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House of Lords Communications and Digital Committee inquiry into Digital Regulation

'An inquiry into the work of digital regulators'

Cooperation. Not Supervision.

Summary:

1) Strategically, the House of Lords Communications and Digital Committee's initiative is timely, pioneering and well-shaped. The purpose of this individual submission is to identify possible operational shortcomings of the proposed model and to highlight the ways for their mitigation.

2) When considering the optimal format for organising the work of sectoral regulators, which simultaneously share broader societal mission & 'digital' subject area, and yet are localised by narrow technical expertise and normative priorities, it is important to design a model synergising the advantages of both. On one hand, the sectoral regulators should indeed be steered by (or at least informed of) a holistic strategic vision and utilise operational functionalities of each other. On the other hand, the narrow expertise, focus, priorities, discrepancies and inconsistencies between the agencies should not be eliminated and should not be seen as systemic flaws.

3) The risk of an uncritical fusion of the sectoral niche-expertise is comparable to the discussions on the role of interdisciplinary research in academia. Interdisciplinarity brings many obvious advantages, improving, informing, assisting specialised silos, helping them to see broader perspective and operate with more differentiated toolkit. Yet, its mechanistic imposition often deprives the relevant silos from their unique narrow expertise. It promises to deliver a productive synergy, but when unadjusted, it can bring a pyrrhic success of the Towel of Babel.

4) The quarterly reports will help to keep parliamentary oversight of digital regulation on the right level: these periods are regular and sufficiently short to allow an effective steering.

5) The Digital Regulation Co-Operation Forum is an example of how the system could function. The new authority should be provided

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with the necessary competences to facilitate communication and assistance between sectoral regulators (but not going beyond this).

6) Sectoral regulators should be informed about the broader strategic interests and priorities in the area of digital governance. Such messages should not be treated as imperative instructions. However, they have to be known by the sectoral regulators. In any complex situation, when several alternative solutions of a specific problem can be offered without compromising the internal competence and expertise, the one, which is simultaneously more beneficial for protecting/achieving/strengthening a broader strategic interest or priority should prevail.

7) The perception that only independent, 'politics-free' inward-oriented sectoral agencies are capable to deliver 'objective' regulatory outcomes, should be softened and relativised. The sectoral independence is not an aim in itself. When the entire architecture of the digital society is being shaped, a broader and more coordinated vision should inform regulatory processes.

Consultation question 1: How well co-ordinated is digital regulation? How effective is the Digital Regulation Co-operation Forum?

There is a risk that only those societal interests, which are easier to convert into two or more sectoral agendas would have a chance to become cross-regulatory priorities.

Each sectoral regulator should keep its own sectoral specificity and the competence to investigate the areas and issues, which in its expert level judgement appear to be the most important. Those areas and issues are not necessarily the ones having inter-sectoral relevance and topicality.

The DRCF should not be used as a forum for reaching a regulatory consensus on selecting the list of inter-sectoral priorities. It should not be used as a place at which the sectoral regulators combine their efforts for targeting inter-sectoral, universal digital challenges.

Instead, it should become a forum at which each sectoral regulator may seek (and offer) assistance in terms of technical expertise or missing competence.

The DRCF should not be a place for synchronising priorities, it should be a place at which each helps the others in reaching each other's priorities.

The main function of the DRCF should be in facilitating the sharing and outsourcing of required expertise, information, competences, skills – but not in helping to reach a consensus upon the societal problems which are partially overlapping in the radars of different regulators.

There is a risk of reaching the illusory consensus by finding common approaches to phonetically identical terms. Such homonyms often mean

different things in different silos. Facilitating a greater communication between sectoral authorities should not be done at the cost of deprioritising niche-expertise (which is not easily convertible to the broader digital regulatory vocabulary).

There are very positive examples of inter-sectoral cooperation: the themes "competition & privacy" and "competition & banking" demonstrate remarkable instances of an effective understanding and cross-fertilisation between the relevant silos.

Consultation question 2: 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?

My specialism is competition law, with the focus on digital competition law. I am familiar mainly with the work of the Competition and Markets Authority. The CMA has a consensual recognition among the global competition law community as one of the most competent, innovative, forward-looking and effective national competition agencies in the world. A remarkable 'Online platform and digital advertising' market study conducted by the CMA, illustrates that the authority has the highest expertise, power and capabilities one could realistically expect under the *current* regulatory framework and under the *current* understanding of the role and goals of competition policy. The establishment of the Digital Markets Unit and the adoption of the legislation basing on the ideas articulated in the Government's consultation 'A new pro-competition regime for digital markets' indicates further paradigmatic improvements of the functioning of this sectoral regulator.

