGA), Digital Services Act (DSA) and Digital Markets Act (DMA).

These new legislative processes need to be seen as a continuation of previous EU negotiations, and would thus gain at being understood in light of the coalition patterns previously mobilised by member states in the Council. Often considered as the most powerful institution of the EU legislative system, the Council is however known for the opacity of its policy-making processes, which has greatly limited academic attempts to uncover its inner-workings (Naurin & Wallace, 2008). This research explores this black box, building on a public data set (Arregui & Perarnaud, 2021) based on 145 interviews conducted in Brussels with Council negotiators and EU officials between 2016 and 2020.

By highlighting the main controversies and coalition patterns between member states on the regulation of data flows and internet platforms as part of three negotiations, this research provides relevant analytical tools to approach future EU digital policy-making processes. It underlines in particular how the ability of certain member states to form and maintain coalitions may determine decision outcomes. Given its success in the adoption process of the free flow of data regulation, the “digital like-minded group” (or the D9+ group) could indeed be activated in the course of the next negotiations on the DGA, DSA and DMA. This paper also argues that the capacity of large member states, such as Germany and France, to formulate their policy preferences early in the process could be a key determinant of their bargaining success. Moreover, while the Council is expected to remain strongly divided regarding the regulation of data flows and internet platforms, this paper

indicates why the European Parliament (EP) could have a significant role in these discussions. It also signals that member states are not equal in their capacity to engage with Members of the European Parliament (MEPs), thus suggesting that the ones with more structured channels of engagement with the EP may be more likely to be successful in upcoming negotiations.

The following section offers a brief literature review on EU negotiations and Council policy-making processes in relation to the DSM. Then, the methodological approach and data set are presented. The empirical section is divided in two parts. The first maps the constellation of preferences and issue salience of member states in the three legislative files, and the second uncovers the main coalition patterns. The findings are then discussed in light of their implications for upcoming EU negotiations.

Section II: Unpacking EU digital negotiations

In recent years, EU digital policies have attracted a growing attention from scholars, partly due to the acceleration of EU legislative activities on key internet-related issues, such as data protection and cybersecurity. This trend reflects a broader pattern of states' increasing engagement with internet governance and policy-making to exercise power in and through cyberspace (Deibert & Crete-Nishihata, 2012; DeNardis, 2014; Harcourt et al., 2020; Radu et al., 2021).

The literature has acknowledged the increasingly active role of the EU in internet policies, as illustrated by recent regulatory and policy initiatives in the fields of data governance (Borgogno & Colangelo, 2019), privacy (Ochs et al., 2016; Bennett & Raab, 2020; Laurer & Seidl, 2020), copyright (Meyer, 2017; Schroff & Street, 2018) and cybersecurity (Christou, 2019). Recent research has also investigated the nature and determinants of a 'European approach' in regulating large internet companies and safeguarding competition (Radu & Chenou, 2015), in balancing competing policy objectives such as national security and data protection (Dimitrova & Brkan, 2018), or in promoting its 'digital sovereignty' (Pohle & Thiel, 2020).

EU decisions have direct implications for member states, companies and citizens, but also for third countries (Bradford, 2020), as illustrated by the recent reform of the EU data protection framework (Bendiek & Römer, 2018). Reflecting its ambition to increase its 'cyber power' (Cavelty, 2018) on the international stage, the EU has progressively established cyber partnerships with third countries to engage on digital issues (Renard, 2018), building on the recognised role of the EU over the past two decades in public policy aspects of internet governance (Christou &

Simpson, 2006).

But EU digital policy can also be seen as a field of struggle (Pohle et al., 2016), with major divides among governments. As emphasised by Timmers in the case of EU cybersecurity policies, the wide diversity of interests of member states can be challenging for EU policy-making (Timmers, 2018) and thus usher in competing political dynamics in the Council. Though the literature provides refined accounts of the discourse and role of the EU in internet governance debates, more limited are political scientists' attempts to unpack the complex political processes and controversies structuring EU digital policies, and identify the "winners and losers" of policy developments from the perspective of national governments.

Exploring this gap, this study draws on recent research on the decision-making system of the EU, grounded in rational choice institutionalist analysis. Due to the intergovernmental design of the Council, a great part of the scholarship pertaining to the Council embraces a rationalist perspective, giving to national decision-makers the lead role and assuming that member states determine their actions according to their national preferences and own calculation of utility (Naurin & Wallace, 2008). This scholarship assumes that negotiations' outcomes are shaped by strategic interactions between goal-seeking governments, with bounded rationality, operating within a set of institutional constraints (Lundgren et al., 2019).

It is common knowledge that a major part of the decisions in the Council is adopted by consensus, making the emphasis on the voting phase of the decision making process less relevant than the bargaining phase. This is the reason why recent research on member states' influence in the EU decision-making system focuses on the actual negotiation processes at play (Thomson et al., 2006; Thomson, 2011). This scholarship is primarily driven by the *Decision-making in the European Union* (DEU) project, followed recently by the *Economic and Monetary Union (EMU) Positions dataset* (Wasserfallen et al., 2019), which led to more generalisable findings on power distribution and bargaining processes in the Council.

I will argue that these analytical tools are much welcome to approach EU negotiations on DSM policies. They offer an established methodology to map the constellation of preferences on key controversial issues, and document the determinants and patterns of coalitions in the Council. The following section describes the methodological steps taken to collect the data on which this article draws its analysis upon, as well as the structure of the data set.

