Dr. Giulia Gentile, Dr. Martin Husovec and Professor Andrew Murray, The LSE Law, Technology and Society Research Group—written evidence (DRG0008)

House of Lords Communications and Digital Select Committee inquiry into Digital Regulation

Executive Summary

1. Since the publication of the report *Regulating in a Digital World* in 2019 the regulatory landscape has become more complex and will continue to complexify [14].

2. The HM Government Plan for Digital Regulation will likely further complexify the digital regulatory landscape, inviting the adoption of market principles and a co-regulatory approach [15].

3. The formation of the Digital Regulation Co-operation Forum has led to a centralisation of regulatory capacity in the "big four" regulators (Ofcom, ICO, CMA and FCA). This has excluded others from formal membership. The Digital Authority if adopted would have empowered and supported all digital regulators and have provided vital resources. The DRCF accretes power in the big four to the exclusion of others. This is particularly important for accountability and oversight [17].

4. Principles-based regulation where clear statutory principles are laid down, supported by clear codes of practice or guidance (as is the case in UK Data Protection Law) are the best model for flexibility but also clarity and certainty [20].

5. Regulators when they apply a flexible approach, must be flexible within the system of rules and regulations. If the rules and regulations do not afford them sufficient flexibility then rightly it falls to Parliament to amend or extend their capacities through statute or secondary legislation. Regulators must not "make it up as they go along" [20].

6. Oversight of the digital regulatory framework is currently lacking. The current framework has developed in a piecemeal fashion and with it a piecemeal oversight process has developed. A key issue for effective and legitimate regulation is regulatory accountability [23].

7. There is currently no functional accountability framework for any regulator in the digital space, in particular in relation to Parliamentary accountability. The use of transparency as an accountability mechanism is insufficient. Transparency is not a replacement for accountability and oversight. The current regulatory model provides insufficient oversight [26].

8. The Digital Authority offers a uniquely inclusive approach which provides a place at the table for all regulators, large or small, statutory or non-statutory [27].

9. The Digital Authority would meet current accountability and oversight problems. By creating a robust oversight and reporting framework which includes quarterly reporting and oversight by a joint committee on digital regulation [28].

10. The Digital Authority has characteristics that the DRCF does not and in its current form cannot have. It is open and inclusive, accountable, legitimate, capacity building, international, flexible and adaptable. If the UK were to take the positive step to create the Digital Authority it could provide global leadership in regulatory co-operation. We could see a London effect similar to the oft-reported Brussels effect [31-32].

11. Examples of effective international regulatory cooperation are provided by the international financial and competition law sectors, and the European Data Protection Board (EDPB) [35].

12. Currently there are in the UK no international horizon scanning programme similar to that of the EDPB. A Digital Authority would facilitate the completion of tasks such as these, while enhancing regulatory coordination with international partners [43].

Background to the LSE Law, Technology and Society Research Group (LTS)

13. The Law, Technology and Society group conducts world-leading research into the regulation of technology and its normative implications, including the legal, regulatory, policy and social implications of emerging technologies such as AI and ICT, biomedical and biotechnologies, distributed systems (including blockchain), FinTech, RegTech and LawTech. The LTS group is at the forefront of legal thought, regulatory and policy development and civil society. Our key interest is the interaction between legal, technological, and social perspectives, including issues of privacy and data protection, competition and markets, and ethics and governance. Our researchers do not only conduct academic research addressed to an academic audience. We engage with a wider community of regulators, policymakers, civil society groups and practitioners through multilateral processes. Our outputs include policy papers, briefings, evidence and consultancies. This submission has been prepared on behalf of the LTS group by Professor Andrew Murray LTS Group Director, Dr. Martin Husovec, and Dr. Giulia Gentile.

How well co-ordinated is digital regulation? How effective is the Digital Regulation Co-operation Forum?

14. When this committee investigated the co-ordination of regulatory bodies active in the digital environment in its 2019 report *Regulating in a Digital World* it found that co-ordination was lacking.[1] We believe nothing has

changed in the two years since the report has come out. The regulatory landscape has, if anything, become more complex and will continue to complexify. Ofcom has been designated as the Online Safety Regulator[2] and must be assumed to be taking up this complex role in 2022 assuming the Online Safety Bill clears Parliament in accordance with its timetable. The Children's Code, or Age Appropriate Design Code,[3] has extended the role of the Information Commissioner's Office to be a principles-based regulator of children's activities (an area of clear overlap with the Children's Commissioner), while the recently published National AI Strategy, while recognising that the boundaries of AI risks and harms are grey, [4] plans to allow sector specific regulators to regulate the use of AI within their sector, while increasing the capacity of regulators to deploy AI to discharge their legal duties.[5]

