THE NEO-REGULATION OF INTERNET PLATFORMS IN THE UK

CREATe Working Paper 2021/11

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Abstract

In 2020, the UK entered a consolidating phase in the development of platform regulation. The present 'neo-regulatory' moment has been shaped first, by Brexit (the UK's withdrawal from the European Union) and second, by the creation of a voluntary collaborative forum by a diverse group of regulators. The regulatory forum is modelled on established UK competition regulation and also draws inspiration from colleges used in international banking regulation. It is founded on a pro-competition approach. This article retraces the key steps taken in establishing the present regulatory posture and machinery. It also illustrates how Brexit has informed recent policy moves. It is too early to know how effective the new framework will be because it still awaits the enactment of two statutes: first, regarding 'online harms' and second, the use of pro-competitive powers in digital markets.

Keywords

Brexit, European Union, Global Britain, forums, online harms, pro-competition, platform neo-regulation

Introduction

By early 2020, following an official paperchase of parliamentary reports and government-commissioned expert reviews, the first phase in reshaping UK platform regulation had concluded. Key elements of a re-framed British 'regulatory field' were now in place (Schlesinger, 2020; Kretschmer, Furgal & Schlesinger, 2021). By summer 2021, with the digital economy its principal focus, a second phase was in train. This may be seen as a 'neo-regulatory' moment in two respects. First, it represents the initial steps taken in setting the stage afresh in response to Brexit – termination of the UK's membership of the European Union (EU). Second, it is characterised by the reorganisation of regulation focused on the digital economy.

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Although the British road to regulatory innovation has decidedly national characteristics, it is also part of an international 'regulatory turn' which reflects different states' reactions to the impact of major platform power (Flew, 2022, in press). In the UK, the propulsive demand for expanded regulation has resulted in two portmanteau rallying-points: 'online harms' (encompassing mainly social and political issues), and a 'pro-competition' approach (focused on the malfunctioning of the market, consumer interests, and engendering innovation).

The present analysis focuses on how key British regulatory agencies have begun to reshape their practice and organisation. These bodies' conditions of existence, not least their legitimacy and terms of reference, depend directly on the British political system. In that respect, they reflect the UK state's digital regulatory interest. Yet, as British platform regulators continually emphasise, their field is internationally connected. Regular use is of made of imported expertise to complement the home-grown as the UK looks to kindred capitalist democracies for pertinent models, allies and also key personnel. As Braithwaite & Drahos (2000: 359) have observed, no state – however nationalist – can indefinitely escape 'reciprocal adjustment' with other states when also pursuing a globalising purpose. International debate and actors therefore significantly shape the national frame of reference for British platform regulation – presently, though, this is filtered through the UK government's post-Brexit worldview.

In March 2021, UK Prime Minister Boris Johnson's 'vision' of a 'Global Britain' was bruited in the government's *Integrated Review*. It proclaimed:

> A more integrated approach supports faster decision-making, more effective policy-making and more coherent implementation by bringing together defence, diplomacy, development, intelligence and security, trade and aspects of domestic policy in pursuit of cross-government, national objectives. (HM Government, 2021: 18)

Still insufficiently debated, this take on changing global geo-politics and -economics conceives the UK as a national security state facing serious adversaries and so needing a 'whole-of-society approach to resilience' (HM Government, 2021: 21). In political and expert circles, there is considerable doubt about precisely how 'integrated' the UK policy machine actually is: whether there is adequate oversight of national security and, indeed, if the critical national infrastructure has been adequately safeguarded. Nevertheless, given undoubted deficits in the state's armature, we should take global-British ideology seriously, because some consequences for policy thinking are evident in the field of platform regulation.[1]

[1] Substantial parliamentary criticism on these lines is amply evident in House of Commons and House of Lords (2021) and House of Lords (2021).

Global Britain's protagonists argue that there is now no clear line between war and peace. As a major cyber power, the UK's defence of critical national infrastructure (not least telecoms) is high on the agenda (HM Government, 2021: 10, 77). In January 2020, the National Cyber Security Centre identified Huawei as a 'high risk vendor' for the planned 5G cellular network upgrade. The government decided to remove Huawei from UK telecoms networks by 2027 because 'national dependence' on a risky supplier constituted a 'significant security risk' (NCSC, 2020: 5, 13). Furthermore, as '[t]he geopolitical role of non-state actors, in particular large tech companies, is likely to continue to grow' platform regulation requires legislation on 'online harms' (HM Government, 2021: 26). On the world stage this entails the pursuit of active 'regulatory diplomacy to influence the rules, norms and standards governing technology and the digital economy' (HM Government, 2021: 20). The UK's present pursuit of global 'convening power' is a form of 'soft power' pursued through regulatory diplomacy (Nye, 1990).

At root, the global British 'vision' is Manichaean: the world is seen as an 'increasingly contested domain' between 'digital freedom' and 'digital authoritarianism'. The contraposition of 'open societies' to 'autocracies' starkly echoes Cold War thinking. Academic analysis of the geopolitics of platforms sometimes reproduces this starting point (van Dijck et al., 2018: 26-27). Concern about China as a 'systemic competitor' is a red thread throughout the *Integrated Review* and a key determinant of the UK's post-Brexit 'Indo-Pacific' turn.[2] Closer to home, in Europe, Russia is fingered as 'the most acute direct threat to the UK' (HM Government, 2021: 21).[3] The manichaeanism is tempered (as indeed it was during the Cold War) by the actual multi-polarity of the world, conceived as a battleground for international influence.