Section III: Data and methodology

This research draws on a new data set documenting recent EU legislative processes, and covering the initial preferences of member states and EU institutions on controversial policy issues, as well as their decision outcomes. The DEU III data set (Arregui & Perarnaud, 2021) builds on 145 semi-structured interviews conducted in Brussels with representatives of member states and EU institutions, and covers 16 recent negotiations. Four of them are directly related to the DSM. They consist in the adoption process of the regulation on the free flow of non-personal data (EU Regulation 2018/1807), the Geoblocking regulation (EU Regulation 2018/302), the European electronic communication code directive (EU Directive 2018/1972), and the directive on copyright in the DSM (EU Directive 2019/790). The selection criteria for the legislative dossiers were the negotiation rules (qualified majority voting in the Council), the adoption period (between 2016 and 2019), and the high level of ‘controversiality’ of the policy issues under discussion.

In this data set, information on actors’ policy positions and their salience is represented spatially using ‘scales’ according to an established methodology (Thomson et al., 2006; Arregui & Perarnaud, 2021). During face-to-face interviews conducted in Brussels, negotiators were asked to identify the main controversies raised among member states once the Commission had introduced the legislative proposal. Subsequently, the policy experts had to locate the positions of all actors along the policy scale. The experts were also asked to estimate the level of salience that actors attached to each controversial issue. Every estimation provided had to be justified through evidence and substantive arguments. A number of validity and reliability tests on the DEU III data set (for instance by systematically comparing experts’ judgments and documents) have corroborated previous analysis of validity and reliability of the DEU I data set made by Thomson et al. (2006).

This methodological approach has its own weaknesses, already identified in the literature (Princen, 2012). In relation to the study of actors’ influence, the first limitation is the clear focus of the DEU data set on the negotiation phase of the EU policy cycle. As the literature on agenda-setting (Princen, 2009) suggests, national governments and other stakeholders can invest significant resources into the preparatory steps of legislative negotiations, dynamics that are not thoroughly addressed in the data set. Similarly, this data set does not investigate the implementation of EU legislations and the actual compliance of member states with decision outcomes. Yet, we know that governments can repeat the same influence efforts observed during negotiations once legislative decisions are actually adopted (Blom-Hansen, 2014). Though not immune from traditional biases related to ex-

pert surveys and spatial models of politics, this data set allows us to analyse and compare the structure of the constellation of preferences in the Council across the range of policy controversies under study. In a prior analysis of this data set, Perarnaud (forthcoming) shows that bargaining success is unevenly distributed among member states when looking at DSM negotiations, and suggests that these asymmetries relate in part to variations in the resources and coordination mechanisms that can be mobilised by national governments in Brussels. Instead, this research follows a policy-oriented approach and focuses on the political controversies that shaped these negotiations, in view to inform our analysis of upcoming legislative processes.

The following section presents the main policy controversies under study. The analysis focuses in particular on three overarching issues: the regulation of data flows, the introduction of new legal obligations for internet platforms, and new financial obligations for internet platforms. Then, the coalition patterns observed in these negotiations are described, laying an emphasis on the 'digital like-minded group' in the Council.

Section IV: Analysis

The three EU negotiations illustrate the extent to which member states were divided regarding the regulation of data flows, the introduction of new legal obligations for internet platforms, as well as new financial obligations for internet platforms.

Data flows

The adoption process of the regulation on the free flow of non-personal data in the EU was characterised by sharp divisions in the Council. This is well illustrated by numerous protracted influence efforts led by several member states, even prior to the publication of the legislative proposal by the European Commission in September 2017.

Before the actual launch of its proposal, certain member states had repeatedly called the European Commission to propose a legislative initiative on the free flow of data. For instance, in a letter sent in December 2016 to Donald Tusk (the European Council President), sixteen heads of states and prime ministers had asked for measures to end data localisation practices (supported by Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Slovenia, Sweden and the United Kingdom ¹).

France and Germany were initially opposed to this initiative. After the legislative proposal was internally drafted by the services of the European Commission, France was reportedly concerned about the scope of the draft proposal and pressured the Commission to delay its official publication, and successfully so between 2016 and 2017². Indeed, the Regulatory Scrutiny Board (RSB), the body with the power to issue opinions to the college of commissioners on draft legislations, adopted two consecutive negative opinions on the Commission draft proposal in 2016 and 2017. One of the main arguments given to justify these two negative opinions was that the draft proposal also covered personal data, and thus overlapped with the newly adopted General Data Protection Regulation (GDPR).

After the negotiations officially started, the main controversial issue opposing member states consisted in the scope of the derogations which could interfere with the principle of free flow of non-personal data. While some advocated for only very limited derogations to the principle of free flow of data, others favoured extensive derogations for different purposes (security, culture, public archives). Proponents of the principle of the free flow of data wanted to maintain the scope of the regulation as broad as possible, as envisioned initially by the European Commission. Estonia, Denmark, Ireland, Czech Republic, Poland, the United Kingdom, Netherlands and Sweden were the most active member states in this group. These member states coordinated their influence efforts at the Brussels-level as part of the “digital like-minded group”, a coalition group that will be further detailed in the following sections. Though sharing a common goal, these member states were driven by different motives. For instance, for Estonia, one of the main driving forces behind this reform, the free flow of data was both an economic and a political priority. Due to its very digitalised economy and society, the Estonian government saw an economic and political interest in supporting more data transfers within the EU, while increasing its resilience against potential third countries’ attacks over its data infrastructures³. Interest groups representing the tech industry in Brussels were also advocating for the suppression of data localisation obstacles (DIGITALEUROPE, 2017). The free flow of data in the EU was considered as a very positive change for most internet platforms, as it could lead towards the formal establishment of the free flow of (non-personal) data between the EU and third countries (such as the United States).