15. Further in the HM Government Plan for Digital Regulation[6] the Government sets out to "drive prosperity through our regulation of digital technologies, while minimising harms to the economy, security and society." To achieve this the Green Paper seeks to embed principles of innovation, interconnection and internationalism by way of three embeds within the regulatory framework. The first is to embed innovation by "examining the case for a new mechanism so that policymakers factor in innovation-friendly measures when designing digital regulations" and "ensure new regulations are designed with systematic input from external experts and tech leaders". This will likely further complexify the digital regulatory landscape, inviting market principles and from our understanding of the phrase "ensure new regulations are designed with systematic input from external experts and tech leaders" to invite a co-regulatory approach.[7] It is clear that in the period following the publication of the 2019 report *Regulating in a Digital World* the regulatory framework for the digital space has become more complex, with further fragmentation and overlap of regulatory capacities – see the ICO Children's Code and the role of the Children's Commissioner – and that with a complex multi-faceted strategy around digital, data and AI being proposed by HM Government this complexity will increase in coming years.

16. Against this backdrop one must consider the role of the Digital Regulation Co-operation Forum (DRCF). The DRCF was formed in July 2020 by the ICO, Ofcom and the CMA. In April 2021 the FCA joined. In March 2021 the DRCF published its first annual plan of work which included some of the key strategic needs identified in the report *Regulating in a Digital World*.[8]

---

1 At [233] – [234].
2 Draft Online Safety Bill, Part 4; Ofcom, *Ofcom to regulate harmful content online*, 15 December 2020.
3 ICO, *Age appropriate design: a code of practice for online services*: https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/
4 HM Government, *National AI Strategy* (Cmnd 525) September 2021, 51.
5 Ibid, 54.
6 *Digital Regulation: Driving growth and unlocking innovation*, 6 July 2021.
7 See Department for Business, Energy and Industrial Strategy, *Designing Self- and Co-regulation Initiatives: Evidence On best practices*, BEIS Research Paper Number 2019/025.
8 They include "coherent regulatory outcomes where different regulations overlap",

The plan of work though reveals one of the vital shortcomings of the DRCF when compared to the previously proposed Digital Authority. In discussing regulatory co-ordination, the plan of work given as example: "the ICO's Age Appropriate Design Code and Ofcom's approach to regulating video-sharing platforms." This fails to account for the role of the Children's Commissioner, who has a legal duty to promote and protect the rights of all children in England in accordance with the United Nations Convention on the Rights of the Child (UNCRC), the BBFC as the (admittedly moribund) Age Verification Regulator or the Advertising Standards Authority who have responsibility for the regulation of advertising to children.

17. This reveals a key distinction between the proposed Digital Authority and the DRCF. The DRCF is a non-statutory, informal group with no statutory powers or terms of reference. It has been formed by the four largest regulators in the digital sphere and in so doing has excluded all others from formal membership. The "big four" have crowded out all other digital policymakers including the Centre for Data Ethics and Innovation, the Alan Turing Institute, and regulators such as the Children's Commissioner, the BBFC, the ASA, the Gambling Commission and the Internet Watch Foundation. The Digital Authority was designed to be inclusive of all bodies active in regulation of the digital space, indeed it was designed to allow smaller regulators a voice at the table and to allow them to "level up" by supporting horizon scanning, providing resources and to be an interface with international regulators.[9] The Digital Authority if adopted would have empowered and supported all digital regulators and have provided vital resources. The DRCF accretes power in the big four to the exclusion of others.[10] This is particularly important for accountability and oversight discussed below.

Do regulators have the powers and capabilities, including expertise, to keep pace with developments? What is the appropriate balance between giving regulators flexibility and providing clarity in legislation?

18. The perennial problem for lawmakers is the balance between flexibility and certainty. The concept of legal or regulatory certainty is often equated with the rule of law. Lord Bingham in his celebrated book *The Rule of Law* required that "The law must be accessible and so far as possible intelligible, clear and predictable". He went on to require that "Questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion". These both speak clearly to

---

"develop[ing] practical ways of sharing knowledge, expertise, capabilities and resources", and "joint public documents and engagement with stakeholders". See Competition and Markets Authority, *Digital Regulation Cooperation Forum: Plan of work for 2021 to 2022*, 10 March 2021.

9 *Regulating in a Digital World,* [238].

10 We note and acknowledge that the DRCF annual plan of work records that "We welcome engagement and are actively facilitating broader cooperation and coordination beyond DRCF…we will work closely with the ASA, Prudential Regulation Authority (PRA), Payment Systems Regulator (PSR), the Intellectual Property Office (IPO), the Gambling Commission and other agencies as appropriate." However, we note that the consultation and participation of other regulators is at the discretion of the four DRCF members and that the level of engagement is not specified or guaranteed.

certainty of laws and their application. However, Lord Mance in his celebrated Oxford Shrieval lecture in 2011 observed that "The infinite circumstances affecting human existence fit uneasily within straitjackets. Certainty can be pushed too far, and, if it is coupled with governmental suspicion of judicial discretion, it can lead to potential injustice."[11] He observed that "the law is not a science, as are physics and mathematics, judges have an important interpretive role even in relation to legislation and an essential developmental role in relation to the common law."[12]

19. The same is true of regulatory frameworks: there is a fine line to walk between what one might call rules and justice. As the German legal philosopher Gustav Radbruch observed: "The conflict between justice and legal certainty should be solved in such a manner that positive law should be considered supreme even if it is unjust or unreasonable unless the conflict between positive laws and justice reaches such an intolerable level that the statute – as 'incorrect law' – has to yield to justice."[13] Regulators should on this principle follow positive rules, be they statutory rules or local rules such as codes of practice or guidance unless the outcome would be unjust. Then discretionary flexibility should be allowed and applied. This is particularly problematic in fast moving arenas such as online digital content, where the environment and social norms can change very quickly.