Sundered from the EU, the global-British UK is grandiosely self-cast as a unique 'European country with global interests' intent on redefining its role (HM Government, 2021: 59). The Aukus defence pact announced on 15 September 2021 between Australia, the UK and the US – aimed at China's containment, while resulting in diplomatic fallings-out with Paris and Brussels – is a telling indication of Britain's new course. According to the *Integrated Review*, the British government has concluded that the 'rules-based international order' can no longer be effectively defended, and tailored alliances of this kind fit that strategic picture.

Anatomising the *first phase* of significant change in the regulatory field, we focused on the multi-source, wide-ranging production of official discourse. Within a sharply defined issue-attention

[2] The China policy has been criticised for its 'deliberate ambiguity' as between pursuing economic interests and upholding democratic values. See House of Lords (2021: 92).
[3] The Intelligence and Security Committee of Parliament's (2020) redacted report, *Russia* – its publication delayed by the Johnson government – concluded that the UK remained open to Russian state penetration.

cycle (Downs, 1972), our analysis identified the breadth of the emergent policy agenda, the spurs to action, and key agencies identified as the frontline of regulatory battles to come (Kretschmer, Furgal & Schlesinger, 2021).

Building on this, the present analysis seeks to depict the *second phase*, currently distinguished by repositioning and re-equipping selected regulators with new instruments. My aim, therefore, has been to capture the process of redefining regulatory practice.[4] Inter alia, this account reveals how national soft-power concerns are inscribed in the work of agencies rapidly adapting to the UK's exit from the European Union.

Tensions remain between platform regulators' collective wish to expand the scope of their activities at pace and the government's concern about how far and fast these should go. Recent moves have thrown into relief the choice of a particular model. Neo-regulatory fire-power has been reorganised into an open-ended expert consortium. This is intended to mobilise a complex state-sanctioned epistemic community, namely a 'collection of knowledge-based experts who share certain attitudes and values and substantive knowledge' which shapes how they use their know-how (Braithwaite & Drahos, 2000: 501).

Such intensive and extensive inter-agency networking – whether within a state, among a group of states, or globally – is not unique to digital platform regulation. 'Concurrency' of this kind developed in the UK during the privatisation of major public enterprises in the 1980s. Its modus operandi was later updated in the Enterprise and Regulatory Reform Act 2013 (ERRA) (Dunne, 2021: 258). Another influence has come from the EU. In response to the 2008 banking crisis, a 'college' model was established in accordance with the Capital Requirements Directive 2009:

> Colleges of supervisors can be defined as permanent, although flexible, structures for cooperation and coordination among the authorities responsible for and involved in the supervision of the different components of cross-border banking institutions. (CEBS, 2010: 3)

The UK's *Turner Review* of the banking crisis endorsed such 'international coordination of banking supervision' through 'the establishment and effective operation of colleges of supervisors for the largest complex and cross-border financial institutions' (FSA, 2009: 9). The college model is currently used in British financial regulation (Financial Services Regulator Initiatives Forum, 2021). Banking and financial services have been a reference point for present developments in digital platform regulation.

[4] The pandemic disrupted my plans for face-to-face interviews with key politicians and officials. The ambition remains.

The model foregone by using a forum or college is that of the 'converged' regulator: an integrated single authority deploying multi-disciplinary expertise. This approach informed the restructuring of UK communications regulation in 2003 but is off the present British agenda. The question of whether the UK would opt for a 'super-regulator' was raised in our earlier research (Kretschmer, Furgal & Schlesinger, 2021: 3). While a 'converged' agency is presently not on the cards, as we shall see a firm move towards developing an integrated form of concurrency certainly is.

First straws in the wind

In January 2017, the UK Cabinet Office published a *Regulatory Futures Review* (Cabinet Office, 2017). This was driven by regulators seeking greater involvement in developing new models. Their collective expertise shaped the *Review*, which recommended data sharing and 'a more co-ordinated approach to intelligence sharing'. It also advocated broadening regulatory knowledge and expertise as well as setting up core training courses (Cabinet Office, 2017: 4, 7). Regulatory changes documented in this article are broadly in line with those proposals.

The present run of platform regulatory activism – which will reach a new staging-post once online harms and digital markets legislation are passed by the UK Parliament – first took political wing under Greg Clark MP, Conservative Secretary of State for Business, Energy and Industrial Strategy from July 2016 to July 2019. Clark set up and chaired a review process. Andrew Tyrie, former Conservative MP and Chair of the Competition and Markets Authority (CMA) from June 2018 to September 2020, was also a protagonist of change. The CMA has occupied pole position in regulatory discussion. Influential in government, it has privately guided 'early-stage policy development' (OECD, 2018: 4). In 2017-18, the CMA noted a 'step-change in the level of cooperation' with 'concurrent regulators'. Exit from the EU was imminent, with an 'increased merger and antitrust role' envisaged for the CMA (OECD, 2018: 7).