1. The United Kingdom (UK) was still part of the European Union at the time, until formally leaving in January 2020.
2. Interview with MS representative, 19/09/2018, Brussels.
3. Interview with MS representative, 11/09/2018, Brussels

A range of member states were however much less positive towards the establishment of a fully-fledged principle of free flow of data within the EU. France and Germany indeed supported a number of derogations to this principle, in particular for the storage of public data, as well as exemptions for national security purposes. Their position could be explained by their negative competitive advantage in terms of cloud and data storage solutions at the global level, but also by their concerns in terms of cybersecurity and intellectual property⁴. Though with less issue salience, their call for more derogations to the principle of free flow of data was backed by Spain, Hungary, Austria and Greece in the first steps of the negotiations. This process thus highlighted two diverging approaches in the Council regarding the regulation of non-personal data flows, a controversial issue that appeared salient for France, Germany, Estonia, Denmark, Ireland, Czech Republic, Poland and the United Kingdom.

New legal obligations for internet platforms

A range of recent EU negotiations has considered the opportunity and possibility to introduce new legal obligations for internet platforms. I will focus here in particular on the recent directive on copyright in the DSM and the reform of the EU telecommunication code. These two legislative instruments have indeed contemplated the introduction of new obligations for internet platforms from different angles. As for the regulation on the free flow of data, both were part of the European Commission's DSM strategy.

The electronic communication code directive was proposed on 14 September 2016 by the European Commission (COM/2016/0590). One of the key provisions of this complex directive proposed to include new communication services, known as over-the-top (OTT) services, within its scope. The extent to which these services needed to be regulated by the same rules as telecom operators was thus a very controversial issue. The European Commission proposal consisted in including OTTs within the scope of the directive, while providing for derogations for certain types of services. The draft directive differentiated between number-based services, which connect users or companies via the public phone network, and number-independent services which do not route communication through the public telephone network and do not use telephone numbers as identifiers (such as Facebook Messenger, Gmail or Apple FaceTime). The Commission had proposed to explicitly bring number-based communication services within the scope of the end user rights provisions of the directive, but to include number-independent ones

4. Interview with MS representative, 19/09/2018, Brussels.

only for a limited set of provisions.

Member states were strongly divided on the extension of telecom rules to OTT service providers. For instance, France and Spain had a maximalist approach and wanted to introduce wide requirements for OTTs. Germany and Poland supported a similar stance, but with less salience. Spain even proposed that these services should be covered by the telecom general authorisation regime in each member state, like any other telecom providers⁵. On the other side of the spectrum, several member states (Sweden, Finland, Denmark, Czech Republic, Netherlands, Luxembourg, Ireland, United Kingdom and Belgium) claimed that regulating number-independent services was unjustified and could hamper innovation in the EU. In its proposal, the European Commission had intended to make a step in the direction of France and Spain, without alienating other member states initially opposed to this inclusion⁶.

The adoption process of the copyright directive, and in particular of its article 17 (formerly known as 'article 13'), generated even more divides between member states (Bridy, 2020; Dusollier, 2020), and is also relevant to map the constellation of member states' preferences in relation to the regulation of internet platforms. Member states were opposed regarding the obligations and rules that internet platforms should follow to protect rights holders' content. They had different views on how to address right holders' challenges to prevent copyright infringements online, and on the type of obligations and liabilities that should be placed on internet platforms. Several member states (including Denmark, Finland, the Netherlands, Czech Republic, Estonia, Luxembourg, Sweden, the UK) argued for a light-touch regulation towards internet platforms, while agreeing with a requirement for platforms to introduce a redress and complaint mechanism for users. Though in favour of the Commission approach, this group opposed a provision aiming to introduce technical requirements for providers of 'large amounts' of copyrighted content, which would oblige platforms to use 'automatic filters' (or *ex ante* measures) to control for copyright infringements⁷. For Denmark, Finland, Ireland and the Netherlands, this issue was highly salient due to the costs and legal risks it would potentially impose on the large and small digital companies headquartered on their territory. Germany supported new *ex ante* measures to protect copyright holders, but with a derogation for small and medium enterprises (SMEs) and start-ups having a turn-over of less than € 20 million per year. The position of

5. Interview with MS representative, 20/06/2018, Brussels.

6. Interview with an EU official, 10/05/2019, Brussels.

7. Interview with MS representative, 20/09/2018, Brussels.

Germany was highly salient given the strong interests of German copyright holders to force platforms to monitor content uploads, combined with the German ministry of economy's red line to maintain a carve-out for small platforms. On the other side of the political spectrum, a number of member states, led by France and Spain, promoted the introduction of more stringent obligations for platforms (regardless of their size), via the introduction of civil liabilities for internet platforms, and *ex ante* measures to protect copyright holders. The high salience of France and Spain was driven by the interests of their large content industry to regulate and hold internet platforms liable, and force them to pay their 'fair share'⁸. Other member states (such as Portugal, Cyprus and Greece) did support the position defended by France, but without significant interests at stake.