20. We therefore propose that principles-based regulation where clear statutory principles are laid down, supported by clear codes of practice or guidance (as is the case in UK Data Protection Law) are the best model for flexibility but also clarity and certainty. The UK Data Protection framework is a very good model for other digital regulators offering the ICO both the certainty of rules and principles but also a degree of flexibility in interpreting and applying the rules. This model only works in the long term though with an effective horizon scanning programme and a programme of oversight and accountability. This is something that might be borrowed from the legal system into the regulatory system. As Lord Mance observes judges have an important interpretive and even developmental role in relation to the law, but they do not do this in a vacuum: "Precedent, consistency, analogy and above all an appreciation of the limits of the judicial as opposed to the legislative role all continue to serve as important controls or restraints."[14] The same must apply to regulators when they apply a flexible approach, they must be flexible within the system of rules and regulations and if the rules and regulations do not afford them sufficient flexibility then rightly it falls to Parliament to amend or extend their capacities through statute or secondary legislation. Regulators must not "make it up as they go along".

21. Moreover, flexibility allows regulators, or courts, to achieve better coherence of the legal framework. In an era when many challenges converge upon the same set of actors, they might inevitably require

---

11 Lord Mance, *Should the law be certain?* The Oxford Shrieval lecture 2011, [13].
12 Ibid [17].
13 G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', (1946) *Süddeutsche Juristenzeitung* 105, 107.
14 Lord Mance, *Should the law be certain?* The Oxford Shrieval lecture 2011, [48].

contradictory actions (e.g. using encryption to protect the privacy of users and minimize its use to improve the protection of children). The openness of legislative design helps the regulators and courts to better reconcile such conflicting demands. In this sense, in the long run, the flexibility of various parts of the system improves the chances of coherence and thus the legal certainty of the legal system as a whole.

22. Excessive use of legal definitions and prescriptive legal standards not only affects the future-proof character of the legal design but also its ability to be coherent with other parts of the legal system. At the same time, the use of extremely vague terms, such as duty of care, in the context of heavy regulatory regimes, can be equally counter-productive and potentially vests too much power with the executive. Therefore, in a case where no predictable rules can be identified by the Parliament, it is always advisable to use more principle-based or similar approaches.[15]

How effective is parliamentary oversight of digital regulation?

23. Oversight of the digital regulatory framework is currently lacking. The current framework has developed in a piecemeal fashion and with it a piecemeal oversight process has developed. A key issue for effective and legitimate regulation is regulatory accountability. Accountability is the duty to give account for one's actions to some other person or body and it is a vital factor in legitimacy of regulation and regulators. As Professor Roger Brownsword observed "Good (active) citizenship and political freedom imply an engagement between regulators and regulatees as to the purposes of the regulation. Unless the regulators' purposes are transparent, there can be no meaningful debate about the acceptability of the measures taken".[16] Or as recorded by Professor Colin Scott "the central problem of accountability arises from the delegation of authority to a wide range of public and some private actors, through legislation, contracts or other means".[17]

24. With the rise of the regulatory state a variety of regulatory functions have been settled on both statutory (such as Ofcom and ICO) and non-statutory (such as ASA and IPSO) regulators. It is vital for accountability that to quote E.L Normanton these regulators have "a liability to reveal, to explain, and to justify what one does; how one discharges responsibilities, financial or other, whose several origins may be political, constitutional, hierarchical or contractual."[18] The problem of accountability has developed as the scope and role of the regulatory state has correspondingly grown. With Parliamentary time limited and with Parliamentarians overstretched it has become a popular and simple solution for Government to create a statutory framework, or to recognise the role of a pre-existing non-

---

15 See the answer to the last question.

16 R. Brownsword, 'Code, Control, and Choice: Why East is East and West is West', (2005) 25 *Legal Studies* 1, 15.

17 C. Scott, 'Accountability in the Regulatory State', (2000) 27 *Journal of Law and Society* 38, 39.

18 E.L Normanton, 'Public Accountability and Audit: A Reconnaissance' B. Smith and D.C. Hague (eds.), *The Dilemma of Accountability in Modern Government: Independence Versus Control* (1971) 311.

statutory regulator, and then to leave the regulator to design and populate the regulatory and enforcement model with little public oversight or accountability. As a result, a number of mega-regulators have developed. The Ofcom Annual Report for 2004/05 (its first full year of operation) revealed "753 staff and 30 secondees from the DTI as of 31 March 2005".[19] In the most recent (2020/21) Report that number had increased to "992 full time equivalents",[20] an increase of over 26% in sixteen years, and with plans to employ around 300 additional staff to meet its Online Safety Regulator role[21] this would see an overall growth in FTE terms of around 65% since its formation in 2003with little oversight of this expansion of staff, budget or role.