Tyrie (2019: 6) canvassed the Business Secretary regarding the CMA's 'reform proposals'. These focused on 'a new statutory duty on the CMA, and the courts, to treat the interests of consumers, and their protection from detriment, as paramount'; further proposals concerned 'powers to investigate, and to intervene quickly', strengthen 'consumer law enforcement', and compulsory notification of mergers. All these ideas remain current.

The key agencies

In previous research we noted that three UK regulators – the Competition and Markets Authority (CMA), Office of Communications (Ofcom) and the Information Commissioner's Office (ICO) –

were likely to dominate the next phase of platform regulation (Kretschmer, Furgal & Schlesinger, 2021: 25). This triad are now the key players.

The CMA is the UK competition regulator, a designated national competition authority that seeks to promote competition, both within and outside the UK, for the benefit of consumers. Operationally launched in 2014, it assumed the prior roles of the Competition Commission and the Office of Fair Trading, and has responsibilities for investigating mergers, conducting market studies, and inquiring into anti-competitive behaviour. Its reach has extended into digital markets both directly and through a newly-formed affiliated body, the Digital Markets Unit (DMU), discussed below. Under the provisions of ERRA, the CMA is the pivotal agency in the regulatory field.

Ofcom is the UK communications regulator, established by the Communications Act 2003. Set up as a 'converged' body, Ofcom incorporated the work of five predecessor organisations: the Broadcasting Standards Commission, the Independent Television Commission, the Office of Telecommunications, the Radio Authority and the Radiocommunications Agency. Ofcom regulates the TV, radio and video on-demand sectors, fixed-line telecoms, mobile telephony, postal services, and the spectrum over which wireless devices operate. In 2017, Ofcom took over regulation of the BBC and late in 2020 was designated by the government as the 'online harms' regulator.

The ICO is an independent public body, whose sponsoring department within government is the Department for Digital, Culture Media and Sport (DCMS). The Information Commissioner is the UK's independent regulator for Data Protection and Freedom of Information, with key responsibilities under the Data Protection Act 2018 (DPA) and Freedom of Information Act 2000 (FOIA). The Information Commissioner is an official appointed by the Crown.

In addition to the above, a further regulator has begun to assume a more central role. The **Financial Conduct Authority (FCA)** is conduct regulator for some 51,000 financial services firms and financial markets in the UK and prudential supervisor of 49,000 firms, setting specific standards for around 18,000 firms. Its purpose is defined by the Financial Services and Markets Act 2000 (FSMA). The FCA aims to protect consumers and financial markets and promote competition. It is an independent public body, funded entirely by the firms it regulates, and accountable both to the UK Treasury and Parliament.

The present reconfiguration of agencies marks an increasing shift, although not an absolute break, away from 'legacy' forms of regulation that continue to straddle the rapidly transforming technoscape, notably in media and communications (Napoli 2019). British neo-regulatory policy

is increasingly dominated by a pro-competition stance. Mansell & Steinmueller (2021: 108) have summed up the approach as follows:

> Conventionally, competition policy and antitrust provisions aim at ensuring that competition is fair and advances consumer welfare. [...] In current practice, the answer depends on determinations about effects within a construct called the "relevant market".

The *Furman Review* and competition

In late 2018, a ministerial working group on future regulation, chaired by Business Secretary Greg Clark, began meeting quarterly (BEIS, 2018). The 'techlash' against the 'digital dominance' of major digital platforms was growing (Faroohar 2018; Tambini & Moore eds., 2018). UK discussion was dominated by the challenge of regulating Facebook and Google (Andrews, 2020; Kretschmer, Furgal & Schlesinger, 2021). The response was to set up a Digital Competition Expert Panel (DCEP) to review competition policy for digital markets. Known as the *Furman Review,* after its chair, Harvard economist Jason Furman, this was jointly commissioned by Clark and the Chancellor of the Exchequer, Philip Hammond MP. *Unlocking Digital Competition* published in March 2019 was aligned with government and CMA thinking. *Furman* advocated a 'pro-competition' policy focused on consumer benefit. It argued for 'a clear set of rules to limit competitive actions by the most significant digital platforms while also reducing structural barriers that currently hinder effective competition' (Furman, 2019: 2).

The *Furman Review*'s key recommendation was a well-resourced Digital Markets Unit (DMU) taking an *ex ante* approach to pro-competition regulation. Another player was going to join the crowded regulatory field. The new body would be linked to the CMA, Ofcom, and the ICO (Furman, 2019: 10-11).[5]

The DMU would develop a 'code of competitive conduct' applied to 'particularly powerful companies deemed to have "strategic market status"' (SMS) and enable 'greater personal mobility and systems with open standards' to advance 'data openness' with regard to non-personal or anonymised data, while respecting privacy. An updated merger policy was proposed, coupled with an antitrust policy. The *Furman Review* sought to expand its focus on digital markets to the much-discussed issues of privacy and harmful content. Striking an evergreen note, it hailed the opportunity for UK 'global leadership' in the regulatory field (Furman, 2019: 5-7; 50).

Neo-regulatory retooling coincided closely with the UK's geo-political repositioning as it prepared to exit from the European Union. *Furman* welcomed 'the government's stated intention

[5] There was a nudge in *Furman* regarding the DMU's eventual location: 'Definition of scope would be less important if the unit sat within the CMA, with its economy-wide scope' (DECT 2019: 80, fn. 18).

to ensure that UK competition authorities can continue to co-operate effectively with the European Commission and competition authorities of EU Member States'. The government was also enjoined 'to maintain and enhance mechanisms for sharing evidence with countries outside the EU, alongside other reciprocal arrangements' (Furman, 2019: 123).