New financial obligations for internet platforms

The adoption process of the copyright directive also led to heated discussions on the introduction of new financial obligations for internet platforms, in particular with the introduction of a "neighbouring right" that would allow press publishers to receive financial compensation when their work is used by internet platforms such as Google News (Papadopoulou & Moustaka, 2020). A large number of member states were opposed to the introduction of a fully-fledged neighbouring right for press publishers. This group was led by Finland, the Netherlands and Poland, which perceived this change as detrimental to their digital sector, and in particular to news-related start-ups. Also, by regulating the practice of hyperlinks, these member states were concerned that it would restrict users' access to information and impact the core functioning of the internet. Other member states, led by France and Germany, urged in favour of the introduction of a neighbouring right for press publishers established in the EU. The high salience of this issue for France and Germany relates to the significant interests of their national press publishers and news agencies (including Bertelsmann media group in Germany) to be compensated for the use of their works⁹. Germany had already introduced in its national legislation a similar provision¹⁰. Other member states such as Portugal, Italy and Spain were also supporting this introduction, though investing less political capital, due to the more limited benefits this new right would bring to their publishers' industry.

8. Interview with MS representative, 07/09/2018, Brussels.

9. Interview with Council Secretariat official, 11/09/2018, Brussels.

10. Germany adopted in 2013 an ancillary copyright law for press publishers ('Presseverleger-Leistungsschutzrecht, Achtes Gesetz zur Änderung des Urheberrechtsgesetzes', 7 May 2013).

These cases illustrate the overall distribution of preferences and issue salience in recent EU negotiations on data flows and the regulation of internet platforms. The next section will look at actual patterns of coordination between member states with similar policy preferences, in view to appreciate their ability to form and maintain coalitions around common interests.

Section V: Member states' coalition patterns on DSM files in the Council

As it is commonly understood, and as the previous section clearly illustrates, member states tend to be significantly divided regarding the regulation of data flows and internet platforms at the EU level. However, we also know that all member states are not equally equipped to advance their policy preferences at the EU level (Panke, 2012). All national negotiators do not benefit from the same level of 'network capital' with their counterparts (Naurin & Lindahl, 2010), neither do they possess the same administrative resources to formulate and defend their positions (Kassim et al., 2001). These asymmetries are partly determined by a set of domestic factors, such as political stability, financial means, administrative legacies, and bargaining style. In a forthcoming article, I argue that they have a direct, though not systematic, effect on the bargaining success of member states (Perarnaud, forthcoming). Qualified majority voting rules in the Council indeed incentivise member states to find coalition partners to either build political momentum around common policy preferences or constitute a blocking minority to challenge competing dynamics. But coalition dynamics require a particular set of resources and capabilities that not all member states can mobilise to the same extent. Coalitions can thus be considered as key to analyse previous and future EU policy-making processes, and this section will present coalition patterns observed as part of the three DSM legislative files under study.

The digital like-minded group

The digital like-minded group is both an intriguing and little-known coalition at the Council level. Though it shares similar features with other issue-based Council groupings (see for instance the Green Growth Group in the context of EU negotiations related to the environment), it is particularly worth studying given its novelty and relative success in advancing policy preferences in the context of DSM policies.

The digital like-minded group is a mostly Brussels-based informal group of national negotiators, which gathers mostly at attaché level, though ambassadors of the

respective member states can also meet under this format. Originally, this coalition group had been launched when the European Commission released its DSM strategy in 2015¹¹. It mobilised concretely for the first time during negotiations on the NIS directive (EU Directive 2016/1148), notably to devise common strategies regarding the possible introduction of new obligations for internet services. Representatives of Denmark and Estonia in Brussels initiated this coalition¹², and in 2019, it gathered 17 member states in total. Despite its influence activities, this group is an informal alliance and does not have any public presence.

Member states part of the digital like-minded group share a liberal approach to internal market and digital issues, and have in common to be digitally “ambitious”, but not necessarily digitally advanced. For instance, Bulgaria belongs to the digital like-minded group, despite being one of the least digitalised member states in the EU (according to the Digital Economy and Society Index). This coalition can mobilise both during and prior to negotiations. For instance, before the adoption of the Commission proposal on the free flow of data, a number of joint letters from heads of states were forwarded by this group (Fioretti, 2016). These efforts to liaise with EU leaders are also exemplified by a number of more recent letters, for instance on the ‘Digital Single Market mid-term review’ in 2017¹³ or in the preparation of EU leaders’ meetings in 2019¹⁴. As part of legislative negotiations, the digital like-minded group can meet regularly to discuss text compromises and help align member states’ influence efforts. This strategy proved successful in the context of the negotiations on the free flow of data, in which the high level of coordination between members of the ‘digital like-minded group’ allowed for the formulation of efficient strategies to contain the initial concerns forcefully expressed by France, and dismantle a blocking minority (Perarnaud, forthcoming). The format of the digital like-minded group is only used by member states when they share a rather homogeneous position on a particular subject matter. For instance, members of the digital like-minded group were significantly divided in the context of the copyright directive, and thus could not leverage this format.

Among the digital like-minded group, negotiators from the most digitally advanced member states appear prominent (Sweden, Denmark, Finland, Estonia, Bel-

11. Interview with MS representative, 11/09/2018, Brussels

12. Interview with MS representative, 11/09/2018, Brussels

13. For more, see: https://euractiv.eu/wp-content/uploads/sites/2/2017/06/170620_HOSGs-EUCO-digital-letter-FINAL.pdf

14. For more, see: https://images.politico.eu/wp-content/uploads/2019/03/Leadersjointletter_MarchEUCO_260219.pdf

gium, the Netherlands, Luxembourg, Ireland and the UK). This group of member states also meet at high-level ministerial level, in what is known as the Digital 9 group (D9), which was launched by the Swedish minister for EU affairs and trade, Ann Linde, on 5 September 2016. According to an interviewee¹⁵, this new initiative partly stemmed from recommendations published in a report on the “European Digital Front-Runners”, carried out by the Boston Consulting Group and funded by Google, which invited member states considered as digital front-runners to coordinate their action “at both political and policy levels [...] for true digitization success and to communicate their strong commitment to the execution of the digital agenda” (Alm et al., 2016). This development illustrates the indirect lobbying channels that corporate actors can use to secure influence in relation to the DSM, in addition to their more traditional repertoire of actions at the EU level (Laurer & Seidl, 2020; Christou & Rashid, 2021).