25. Ofcom is not unusual in this sense. As the regulatory environment becomes more complex a better funded, better equipped and better staffed regulator is essential. But these regulators are seeing their reach and scope extended, such as the ICO with the Age Appropriate Design code, without equivalent oversight and accountability requirements. The concern that Parliamentary oversight would be lost was discussed at the point of Ofcom's creation with concern raised as to whether there was sufficient oversight of Ofcom.[22] At the time it was noted that "Ofcom would welcome structured accountability to both Houses of Parliament"[23] however although Ofcom is accountable to Parliament, this is a light touch form of regulation.[24]

> Ofcom is responsible for providing Parliament (including its Select Committees) with such information as may be requested concerning its policy decisions and actions. Ofcom is under a specific duty to present its annual report to the Secretary of State, who then lays it before Parliament. Ofcom may be required to give evidence to Select Committees of Parliament and to the Parliamentary Accounts Committee. Accounts are subject to audit by the National Audit Office. A copy of the statement of accounts must be sent to the Secretary of State and to the Comptroller and Auditor General.

26. When we examine this, we find Ofcom has a duty to supply information which is not dissimilar to that expected of private actors who are called to appear in evidence before Committees. It has a duty to lay its Annual Report before Parliament but this is a description of its actions not a discussion of policy or regulatory strategy. Similarly, an audit of accounts is a value for money exercise not an oversight or accountability exercise. Again, we do not mean to single out Ofcom, this is a systemic problem of regulatory accountability and in particular accountability to Parliament.

---

19 Ofcom, *Annual Report 2004/5*, 8.
20 Ofcom, *Annual Report 2020/21*, 56.
21 C. Moloney, 'TV regulator Ofcom hires 300 staff to take on social media' *The Times* 3 July 2021.
22 Memorandum by the Office of Communications to the Select Committee on Constitution, April 2003 at [6.5] – [6.8]. https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3121711.htm
23 Ibid [6.9].
24 Ofcom, *Code of conduct for: Ofcom Board* March 2019 [2.1].

There is simply no functional accountability framework for any regulator in the digital space, in particular in relation to Parliamentary accountability. This is not to underestimate the transparency these regulators provide through policy statements, position papers, annual reports and other transparency tools. Transparency is though not in of itself a replacement for accountability and oversight. The current model provides insufficient oversight.

What is your view of the Committee's proposal in *Regulating in a digital world* for a 'Digital Authority', overseen by a joint committee of Parliament?

27. The Digital Authority proposal would in our view solve a number of the problems we have identified in our evidence and would provide an effective oversight model. Firstly, in relation to co-operation and participation we note that at paragraph 242 of the report *Regulating in a Digital World* it was proposed that "The Digital Authority should be politically impartial and independent of the Government. Its board should consist of chief executives of relevant regulators with independent non-executives." This is a uniquely inclusive approach which offers a place at the table for all regulators, large or small, statutory or non-statutory. The Digital Authority offered a scalable solution where membership could be reviewed and amended as developments required. This is very different from the DRCF or the recently announced Dutch Digital Regulator Cooperation Platform,[25] where membership is by invite of other regulators rather than in the management of an independent chair.

28. Secondly the Digital Authority model would meet the accountability and oversight problems. By creating a robust oversight and reporting framework at paragraph 244 which includes quarterly reporting and oversight by a joint committee on digital regulation a clear reporting and oversight model is developed. This would bring not only as the Report recognised, "a new consistency and urgency to regulation" but also a renewed and reinvigorated legitimacy to the actions of regulators in this area both statutory and non-statutory. By pairing this oversight and accountability model with the horizon scanning role the Digital Authority would be imbued with, would give regulators the possibility of an open dialogue with Parliament and with Government. This would be better than the current model where regulators compete for resources, responsibility and where they lobby for changes in their role in a non-transparent fashion.

29. Thirdly the specific functions of the Digital Authority to provide a pool of expert investigators; to liaise with European and international bodies; to raise awareness of issues connected to the digital world among the public; to engage with the tech sector; and to continually assess regulation in the digital world would allow smaller or slightly less digitally focused regulators to level up by allowing them access to data and resources that are currently only available to the "big four" regulators. Whereas the

[25] See https://autoriteitpersoonsgegevens.nl/nl/nieuws/nederlandse-toezichthouders-versterken-toezicht-op-digitale-activiteiten-door-meer-samenwerking.

DRCF accretes resources and influence to the centre the Digital Authority would have democratised internet and digital sphere regulation.