An emerging strategy

Furman's recommendations set the stage. In June 2019, its conventional wisdom had become part and parcel of the CMA's *Digital Markets Strategy* (CMA, 2019). This also addressed issues such as Machine Learning, AI, and digital advertising. However, the key policy point was *Furman*'s proposal for the DMU, which would designate 'certain businesses as having "strategic market status"' under a code of conduct (CMA, 2019: 11).

Regarding 'regulatory concurrency', the CMA (2019: 6) stated its commitment to working with 'cross-sector bodies' (the ICO and Trading Standards) and with 'sector-specific' agencies (Ofcom and the FCA). It also stressed its international collaboration with the European Competition Network (ECN), the OECD, International Competition Network (ICN), and International Consumer Protection and Enforcement Network (ICPEN). The CMA was already the focal agency in the UK Competition Network (Dunne, 2021: 260). The *Strategy* referenced the European Commission's antitrust case against Google, the German *Bundeskartellamt*'s action regarding Facebook, and the Australian Competition and Consumer Commission's digital platforms inquiry. Such international signifying touchstones recur in successive reports.

At a national level, the CMA noted digital platforms' competitive challenges to UK journalism, citing the *Cairncross Review* (2019), commissioned by the Department for Digital, Culture, Media and Sport (DCMS), which earlier that year had addressed the effects of search engines and news aggregation services on press publishers' loss of advertising revenue. *Cairncross* saw major platforms' threat to sustainable quality journalism as contributing to disinformation and a decline in public-interest reporting. The CMA's pro-competition approach now expanded its horizon, taking in the democratic role of press publishing.

From review to taskforce

In March 2020, the government accepted the strategic recommendations of the *Furman Review* and charged the CMA with forming a Digital Markets Taskforce to report later that year on a possible new regime. Ofcom and the ICO were part of this expert group. Also in March, the CMA published its *Annual Plan 2020/21* (CMA, 2020a), stressing its role as 'the UK's lead competition and consumer authority' whose remit included collaboration with sector regulators (CMA, 2020a: 5, 12).

The CMA endorsed the *Furman Review*'s push for the 'development of a new pro-competition regulatory regime for digital platforms' (CMA, 2020a: 14). It aimed to promote competition in communications in collaboration with sector regulators. '[T]ackling concerns in digital markets' was a strategic objective because 'most markets are increasingly digital' (CMA, 2020a: 9, 13) – a neat statement of the rationale for a neo-regulatory order. As an adviser to government 'on the possible regulation of digital markets', the CMA judged their 'global nature' to require internationally 'concerted action' (CMA, 2020a: 13-14). It proposed 'the "colleges" which currently exist for supervising the largest global banks' – discussed above – as a relevant model (CMA, 2020a: 8). As noted, this approach was closely aligned with existing regulatory concurrency.

The CMA's Market Study as 'proof of concept'

On 1 July 2020, hot on the heels of its *Annual Plan 2020/21*, the CMA published *Online Platforms and Digital Advertising*. This was the final report of an investigation prompted by Google's overwhelming dominance of the UK search advertising market and by Facebook's sway over the display advertising market. The two platforms jointly accounted for over a third of UK internet users' time online (CMA, 2020b: 5).

The CMA's analysis was informed both by its own and the government's acceptance of *Furman*'s key recommendations. Its empirical investigation was proffered as a humble 'proof of concept' for the grand new design. The CMA concluded that the priority was to change the present regulatory regime; a market investigation into digital advertising, therefore, could be postponed as the remedy needed to be fundamental.

There was 'a compelling case for the development of a pro-competition ex ante regulatory regime to oversee the activities of online platforms funded by digital activity' (CMA, 2020b: 21). Therefore, the creation of a 'dedicated' DMU empowered to enforce a code of conduct on platforms with 'strategic market status' (SMS) found unreserved favour. The code of conduct would have broad objectives: fair trading, open choice, and trust and transparency, supplemented by detailed prescriptions (CMA, 2020b: 23).

Signalling two other features of the emerging neo-regulatory regime, the CMA emphasised its continuing collaboration with the ICO 'on issues relating to the intersection of competition and data protection law'. It also noted that following the UK's exit from the EU 'the CMA will continue to work closely with the European Commission' (CMA, 2020b: 32-33; 436), while also carefully sticking to the unavoidable idea of a distinctively British road to regulation.

The government's view

In November 2020, the government published its response to the CMA's study of online platforms and digital advertising. The joint statement by the Business and Culture departments, emblazoned with the logo of the UK's industrial strategy,[6] emphasised the intersection of the economic, social and political dimensions of platform regulation, and endorsed the need to tidy up the regulatory field.