Since October 2017, “digitally advanced” member states meet at ministerial level as part of a larger group, known as the D9+, which also includes Czech Republic and Poland (The Digital Hub, 2018). The D9 initiative was indeed not perceived positively by all member states within and outside this group. Some negotiators argued that these nine member states did not hold sufficient voting power to influence legislative negotiations, whereas certain member states, such as Poland and Czech Republic, still wanted to cooperate with like-minded member states but were found excluded. These considerations were the main drivers behind the creation of the D9+ group. Yet, the overlap between these formats was identified as a challenge by two interviewees¹⁶.

The Franco-German alliance

As opposed to the “digital front-runners”, France and Germany did not appear to coordinate their influence efforts as part of the three negotiations under study. This can be partly explained by differences in their national preferences with respect to the regulation of internet platforms. Though they generally share common concerns, Germany and France had different, and sometimes, divergent interests to defend. Also, the repeated delays in the formulation process of the German position did not allow for strong coordination mechanisms between Paris and Berlin on key controversial issues. The position of Germany on article 13 of the copyright directive (article 17 in the final text) was agreed two years after the publication of the Commission proposal, and the German government only agreed on its own po-

15. Interview with MS representative, 18/09/2018, Brussels.

16. Interviews with MS representatives, 14/09/2018 and 18/09/2018, Brussels.

sition in the negotiations on the free flow of data regulation during the final stages of the adoption process of the Council's position in 2018. These delays mainly originate from the horizontal coordination structure between ministers and *Länder* (Sepos, 2005), especially as the German ministry of justice and the ministry of economy's positions can be difficult to reconcile on digital matters. The Franco-German alliance on DSM policies was thus only visible at high-level on a limited number of instances ¹⁷, but rarely at the level of negotiators.

Though the research fieldwork did not allow for conducting interviews with all the negotiators involved in these processes, it should be noted that there was no evidence of other Council coalitions mobilised by member states. The literature on coalitions in the Council indicates that national representatives generally coordinate their position and strategy with their counterparts on an *ad hoc* basis depending on the issues at stake (Ruse, 2013), as illustrated here by the cases of Spain and Italy. Both could be considered pivotal in the shaping process of these decisions. Spain's progressive shift in the negotiations regarding the regulation on the free flow of data is for instance essential to understand the outcomes of these dynamics, and thus shows how member states not pertaining to coalition groups can still leverage influence in EU policy-making processes.

Section VI: Conclusion

These negotiation processes highlight the competing interests of EU member states and institutions with regard to key controversial aspects of the EU's DSM, and the coalitions they mobilise to amplify their message in Brussels.

These descriptive findings can be of great use for understanding the next political sequence initiated by the European Commission over the regulation of data flows and internet platforms. They provide new insights on the structure and salience of member states' preferences on these controversial issues, and the mechanisms at their disposal to gain influence.

While the observation of coalition patterns was specifically focused on the Council, it should be noted that member states can also approach other EU institutions to advance their preferences. Previous studies (Panke, 2012; Bressanelli & Chelotti, 2017) show that not all Brussels-based national negotiators regularly engage with MEPs in order to channel national interests and 'tame' the different political posi-

17. See for instance the Franco-German joint statement released in the context of a high-level ministerial meeting on October 2015: https://www.economie.gouv.fr/files/files/PDF/Declaration_conference_numerique_finale_FR.pdf

tions voiced inside the EP. These variations partly relate to differences in the size of national delegations in the EP, but also to member states' negotiation style and administrative resources (Perarnaud, forthcoming). Interestingly, the member states with the more structured channels of communications with EU institutions are the ones that have expressed the highest salience on issues related to data flows and internet platforms regulation. As shown by previous studies (Panke, 2012), France, the Netherlands, Sweden, Finland and Czech Republic are indeed among the member states with the most powerful connections with the EP and the European Commission. Given the existing divides among member states in the Council, the European Parliament could have a greater say in the upcoming negotiations, thus possibly giving more leverage to the member states with structured mechanisms to liaise with MEPs.

The negotiations on the DSA, DMA and DGA legislative dossiers will generate significant debates and controversies at the EU level. Many detailed proposals and ideas are being voiced to shape the EU's approach on myriad of policy issues related to the regulation of data flows, competition and content moderation (Graef & van Berlo, 2020; Gillepsie et al., 2020). Policy proposals presented in the context of this new phase should take into account the informal power balance between member states in the Council, and existing asymmetries in their capabilities to defend national positions in Brussels. As it appears that strong coordination mechanisms between the most digitally advanced countries of the EU have granted them significant influence over large member states in recent years (Perarnaud, forthcoming), future research on these processes should carefully study coordination processes and coalition patterns, as well as their implications. The recent joint statement released by the D9+ group (D9+ group, 2019) ahead of the DSA negotiations is a good indicator of the relevance of studying preferences' allocation structure and coalitions as part of this new political sequence.