30. Finally, the horizon scanning function of the Digital Authority would be beneficial for regulators, Parliament, and the public. Currently there is a discrete set of horizon scanning programmes from among others the Centre for Data Ethics and Innovation, the Alan Turing Institute and the DRCF who have made horizon scanning part of the 2021/22 work plan. Each of these exercises operates separately and from different institutional perspectives – ethically, technically and regulatory. The regulatory horizon scanning done by DRCF also narrowly excludes a number of related regulators such as IPSO or the Gambling Commission (except by invitation). This suggests the horizon scanning exercise is as fragmented as the regulatory landscape. The problem with this is, as was noted by Jamie Bartlett, then of Demos, in his evidence to the original inquiry "it [is] very easy to pass very bad laws about how the internet works now, not thinking about how it might work in future".[26] An example which one might draw from the Covid-19 pandemic is in digital remote healthcare. In 2019 the idea that a major challenge within the next two years might be seeing a doctor face to face or that health consultations with GPs would be digitally enabled with a "smart" triage system was remote. It is something we venture to suggest that would not be on the horizon scanning exercises of the ICO, Ofcom, FCA or CMA (the DRCF). The Digital Authority would have the capacity to recognise these risks and quickly onboard Public Health England in a way which the DRCF seems unable to do – coming as it does from a narrow view of regulatory horizon scanning.

31. The Digital Authority has characteristics that the DRCF does not and in its current form cannot have. It is open and inclusive, accountable, legitimate, capacity building, international, flexible and adaptable. Also, though the independent chair and its secretariat and proposed connections to Parliament and Government it has the possibility of effective policy making independent of politics (both Westminster politics and the politics of the regulators) and with its small pool of shared resource staff offers the possibility of shared capacity building and value for money.

32. If the UK were to take the positive step to create the Digital Authority it could provide global leadership in regulatory co-operation. We could see a London effect similar to the oft-reported Brussels effect.[27]

How effectively do UK regulators co-operate with international partners? How could such co-operation be improved?

---

26 *Regulating in a Digital World,* [230].

27 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, 2020).

33. There is no perfect formula to measure the effectiveness of international regulatory cooperation.[28] Yet, without an understanding of effectiveness, it is difficult to design useful, protective institutions and accordingly identify best cooperation practices. Effectiveness in international regulatory cooperation can be defined as the achievement of mutual assistance and support among regulatory bodies, which, in turn, should benefit from that very cooperation. Therefore, in these settings, effectiveness works as a multi-level concept, concerning both the individual/national (the advantages taken by an individual regulatory body) and collective/international governance (the benefits drawn from the group of regulators involved in the cooperation). Numerous case studies and the OECD[29] converge in highlighting four main benefits[30] of international regulatory cooperation: economic gains, progress in managing risks and externalities across borders, administrative efficiency and knowledge flow. Moreover, research has discussed the (adverse) implications of regulatory competition[31] while highlighting that cooperative regulatory strategies can lead to better enforcement.[32]

34. The literature on international relations and global administrative governance has identified several factors that facilitate effective international regulatory cooperation. Taking as a case study the intellectual property rights framework, Marney L. Cheek[33] observed that the uncoordinated regulatory action at the international level impacted effective law enforcement. She therefore proposed to tackle this issue by implementing enforcement networks and fostering coordinated policymaking in the international arena. Bernard Hoekman and Aaditya Matoo submitted that key actions to re-invigorate international regulatory cooperation in the field of services are, first, the creation of services knowledge platforms to bring together regulators, trade officials, and stakeholders to discuss services regulatory reform; second, the negotiation of an agreement among the international regulators to attain a certain level of protection. Focusing on international environmental law,

---

28 For an overview of various models of international regulatory cooperation, especially on the data sharing, see https://theodi.org/article/what-types-of-international-regulatory-cooperation-are-available-for-boosting-trust-in-cross-border-data-flows-for-global-trade/.

29 See https://www.oecd.org/gov/regulatory-policy/international-regulatory-cooperation-policy-brief-2020.pdf.

30 Existing scholarship acknowledges that there is paucity of data on the approach of countries' evaluations on the costs and the benefits of international regulatory cooperation. A virtuous example in this respect is New Zealand, where the Standing Order 389 requests the government departments in charge of concluding international treaties to prepare a National Interest Analysis. Components of this document are an outline on the reasons for New Zealand to become party to the Treaty, the Obligations that would be imposed on New Zealand as a result of the Treaty, the Costs of compliance and withdrawal procedures. See https://read.oecd-ilibrary.org/governance/international-regulatory-co-operation/building-successful-international-regulatory-co-operation_9789264200463-6-en#page8.

31 Paul B. Stephan 'Regulatory cooperation and competition: the search for virtue' in George A Bermann, Matthias Herdegen & Peter L Lindseth, *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (OUP, 2001).

32 John T Scholz, 'Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness' (1991) 85 *American Political Science Review* 115.