> A new pro-competition regime will form a key part of our forthcoming Digital Strategy, where we will set out our overarching approach to regulating digital technology. This includes the steps we are taking to boost innovation, build public trust through greater safety and security for users of digital tech, and promote a democratic, open society. We will also set out the action we are taking to ensure the coherence of our approach, including streamlining the digital regulatory landscape, minimising overlaps and ensuring strong coordination between regulators. (BEIS & DMCS, 2020: 11)

The government endorsed both the *Furman Review* and the CMA's *Market Study* (modelled on the former). An enforceable code of conduct applied to SMS platforms by a powerful, statutorily-underpinned DMU was on the agenda. The government also folded in its approval of the *Cairncross Review*'s (2019) arguments about the need for sustainable journalism. The press's loss of advertising, notably to Google and Facebook, would require a code of conduct to govern commercial arrangements between news publishers and major platforms. With effect from April 2021, the new DMU's location would be within the CMA.

Yet caution prevailed:

> The Government agrees in principle with giving pro-competition powers to the DMU. However, these interventions are complex and come with significant policy and implementation risks. More work is required to understand the likely benefits, risks and possible unintended consequences of the range of proposed pro-competitive interventions. The Government will continue to consider this, taking into account the advice of the Taskforce, our findings from the National Data Strategy consultation, and views of stakeholders. (BEIS & DCMS, 2020: 10)

The consultation on the DMU was finally called on 10 September 2021.

The Digital Markets Taskforce

Policy preferences were already well established when, in March 2020, the CMA launched the Digital Markets Taskforce (DMTF). Its purpose was to 'build on the outputs of the Furman Review, as well as drawing evidence from the CMA's market study into online platforms and digital advertising' (CMA, 2020c: 2). The Taskforce reported on 3 December 2020. In line with the agencies' concurrency arrangements, the Taskforce's driving ambition was to achieve 'regulatory coherence'. In pursuit of this ambition, a new body called the Digital Regulation

[6] Replaced by the Plan for Growth in March 2021.

Cooperation Forum (DRCF) – discussed in the next section – was set up during the Taskforce's deliberations and its role was taken fully into account.

Noting that '"digital" is not a sector' (CMA, 2020c: 75) but rather the articulation of various technologies with the wider economy, the Taskforce concluded that regulators needed to combine forces to address the power of major platforms identified as having a 'strategic market status' (SMS). The Taskforce's report argued that the DMU should operate as a 'centre of expertise for digital markets' (CMA, 2020c: 3), using its powers to focus on the SMS regime. The CMA would handle mergers. The DMU should have 'primacy' in designating any SMS assessments in the digital economy. However, it would collaborate with Ofcom in respect of 'online harms', the ICO regarding data and privacy, and the FCA in regulating financial services (CMA, 2020c: 75).

Akin to the CMA, the Taskforce offered a particularly clear statement of the need for regulatory collaboration. In the UK, that meant support for the new DRCF and, internationally, similar use of a 'college' model (CMA, 2020c: 78-80). It was now imperative to put regulators' collaboration and the DMU on a statutory footing:

> We urge government to move quickly in taking this legislation forward. As government rightly acknowledges, similar action is being pursued across the globe and there is a clear opportunity for the UK to lead the way in championing a modern pro-competition, pro-innovation regime. (CMA, 2020: 81)

The Digital Regulation Cooperation Forum

In a brief press release issued on 1 July 2020, the CMA, Ofcom and the ICO announced the creation of the Digital Regulation Cooperation Forum (DRCF). The three bodies had combined forces 'so as to achieve coherent, informed and responsive regulation of the UK digital economy which serves citizens and consumers and enhances the global impact and position of the UK' (DRCF, 2020a:1).

Doubtless, lines were first cleared with ministers, yet the DRCF's founding statement strongly suggests a regulators' initiative. Future collaboration with other bodies was indicated, as was engagement with government by inviting 'a relevant DCMS Director General to participate in meetings on a periodic basis' (DRCF, 2020a: 3).

There were standard disclaimers: the DRCF (2020a: 2) would be 'a non-statutory body [...] not a decision-making body' and 'not provide formal advice or direction to members'. The new process of formalised collaboration – as with other concurrent regulation – had to address the regulators' disparate remits.

Speaking with one voice?

The DRCF's *Plan of Work 2021/22*, published on 10 March 2021, foregrounded reasonable public expectations of 'joined up' regulation of the digital economy. Three benefits were identified: (1) providing coherent digital regulation in the public interest; (2) responding strategically to industrial and technological developments; (3) building shared skills and capabilities 'to develop and make use of shared resources' (DRCF, 2021a: 3).[7]

Neo-regulation faces challenges. While recognising the benefits of the digital economy, the DRCF's *Plan of Work* highlighted harms such as disinformation and misinformation as well as concentrations of monopoly power 'restraining growth, holding back innovation' (DRCF 2021a: 2). Regulation had to keep pace with firms' development and technological innovation. Seeking 'coherence across digital and traditional services' was a must. In tune with the Conservative government's Global Britain stance, the *Plan of Work* burnished the DRCF's soft power credentials, describing it as 'the first national regulatory network supporting cooperation across the breadth of our responsibilities for regulating digital services' (DRCF, 2021a: 3).[8]

The DRCF is a strategic response to new circumstances and has built on established regulatory concurrencies in other sectors. Its regulator members have underlined their need to increase cooperation in a 'dynamic policy environment', to become a one-stop shop where 'joint project teams, share resources and expertise, engage once with stakeholders rather than separately, and publish our findings jointly' (DRCF, 2021a: 4).[9] For Kate Davies (2021), Ofcom Public Policy Director, 'The workplan signals a true shift in regulatory coordination and a commitment from the members to explore practically how specific regimes interact and how we can improve outcomes for consumers and businesses.' The DRCF has been candid about constraints on member agencies subject to the diverse powers conferred by different statutes in force, as well as the legal limits faced on information exchange. The process is still experimental as Davies (2021) also carefully noted: 'the question of what it means to engage as a cross-regulatory forum is still a little untested. If we can find a way to effectively reach across domestic and international borders – just as the tech giants themselves have done – then we will all benefit.'