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References

Alm, E., Colliander, N., Deforche, F., Lind, F., Stohne, V., & Sundström, O. (2016). *Digitizing Europe: Why Northern European frontrunners must drive the digitization of the EU economy* [Report]. Boston Consulting Group. https://www.beltug.be/news/4922/European_Digital_Front-Runners_The_Bosto

n_Consulting_Group_publishes_new

Arregui, J., & Perarnaud, C. (2021). *The Decision-Making in the European Union (DEUIII) Dataset (1999-2019)* [Data set]. Repositori de dades de recerca. <https://doi.org/10.34810/DATA53>

Bendiek, A., & Römer, M. (2018). Externalizing Europe: The global effects of European data protection. *Digital Policy, Regulation and Governance*, 21(1), 32–43. <https://doi.org/10.1108/DPRG-07-2018-0038>

Bennett, C. J., & Raab, C. D. (2020). Revisiting the governance of privacy: Contemporary policy instruments in global perspective. *Regulation & Governance*, 14(3), 447–464. <https://doi.org/10.1111/rego.12222>

Blom-Hansen, J. (2014). Comitology choices in the EU legislative process: Contested or consensual decisions? *Public Administration*, 92(1), 55–70. <https://doi.org/10.1111/padm.12036>

Borgogno, O., & Colangelo, G. (2019). Data sharing and interoperability: Fostering innovation and competition through APIs. *Computer Law & Security Review*, 35(5), 105314. <https://doi.org/10.1016/j.clsr.2019.03.008>

Bradford, A. (2020). *The Brussels effect: How the European Union rules the world*. Oxford University Press. <https://doi.org/10.1093/oso/9780190088583.001.0001>

Bressanelli, E., & Chelotti, N. (2017). *Taming the European Parliament: How MS Reformed Economic Governance in the EU* (Research Paper No. 2017/54). Robert Schuman Centre for Advanced Studies Research Paper.

Bridy, A. (2020). The Price of closing the ‘value gap’: How the music industry hacked EU copyright reform. *Vanderbilt Journal of Entertainment & Technology Law*, 22(2), 323–358. <https://scholarship.law.vanderbilt.edu/jetlaw/vol22/iss2/4>

Cavelty, M. D. (2018). Europe’s cyber-power. *European Politics and Society*, 19(3), 304–320. <https://doi.org/10.1080/23745118.2018.1430718>

Christou, G. (2019). The collective securitisation of cyberspace in the European Union. *West European Politics*, 42(2), 278–301. <https://doi.org/10.1080/01402382.2018.1510195>

Christou, G., & Rashid, I. (2021). Interest group lobbying in the European Union: Privacy, data protection and the right to be forgotten. *Comparative European Politics*, 19, 380–400. <https://doi.org/10.1057/s41295-021-00238-5>

Christou, G., & Simpson, S. (2006). The internet and public–private governance in the European Union. *Journal of Public Policy*, 26(1), 43–61. <https://doi.org/10.1017/S0143814X06000419>

Deibert, R., & Crete-Nishihata, M. (2012). Global Governance and the Spread of Cyberspace Controls. *Global Governance*, 18(3), 339–361. <https://doi.org/10.1163/19426720-01803006>

DeNardis, L. (2014). *The global war for internet governance*. Yale University Press. <https://doi.org/10.12987/yale/9780300181357.001.0001>

DIGITALEUROPE. (2017, September 19). *Free Flow of Data proposal brings the Digital Single Market strategy back on track* [Press release]. DIGITALEUROPE.

Dimitrova, A., & Brkan, M. (2018). Balancing National Security and Data Protection: The Role of EU and US Policy-Makers and Courts before and after the NSA Affair. *JCMS: Journal of Common Market Studies*, 56, 751–767. <https://doi.org/10.1111/jcms.12634>

Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 92 (2019).

Dusollier, S. (2020). 'The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition'. *Common Market Law Review*, 57(ue 4), 979-1030,. <https://kluwerlawonline.com/JournalArticle/Common+Market+Law+Review/57.4/COLA2020714>

European Commission. (2021). *Digital Economy and Society Index (DESI) 2019*. European Commission Directorate-General for Communications Networks, Content and Technology. <http://semantic.digital-agenda-data.eu/dataset/DESI>

Fioretti, J. (2016, May 23). EU countries call for the removal of barriers to data flows. *Reuters*. <https://www.reuters.com/article/uk-eu-digital-data-idUKKCN0YE06O>

Gillespie, T., Auderheide, P., Carmi, E., Gerrard, Y., Gorwa, R., Matamoros-Fernández, A., Roberts, S. T., Sinnreich, A., & Myers West, S. (2020). Expanding the debate about content moderation: Scholarly research agendas for the coming policy debates. *Internet Policy Review*, 9(4).

Graef, I., & Van Berlo, S. (2020). Towards smarter regulation in the areas of competition, data protection, and consumer law: Why greater power should come with greater responsibility. *European Journal of Risk Regulation*, 25(1). <https://doi.org/10.1017/err.2020.92>

Group, D. (2019). 'D9+ non-paper on the creation of a modern regulatory framework for the provision of online services in the EU'. <https://www.gov.pl/web/digitalization/one-voice-of-d9-group-on-new-regulations-concerning-provision-of-digital-services-in-the-eu>

Harcourt, A., Christou, G., & Simpson, S. (2020). *Global Standard Setting in Internet Governance*. Oxford University Press.

Hub, T. D. (2018). *Minister Breen chairs meeting of D9+ EU countries*. <https://www.thedigitalhub.com/news/minister-breen-chairs-meeting-d9-eu-countries/>

Kassim, H. M., A., & Peters, B. G. (Eds.). (2001). The National Coordination of EU Policy. *The European Level*.