33 Marney L Cheek, 'The Limits of Informal regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime' (2001) 33 *George Washington International Law Review* 227, at 316.

Kal Raustiala[34] further suggested that the following elements enhance international regulatory cooperation: (a) 'architecture' as a regulatory strategy (i.e. embedding rules on international cooperation in national frameworks), (b) the power of non-state actors to promote compliance with regulatory rules, (c) the presence of systems for implementation review, (d) the costs of international regulatory competition and, finally, (e) the presence of non-binding rules which favour soft harmonisation over punishment for non-compliance. Additional factors contributing to effective international regulatory cooperation are the availability of human capital, trust[35] and good faith[36] among the regulators.

35. Virtuous examples[37] of effective international regulatory cooperation are provided by the international financial and competition law sectors, and the European Data Protection Board (EDPB). Starting with the financial sector, international regulatory cooperation is favoured by the presence of international harmonised standards,[38] coupled with monitoring, implementation review mechanisms,[39] and consultation fora facilitating intra-regulatory discussion and exchange of best practices.[40] A plethora of international organisations dominate the field of international financial regulation, such as the Basel Committee, the International Organization of Security Commissions, the International Association of Insurance Supervisors and the International Monetary Fund. In particular, scholars converge in supporting the view that the Basel Committee is one of the most effective examples of international regulatory cooperation,[41] which successfully combines centralisation and soft harmonisation.

36. The Basel Committee is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its forty-five members comprise central banks and bank supervisors from 28 jurisdictions.[42] The works of this organisation are regulated by the Basel Committee Charter and are centred on the following activities: (a) facilitating the exchange of information among regulators, (b) sharing supervisory issues, approaches

---

34 Kal Raustiala, 'Compliance &(and) Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal in International Law* 387.

35 Clara Weinhardt, 'Relational Trust in International Cooperation: The Case of North–South Trade Negotiations' (2015) 5 *Journal of Trust Research* 27.

36 Steven Reinhold 'Good Faith in International Law' available at https://discovery.ucl.ac.uk/id/eprint/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf

37 However, see also Recommendation of the Council on International Co-operation in Science and Technology, available at https://legalinstruments.oecd.org/public/doc/133/133.en.pdf; FATF Recommendation 40: Other forms of international cooperation, available at https://cfatf-gafic.org/index.php/documents/fatf-40r/406fatf-recommendation-40-other-forms-of-international-cooperation.

38 See IOSCO Key Regulatory Standards on the Objectives and Principles of Securities Regulation, available at https://www.iosco.org/about/?subsection=key_regulatory_standards.

39 See *infra*.

40 See *infra*.

41 Enrico Milano & Niccolò Zugliani, 'Capturing Commitment in Informal, Soft Law Instruments: A Case Study on the Basel Committee', (2019) 22 *Journal of International Economic Law*, 163.

42 See the Basel Committee Charter, available at https://www.bis.org/bcbs/charter.htm.

and techniques to improve cross-border cooperation, (c) promoting global standards for regulation and monitoring the implementation of BCBS standards, (d) consulting with central banks and bank supervisory authorities and, finally, (e) addressing the regulatory and supervisory gaps posing risks to financial stability. While the ultimate decision-making and monitoring body is the Committee, numerous working groups, virtual networks and task forces facilitate international cooperation.[43]

37. Moving on to the competition sector, several initiatives have improved international regulatory cooperation. Scholarship[44] overall agrees that international regulatory cooperation in this field offers a very successful model, although different from that of the Basel Committee. Among the measures that have facilitated assistance among competition authorities, we should cite the OECD[45] Council Recommendation Concerning International Co-operation on Competition Investigations and Proceedings (OECD Recommendation). Differently from the Basel Committee, the OECD Recommendation promotes a more-decentralised framework in which national authorities have a leading role in governing the dynamics of intra-regulatory collaboration. Adopted in 2014, the OECD Recommendation[46] concentrates on the following measures to be adopted by national authorities to foster regulatory cooperation: (a) enhancing consultation and comity; (b) notifying competition investigations or proceedings to other authorities; (c) co-ordinating competition investigations and proceedings; (d) exchanging information in competition investigations and proceedings; (e) offering investigative assistance to other supervisors. The OECD Competition Committee is tasked with overseeing the implementation of the OECD Recommendation, inter alia, by offering a forum for exchange of information or considering developing model bilateral and/or multilateral agreements on international cooperation.

38. Finally, we should discuss the EDPB, which is an independent European body having a twofold role: first, it contributes to the consistent application of data protection rules throughout the European Union; second, it promotes cooperation between the EU's data protection authorities. The EDPB is directed by a Chair and Deputy Chairs and is composed of representatives of the EU national data protection authorities, and the European Data Protection Supervisor. The supervisory authorities of the EFTA EEA States are also members with regard to GDPR related matters and without the rights to vote and to be elected as chair or deputy chairs. The European Commission and – with regard to GDPR-related matters – the EFTA Surveillance Authority have the right to

---

43 See Article 9 of the Basel Committee Charter.

44 Antonio Capobianco & Aranka Nagy, 'Developments in International Enforcement Co-Operation in the Competition Field' (2016) 7 *Journal of European Competition Law & Practice* 566.