[7] The FCA finally joined the existing triad on 1 April 2021, after one year as an observer but did not contribute to the DRCF's May 2021 review.
[8] A footnote briefly compares parallel moves in the US, the EU and Australia.
[9] The DRCF's priority areas for action in 2020/21 are: design frameworks; algorithmic processing; digital advertising technologies (with the Advertising Standards Authority); and end-to-end encryption.

Further capacity building

Creating the DRCF was a move towards voluntary regulatory consolidation through intensified network collaboration. Regulatory proliferation, however, had not yet peaked. In February 2021, the CMA's 2019 digital markets strategy was given a 'refresh'. The updated *Strategy* paper noted that from April 2021 the new DMU was to be 'housed in the CMA' (CMA, 2021: 5). This addition to its regulatory expertise squared with the CMA's 'overarching ambition – to build towards a proactive new pro-competition regulator for digital markets' (CMA, 2021: 6).

In 2021, with Brexit completed, platform regulators' horizon-scanning still included the EU. The CMA noted the significance for competition regulation of the EU's Digital Markets Act of December 2020 along with German reforms to competition legislation dealing with large digital companies. Moves by the US House Judiciary Antitrust Subcommittee were also considered.

In May 2021, with growing confidence, the DRCF published a clarion call for structural reform. Responding to the DCMS,[10] it asserted its own novelty: 'Our ambitions for the DRCF represent a true innovation in the breadth and depth of cooperation between regulators.' In November 2020 the UK Government had asked about 'further measures' needed for 'delivering effective digital regulation'. The DRCF responded that 'in the absence of legislative change' its work would 'help us provide policy coherence in the public interest, respond strategically to industry and technological developments, and build skills and capacities'. Yet the 'potential limitations of a voluntary approach' had come up against 'barriers to cooperation' and therefore possibly 'the need to develop a legislative framework that embeds cooperation in the digital regulatory landscape'. This was a matter for the government and further discussion would be welcomed (DRCF, 2021b:1).

Appropriate data- and information-sharing were proposed to facilitate or coordinate activities 'for the purposes of cross-cutting work' such as 'a change in the Enterprise Act to add an information gateway for the purposes of cooperating on digital regulatory matters, listing the relevant functions of the ICO, Ofcom and the DMU' (DRCF, 2021b: 2).[11] The DRCF recommended that the government adopt 'measures to incorporate regulatory coherence and cooperation into the duties of digital regulators', noting how the CMA's Google Privacy Sandbox investigation had interlinked data protection and competition concerns, thereby involving the ICO. A statutory framework that aligned regulators' 'supplementary duties' was needed. The adoption of a common principle to 'promote the interests of consumers and citizens' was

[10] By addressing reservations in the government's response to the CMA's *Market Study*, cited above.
[11] Legal frameworks and their obstacles to information exchange are noted on p.4 of the DRCF's paper.

mooted, imposing on relevant agencies duties both to consult and to cooperate, as under legislation for regulators in the financial sector (DRCF, 2021b: 5,7).[12]

Given regulators' present remits, the DRCF argued that added duties would need to be limited in scope and carefully sequenced. Cooperation was to be undertaken transparently and accountably. The government was asked to set out its strategic priorities for digital services and platforms on the lines of the General Duties of Ofcom in the Communications Act 2003. It was also asked to clarify 'the desirable scope of digital regulatory cooperation' – in effect, to state what ministers would actually accept as discretionary action (DRCF, 2021b: 9-10).

The DRCF considered its own approach, expertise, resources and stakeholder connections had trumped the idea of setting up a new digital authority. Such a body might duplicate existing efforts, losing out on existing regulators' connections with 'traditional actors and services' (DRCF, 2021b: 10).[13] Aside from seeking to weld a single epistemic community out of diverse expert groups, therefore, forum-style collaboration worked as a stratagem to forestall the creation of a powerful new rival.

A key step in the DRCF's development was the appointment of Gill Whitehead as Chief Executive in November 2021. She was previously a member of Google's UK Management Group, 'leading specialist teams in data science, analytics, measurement and UX', with earlier 'consumer and markets insight' work for the platform, for which she had worked since 2016. Previously, she led on Channel 4 TV's data strategy. Whitehead is 'in charge of the Secretariat formed by each of the regulators', collaborating with their respective CEOs 'to ensure that regulatory policy is developed in a responsive and holistic way' (Ofcom 2021b).

Towards 'online safety'

The pro-competition agenda has dominated the process of neo-regulatory reforms. However, official and public attention has focused far more on 'online harms', now the province of Ofcom, best known of the key regulatory ensemble because of its oversight of media and telecommunications.