Laurer, M., & Seidl, T. (2020). Regulating the European Data-Driven Economy: A Case Study on the General Data Protection Regulation'. *Policy & Internet. DOI*. <https://doi.org/10.1002/poi3.246>

Lundgren, M., Bailer, S., Dellmuth, L. M., Tallberg, J., & Târlea, S. (2019). Bargaining success in the reform of the Eurozone'. *European Union Politics*, 20(1), 65–88. <https://doi.org/10.1177/1465116518811073>

Meyer, T. (2017). *The Politics of Online Copyright Enforcement in the EU*. Palgrave Macmillan.

Naurin, D., & Lindahl, R. (2010). Out in the cold? Flexible integration and the political status of Euro opt-outs. *European Union Politics*, 11(4), 485–509. <https://doi.org/10.1177/1465116510382463>

Naurin, D., & Wallace, H. (2008). *Unveiling the Council of the European Union*. Palgrave Macmillan

UK.

Ochs, C., Pittroff, F., Büttner, B., & Lamla, J. (2016). Governing the internet in the privacy arena'. *Internet Policy Review*, 5(3), 1–13. <https://doi.org/10.14763/2016.3.426>

Panke, D. (2012). Lobbying Institutional Key Players: How States Seek to Influence the European Commission, the Council Presidency and the European Parliament'. *Journal of Common Market Studies*, 50, 129–150. <https://doi.org/10.1111/j.1468-5965.2011.02211.x>

Papadopoulou, M.-D., & Moustaka, E.-M. (2020). Copyright and the Press Publishers Right on the Internet: Evolutions and Perspectives. In T.-E. Synodinou, P. Jougoux, C. Markou, & T. Prastitou (Eds.), *EU Internet Law in the Digital Era: Regulation and Enforcement* (pp. 99–136). Springer International Publishing. https://doi.org/10.1007/978-3-030-25579-4_5

Perarnaud, C. (Forthcoming). *Why do negotiation processes matter? Informal Capabilities as Determinants of EU Member States Bargaining Success in the Council of the EU* [Doctoral dissertation]. University Pompeu Fabra.

Pohle, J., Hösl, M., & Kniep, R. (2016). Analysing internet policy as a field of struggle. *Internet Policy Review*, 5(3). <https://doi.org/10.14763/2016.3.412>

Pohle, J., & Thiel, T. (2020). Digital sovereignty. *Internet Policy Review*, 9(4). <https://doi.org/10.14763/2020.4.1532>

Princen, S. (2009). *Agenda-setting in the European Union*. Palgrave Macmillan. <https://doi.org/10.1057/9780230233966>

Princen, S. (2012). The DEU approach to EU decision-making: A critical assessment. *Journal of European Public Policy*, 19(4), 623–634,. <https://doi.org/10.1080/13501763.2012.662039>

Proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast). COM/2016/0590 final. (n.d.).

Radu, R., & Chenou, J. M. (2015). Data control and digital regulatory space(s): Towards a new European approach. *Internet Policy Review*, 4(2). <https://doi.org/10.14763/2015.2.370>

Radu, R., Kettemann, M. C., Meyer, T., & Shahin, J. (2021). Normfare: Norm entrepreneurship in internet governance. *Telecommunications Policy*, 45(6), 102148. <https://doi.org/10.1016/j.telpol.2021.102148>

Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, (2018).

Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

Renard, T. (2018). EU cyber partnerships: Assessing the EU strategic partnerships with third countries in the cyber domain. *European Politics and Society*, 19(3), 321–337. <https://doi.org/10.1080/023745118.2018.1430720>

Ruse, I. (2013). *(Why) Do neighbours cooperate? Institutionalised coalitions and bargaining power in EU Council negotiations*. Burdich Unipress.

Schroff, S., & Street, J. (2018). The politics of the Digital Single Market: Culture vs. Competition vs.

Copyright. *Information, Communication & Society*, 21(10), 1305–1321. <https://doi.org/10.1080/1369118X.2017.1309445>

Sepos, A. (2005). The national coordination of EU policy: Organisational efficiency and European outcomes. *Journal of European Integration*, 27(2), 169–190. <https://doi.org/10.1080/07036330500098227>

Thomson, R. (2011). *Resolving Controversy in the European Union*. Cambridge University Press.

Thomson, R., N., S. F., Achen, C. H., & T, K. (Eds.). (2006). *The European Union Decides*. Cambridge University Press.

Timmers, P. (2018). The European Union's cybersecurity industrial policy. *Journal of Cyber Policy*, 3(3), 363–384. <https://doi.org/10.1080/23738871.2018.1562560>

Wasserfallen, F., Leuffen, D., Kudrna, Z., & Degner, H. (2019). Analysing European Union decision-making during the Eurozone crisis with new data. *European Union Politics*, 20(1), 3–23. <https://doi.org/10.1177/1465116518814954>

Appendix 1: Extracts from the DEU III data set (Arregui & Perarnaud, 2021)

The following figures illustrate the distribution of the policy positions (axis X), and their intensity (axis Y), for all member states and EU institutions on the main controversial issues under study. The vertical arrow indicates where research respondents located the decision outcome on the policy scale.