45 OECD, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, (2014) available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408.

46 Although non-bindings, OECD recommendations accord great moral force ad representing the political will of the OECD signatory parties. There is the expectation that the parties will do their utmost to fully implement OCED recommendations.

participate in the activities and meetings of the Board without voting rights.

39. The EDPB's activities are governed by Rules of Procedure[47] which set out the principles guiding the endeavours of this authority, such as collegiality,[48] inclusiveness[49] and cooperation.[50] Article 9 of the EDPB Rules of Procedure allows the Chair to invite via the secretariat external experts, guests or other external parties to take part in a plenary meeting. The involvement of experts is particularly helpful to address issues which may not fall within the direct remit of the EDPB and to carry horizon scanning exercises. Along the same lines, the EDPB can also grant the status of permanent observer to public authorities supervising the implementation of data protection legislation which demonstrate a substantial interest in the implementation of EU data protection legislation.[51] The works of the EDPB are further supported by a Secretariat, in charge of providing analytical, administrative, logistical[52] and communication[53] assistance to the Board, and (co-)rapporteurs, which can be designated by the Board to assist the Secretariat for the drafting of documents, decisions or other measures by the expert subgroups and/or the Board.[54] Other rules stemming from the Rules of Procedure which positively influence international regulatory cooperation are disclosure duties on national authorities in transnational investigations[55] and the possibility to translate opinions and binding decisions adopted by the EDPB, which facilitates circulation.[56]

40. It is against this background that the effectiveness of the international cooperation of UK regulators should be assessed. Due to space constraints, the following sections will offer reflections on a selected UK regulator, the Information Commissioner's Office, as a case study. In our view, this regulator has taken positive steps towards effective international regulatory cooperation with its partners. Nevertheless, outstanding issues that negatively impact the effectiveness of international collaborations still remain. As mentioned, the proposed Digital Authority would be competent to facilitate and support effective cooperation with international regulators, relying on its specialised staff resources.

41. It should be preliminarily observed that the international cooperation of the Information Commissioner's Office is facilitated by Convention 108, adopted under the aegis of the Council of Europe,[57] and its participation in

---

47 See https://edpb.europa.eu/sites/default/files/files/file1/edpb_rop2_adopted_23112018_en.pdf.pdf.
48 See Article 3 of the EDPB Rules of Procedure.
49 See Article 3 of the EDPB Rules of Procedure.
50 See Article 3 of the EDPB Rules of Procedure.
51 See Article 8 of the EDPB Rules of Procedure.
52 See Article 14 of the EDPB Rules of Procedure.
53 See Article 17 of the EDPB Rules of Procedure.
54 See Article 27 of the EDPB Rules of Procedure.
55 See Article 11 of the EDPB Rules of Procedure.
56 See Articles 10 and 11 of the EDPB Rules of Procedure.
57 Convention 108 lays down several cooperation obligations for the Information

various information exchange fora.[58] Moreover, Schedule 14 of the Data Protection Act 2018 provides guidance on cooperation and mutual assistance with other data protection supervisors located in the EU. In this respect, it should be noted that any modification of the current UK data protection framework which is liable to lower the standards of data protection currently in force could entail short-term and long-term adverse implications from the perspective of regulatory cooperation with the EU. First, the EU Commission may revoke the adequacy decision adopted in June 2021,[59] meaning that there would be no legal basis for the lawful transfer of data between the EU and the UK; second, trust among EU and other European regulators could be hindered in the long term. To maintain fruitful cooperation with the EU, regulatory alignment between the UK and the EU data protection frameworks remains of essence.

42. In addition, the Information Commissioner's Office currently follows an international strategy[60] which concentrates on four objectives: (a) operating as an influential data protection authority; (b) maximising its relevance and delivery against its objectives in an increasingly globalised world with rapid growth of online technologies; (c) ensuring that UK data protection law and practice is a benchmark for high global standards; (d) addressing the uncertainty of the legal protections for international data flows to and from the EU, and beyond, including adequacy. In the Information Commissioner's Office's International Strategy, mention is made of the intention of that authority 'to take part in international work to promote global data protection standards and the long-term aim of a global data protection and privacy agreement or treaty'.[61] The authority also intends to cooperate and team up with other international regulators.[62] Furthermore, the Information Commissioner's Office is willing to engage 'with international bodies and regulatory networks that do not focus on data protection but have an important influence on developing global standards that affect data protection.'[63]

Commissioner's Officer. These are included in Article 16 thereof, which establishes that the parties agree to cooperate and 'render each other mutual assistance in order to implement this Convention.' Furthermore, Article 17 provides three forms of cooperation among data protection authorities: (a) mutual assistance by exchanging relevant and useful information and co-operating with each other under the condition that, as regards the protection of personal data, all the rules and safeguards of this Convention are complied with; (b) co-ordinating investigations or interventions, or conducting joint actions; (c) providing information and documentation on their law and administrative practice relating to data protection. Convention 108 is available at https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1.