Ofcom is the product of an attempt to achieve regulatory coherence across broadcasting, wireless and telecommunications. As Moran (2003: 146) noted, Ofcom's creation as a 'peak'

[12] Specific articles of the Financial Services and Markets Act 2000 refer, as noted on p.8 of the DRCF's paper.

[13] The Stigler Center (2019: 18) recommended the creation of a 'single powerful regulator capable of overseeing all aspects of digital platforms' in partnership with an antitrust agency. The DMU's regulatory scope is more limited than this envisaged, given the formation of the DRCF.

institution in 2003, was a response to the fragmented regulation of the new technologies of communication, part of 'the trend towards the creation of regulatory agencies designed to provide synoptic overviews of wide social domains'. This top-down design was singularly different from the DRCF's lateral and incremental approach to regulatory consolidation in respect of digital platforms. Rooted in a four-decades-old tradition of regulatory concurrency, the forum is a consortium of the willing, whose discretion is subject to ministers' oversight. The key alternative is a command-and-control approach where one agency deploys an in-house range of competencies grown over time. That said, the DCRF's need for coherence has been addressed by the appointment of a CEO and a common secretariat.

Ofcom's (2018) agenda-setting discussion paper, *Addressing harmful online content*, in effect laid its claim to a remit that would include digital platform regulation. Its broad assessment included activities harmful to children, spreading terrorist content, incitement to violence, and misinformation. Ofcom's initiative was followed by the government's *Online Harms White Paper* in April 2019. A consultation on the White Paper ensued. Finally, on 15 December 2020, the government's full response paved the way to the Online Safety Bill, coinciding with Ofcom's designation as the online harms regulator. Along with online harms, the joint ministerial statement by the then Digital Secretary, Oliver Dowden MP, and the Home Secretary, Priti Patel MP, gave major play to the soft power and economic dimensions of regulation:

> The development of the online harms regime represents an important step in the UK's strategy to create a coherent and pro-innovation framework for the governance of digital technologies, and to set the global standard for a risk-based, proportionate regulatory framework. (DCMS & Home Office, 2020: par.4)

On 12 May 2021, the Draft Online Safety Bill was published. The accompanying 121 pages of explanatory notes described the regulator's role as follows:

> The Bill confers powers on the Office of Communications (OFCOM) to oversee and enforce the new regulatory regime (including dedicated powers in relation to terrorism content and child sexual exploitation and abuse (CSEA) content), and requires OFCOM to prepare codes of practice to assist providers in complying with their duties of care. The Bill also expands OFCOM's existing duties in relation to promoting the media literacy of members of the public. (Online Safety Bill, 2021: 4)

According to the Draft Bill, the UK, was no longer required to legislate in line with the EU's e-Commerce Directive. Protection from liability had also ceased for previously exempt service providers storing illegal user-generated content (Online Safety Bill, 2021: 7).

Post-Brexit intimations

At the end of 2020, both the EU and the UK set out their regulatory stalls for taming big tech. The EU's big-ticket interventions were the Digital Markets Act, aimed at major 'gatekeeper'

platforms, and the Digital Services Act, intended to oversee 'very large online platforms'. Meanwhile, in the UK, Ofcom took on the task of 'online harms' regulation, while the CMA was reinforced with a DMU focused on firms with 'strategic market status' (Kretschmer, 2020).

Post-Brexit, the UK government has been keen to signal a new course. Two current indications of future policy suggest regulatory divergence from the EU, although it is still too early to determine how far the process will go.

Whither net neutrality?

On 7 September 2021, citing developments in innovative technologies and new demands on capacity, Ofcom launched a call for evidence for an impending review of net neutrality. The principle is described as 'ensuring that users of the internet can control what they see and do online – not the internet service provider (ISP) that connects them to the internet' (Ofcom, 2021: 3). Humphreys and Simpson (2018: 77) have pertinently noted that net neutrality is of far-reaching importance, as it 'sits at the core of any media policy consideration of the role and function of electronic communication in the social world'.

Ofcom's call was triggered by Brexit. The regulator observed that it was no longer required to take 'utmost account' of the guidelines issued by the Body of European Regulators for Electronic Communications (BEREC) regarding the EU's Open Internet Regulation (in force since April 2016). In addition, it also did not need to submit a compliance report to the European Commission. A pro-competition rationale set the stage:

> Innovation is integral to promoting a vibrant and dynamic digital sector. Given developments to date and possible changes in the future, it is important that the net neutrality framework continues to best serve citizen and consumer interests and promote access and choice, while also supporting innovation and investment in the digital space. With this in mind, we think it is an appropriate time for us to consider how the net neutrality framework is functioning; both in terms of today and how it may work over the coming decade. (Ofcom 2021a: 9)

With economic considerations to the fore, how this debate proceeds warrants careful watching, as it goes to the heart of democratic politics. As Tambini (2021: 104) has remarked, 'which forms of speech should benefit from the free distribution provided by the internet, and which should not, should never be seen as a "technical" issue'.

Reforming the data economy

On 21 August 2021, the DCMS (2021) announced its 'post-Brexit global data plans'. These included appointing a new Information Commissioner to head the ICO. The preferred candidate 'to oversee shake-up' was John Edwards, New Zealand's Privacy Commissioner, whose appointment was approved by the House of Commons DCMS Committee on 10 September 2021.