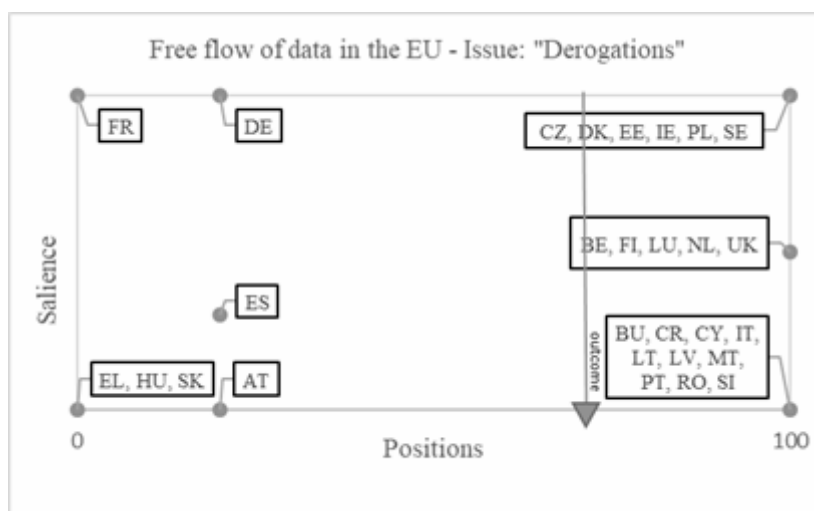


FIGURE 1: Structure of the controversy on 'derogations' during the adoption process of the regulation on free flow of non-personal data (2017/0228/COD).

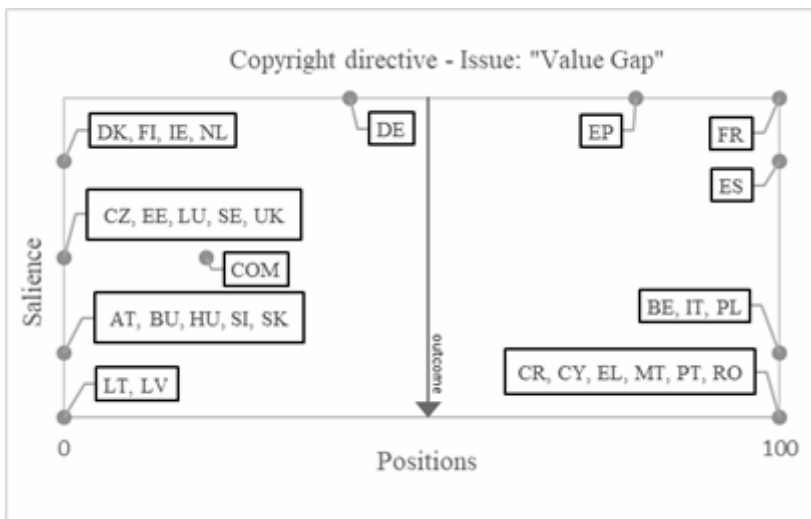


FIGURE 2: Structure of the controversy on the 'value gap' during the adoption process of the directive on copyright in the DSM (2016/0280/COD).

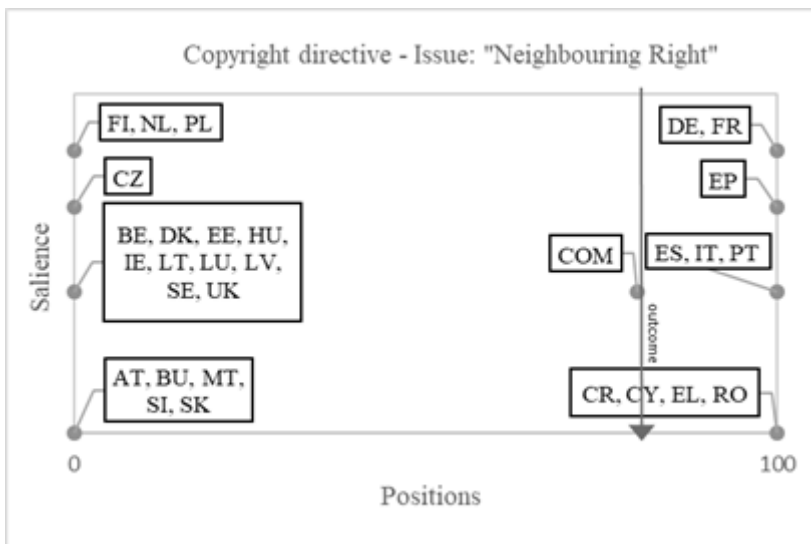


FIGURE 3: Structure of the controversy on the introduction of a 'neighbouring right' for press publishers during the adoption process of the directive on copyright in the DSM (2016/0280/COD).

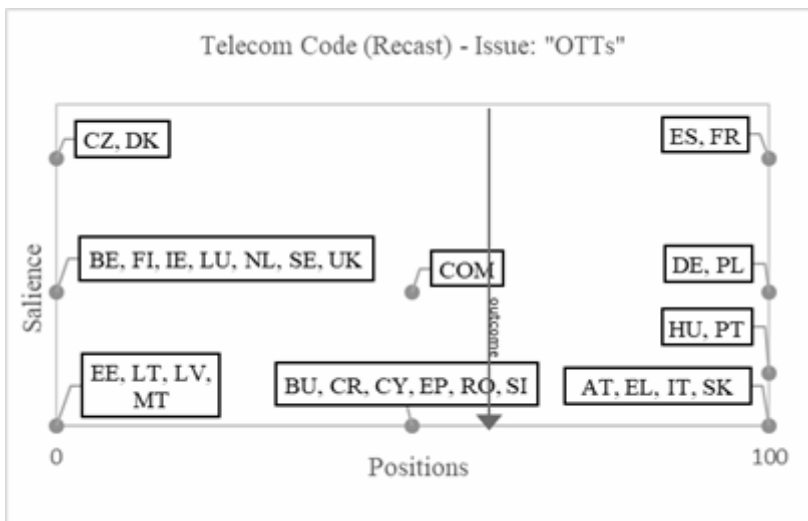


FIGURE 4: Structure of the controversy on the inclusion of ‘OTTs’ during the adoption process of the European electronic communication code directive (2016/0288/COD).

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