58 See the Information Commissioner's Office participation in the Global Privacy Enforcement Network, (https://www.privacyenforcement.net/authorities-listings) and in the Global Privacy Assembly (List of Accredited Members – Global Privacy Assembly).

59 See decision_on_the_adequate_protection_of_personal_data_by_the_united_kingdom_-_general_data_protection_regulation_en.pdf (europa.eu).

60 See Information Commissioner's Office International Strategy, available at international-strategy-03.pdf (ico.org.uk).

61 Information Commissioner's Office International Strategy, page 6.

62 Information Commissioner's Office International Strategy, page 5.

63 Information Commissioner's Office International Strategy, page 5.

43. While all the described measures and initiatives certainly favour effective international regulatory cooperation, more can be done. For instance, currently there are no international horizon scanning programme similar to that of the EDPB to which the Information Commissioner's Office is part. Furthermore, the current Information Commissioner's Office international strategy does not envisage the appointment of external observers or the creation of expert groups which could provide important cooperation tools. Finally, there is no centralised database on the international cooperation activities carried by the Information Commissioner's Office, and open questions remain on the availability of human resources of that authority that could engage in fostering collaboration with international partners. We therefore suggest that the creation of a Digital Authority would facilitate the completion of these tasks, while enhancing regulatory coordination with international partners.

Are there any examples of strategic approaches to digital regulation in other countries from which the UK could learn?

44. Some continental countries, such as Germany,[64] rely heavily on regulation through collective action. They create legal entitlements for consumer associations and trade associations to enforce various policies through courts (e.g. in consumer law, unfair competition law, or copyright law). The benefit of such a set-up is that such organizations themselves are in charge of making a change or bringing problematic practices to the public light. They do not need to wait for the regulator to agree with them and allocate resources to their cause. If such organizations persuade their membership, they can initiate actions, that ultimately serve the public interest and develop the law. They usually do so by seeking injunctions that are assessed by courts. Such an approach relies on more open-ended norms and partly also on the funding that is allocated to such organizations by the state. The courts play an important role in the development of the law in such systems. However, at its core, the regulation resulting from such a system is far from a top-down system, as many cases are resolved during the negotiations *before* any legal proceedings are initiated. The litigation thus serves only as a credible threat that facilitates negotiations.

45. The upcoming EU Digital Services Act[65] similarly tries to build societal capabilities instead of simply developing legal standards top-down. It tackles a broad set of digital content challenges not by concentrating its attention on platforms only, but by incentivizing the creation of an entire ecosystem around content disputes. The advantage of such an approach is that the legal rules try to identify benchmarks for the quality of behaviour (e.g. who is to be especially trusted under what circumstances), connect such status with advantages and then leave it to civil society, associations

64 See Reiner Muenker, 'Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale in 2015 (1) *Journal of Intellectual Property Law & Practice*, available at https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=35283.

65 See Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, e.g. solution in Art 19 for so called Trusted Flaggers or Art 18 for alternative dispute resolution.

and platforms to interact on such 'markets'. The advantage of such an approach is that the legislature or regulators do not have to identify best practices but only appropriate benchmarks. Such benchmarks linked with benefits then incentivize the creation of organizations of various stakeholders who shape the ecosystem. They seek ways how to outperform others and thereby set new best practices. The regulator in this system oversees the functioning of the system and steps in only to correct when trust is breached (e.g. when previously trusted actors start abusing its position by stripping them of the privileged position). Such an approach focuses more on a procedure and the corresponding incentives than on the development of rules and definitions.

46. For instance, if the liability system fails to create equally strong incentives for providers to avoid over-removal of legitimate content at scale, the regulation should tackle the asymmetry in incentives (the fact that it is cheaper to not invest in good content moderation). To correct this imbalance, the platforms need to be equally exposed to incentives to improve the quality of their review ex-ante. Lenka Fiala and Martin Husovec show one of the ways how to reduce the bias against over-removal is to let platforms potentially bear a small cost for each potential mistake.[66] The logic is simple: if platforms bear the costs of their mistakes because over-removal suddenly also has a price tag, they have more incentive to improve by investing resources into the resolution of those errors (false positives). Such a rule then potentially achieves the goal without prescribing how and when to invest in better content moderation.

21 October 2021

[66] See the briefing note at Martin Husovec, How to fix the over-removal of legal content?, available at https://husovec.eu/2021/10/how-to-fix-the-over-removal-of-legal-content/ and the analyzed paper: Lenka Fiala and Martin Husovec, Using Experimental Evidence to Design Optimal Notice and Takedown Process (July 23, 2018). TILEC Discussion Paper No. 2018-028, Available at SSRN: https://ssrn.com/abstract=3218286