The government's intention was to empower a neo-regulatory ICO 'to encourage the responsible use of data to achieve economic and social goals as well as preventing privacy breaches'. The then Digital Secretary, Oliver Dowden, stressed that leaving the EU had enabled the UK to develop 'a world-leading data policy [...] seeking new international data partnerships [...] reforming our own data laws', with the ICO pursuing 'a new era of data-driven growth and innovation'. Brexit gave the Digital Secretary powers 'to strike data adequacy partnerships with partners around the world'. The government's intention was to remove barriers to data flows, with the process overseen by an International Data Transfers Expert Council, in conformity with the Data Sharing Code devised by the ICO. It was still intended to 'maintain equivalence with the EU's data standards [...] while developing a new pro-growth approach to data law' (DCMS, 2021).

'Datafication' processes on networked platforms that capture 'every form of user interaction' as a far-reaching 'techno-commercial strategy' (van Dijck et al., 2018: 33) are unavoidably at the heart of policy debate. It remains to be seen how the UK government's data trade plans will impact on platform regulation, given the ICO's broadened remit.

Conclusion

Almost two decades have passed since Moran (2003) anatomised the onset of 'hyper-innovation' in the British regulatory state. Although from March 2020 to July 2021 the Covid-19 pandemic held much of the UK on pause, key steps towards establishing a neo-regulatory platform regime did not slacken. Hyper-innovation is plainly alive and well.

Although regulatory activism is occurring on a global scale in various regimes, Brexit has provided the particular geo-political framework for the process depicted here. Its architects in the UK government are pursuing their vision of a sovereign national security state. Regulation is an inherent part of the defence of the realm. In a world in which war and peace are deemed to have no dividing line, cyber-space has become a prime battle-ground. As the above analysis shows, the urgent quest to seek firm foundations for the UK's post-Brexit digital resilience means that economic competitiveness is an overarching government priority. The pro-competition approach driving the CMA is also evident in the latest initiatives pursued by Ofcom (reviewing net neutrality) and the ICO (reforming the data economy).

British regulatory activism has entered a new institutional stage. As documented here, key regulators have coalesced in a forum in order to rationalise a patchwork quilt of statutory powers. In a cautionary note, Lovdahl Gormsen (2021: 384) has argued that the CMA has already sidestepped the use of a 'fully-fledged regulatory regime', while also dropping the ball on 'investigating online platforms and digital advertising'. She has concluded that the digital market

needs 'a bolder, more confident and critical competition enforcer'. Accompanied by great expectations, the much lobbied-for DMU has since been added to the mix.[14] Will it make a significant difference?

The 'forum-isation' of British platform regulation has resulted, first, in an incremental deepening of inter-regulator relations and second, in a pragmatic extension of membership of the club, with the FCA as the latest major entrant. Expertise is being mobilised on a need-to-use basis. The institutional core of agencies involved in voluntary coordination is set to grow incrementally.

Of course, this raises questions. With a CEO of the joint secretariat now appointed, what challenges are faced in integrating the DRCF's broadly-based, multi-specialist knowledge base? Will a qualitative shift occur, creating a new regulatory entity? The call for all to serve a common citizen and consumer purpose underpinned by statute might be a step in that direction. Yet, the present entrenchment of the college model suggests the DRCF will not mutate into a converged regulator. Its future is a topic apt for further research.

Compelling national practices may exert considerable influence internationally, well beyond the level of the given regulatory state. Taking increasing distance from the EU, Global Britain's architects avidly seek such soft, convening power.[15] Yet, as Braithwaite and Drahos (2000: ch.25) demonstrate, the route to becoming a global regulatory model is complex and multi-level. At present, it is too early to tell whether the platform regulators' forum is up to the mark. Its wider diffusion depends on the receptiveness by diverse political cultures of this distinctively British approach. Pertinently, Dunne (2021: 281; original emphasis), has noted that 'the paucity of countries that have followed the UK example suggests that the benefits of concurrent enforcement are not *entirely* self-evident in practice'.

Global Britain's day has yet to dawn in convening the international field of platform regulation. In the short term, a serious claim to global leadership will rest on the new framework's legislative underpinnings. The enactment of the Online Safety Bill, presented to Parliament in May 2021, is yet to come. After the government's consultation on the DMU has concluded, legislation should follow. Then, the acid test will be the demonstrable efficacy of platform neo-regulation in the UK.

[14] DMU Director Catherine Batchelor (2021) has characterised the British approach as 'more discretionary' than the EU's. But she sees broad similarities between the two regulatory strategies, with eventual convergence likely – an intriguing counterpoint to ministers' public stress on increasing differentiation.
[15] Given the CMA's 'Brexit Guidance', Lovdahl Gormsen (2021: 377) considers 'divergence on enforcement patterns' to be 'unlikely'. The jury is out.

Acknowledgements

This research has been conducted as part of the UK Creative Industries Policy and Evidence Centre's programme of work. It was funded by the UK Arts and Humanities Research Council, award no. AH/S001298/1. My thanks to Martin Kretschmer and Martin Montgomery for their helpful comments.

Declaration of interests statement

The author has no conflicts of interest to declare.

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2021/11 DOI: 10.5281/zenodo.5708186

In collaboration with:

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Led by nesta