The *future* regulatory framework and the *future* understanding of the role and goals of (digital) competition policy is different. Competition policy is transitioning from its *preventative* to a more *proactive* modality. The authority is expected to be assigned with higher competences and broader regulatory oversight. It should be provided thus with stronger mandate and greater flexibility in pursuing the new pro-competitive regime. As competition policy is becoming less axiomatic and more pragmatic, there may be broader societal factors, which have to be taken into account when a) prioritising cases; b) interpreting facts, theories and rules; and c) balancing competing interests.

On the other hand, the CMA should not be expected to be a mere 'dump pipe' in pursuing these broader societal policies and objectives. The CMA should be expected to take them into account when possible, without yet subordinating to them – but certainly more frequently and more systematically than envisaged in the *current* regulatory model.

Consultation question 3: How effective is digital regulators' horizon scanning? How could this be improved?

The very nature of the digital economy implies by definition a long gap between the rapid technological progress and the adequate regulatory

responses to the new challenges. There is a room for making this gap narrower, and the recent global regulatory initiatives in the UK, EU, Australia, US and other trendsetting jurisdictions prove this. The UK is in the vanguard of these processes, being a benchmark for many countries and in many discussions.

However, making the gap narrower does not eliminate it. This is the maximum we can expect. Only now we begin dealing with the practices and challenges, which have been developed and tested two decades ago, and which were commercialised and scaled up a decade ago. The behavioural sandbox of the Digital Panopticon does not stop experimenting. Algorithms do not sleep, and the speed of innovation is accelerating as we are approaching closer to the foothills of the Digital Everest of 'Internet of Everything'.

It is often observed that the main challenge is not in identifying market failures (horizon scanning) as such but rather in a lack of competence (or in an excessively cautious attitude) to respond meaningfully. This could be remedied by delegating to the sectoral regulators a greater societal mandate in pursuing their digital policies and by softening excessively cautious, risk-averse conventions by which the performance of an agency is assessed by the amount of cases it did not lose in court.

Consultation question 5: 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?

Digital Authority, coordinating, steering, navigating – but not interfering into the narrow professional expertise of sectoral regulators may become a workable channel for establishing an effective communication between the Parliament and different sectoral regulators.

I disagree however with recommendation that "The Digital Authority should be politically impartial and independent of the Government" (para 242). Digital policy is an important component of all other public policies. The view that only a neutral, policy-free regulatory expertise is capable to deliver "unbiased" and "evidence-based", "neutral" results to the society is the central attribute of the *previous* approach to Internet governance. The main added value in establishing the Digital Authority is precisely in having it engaged into a broader societal challenges and initiatives. It should be able to communicate these messages effectively and delicately to each sectoral regulator, and it should be able to steer them in the direction expected by society (again, very delicately).

If the will is to establish an overarching Digital Authority, it must be an authority for (i) channelling and streamlining communication between the Government and sectoral regulators; as well as for (ii) facilitating cooperation between sectoral regulators themselves. However, creating an authority focusing on synchronisation and unification of sectoral agendas and expertise risks deceasing sectoral expertise and efficacy behind the façade of uniformity and common themes.

Consultation question 6: How effectively do UK regulators co-operate with international partners? How could such co-operation be improved?

In the area of competition law, there are several well-established venues for enforcers' cooperation. Among the most important are International Competition Network. OECD Competition Division and European Competition Network (network of EU national competition agencies, NCAs).

Additionally, greater transparency and speed in reporting national competition cases has strong spillover effect on other national agencies. NCAs learn from each other's practices. Sharing very similar doctrinal, methodological and normative understanding about the mission and goals of competition policy as well as the universal nature and effect of anticompetitive practices in the area of digital economy allow many regulatory synergies. Each agency however has its own priorities, vision, capacity and interests in opening (or not) a specific case.

This cooperation of course is different to the one anticipated in the Call for Evidence as in the case of international cooperation, the agencies may have different priorities and interests, but they understand the niche-expertise of each other. The domestic cooperation between different sectoral regulators is a reverse situation: the agencies may have the same national priorities and united interests, but they do not necessarily share the same expert-language and understanding.

Consultation question 7: Are there any examples of strategic approaches to digital regulation in other countries from which the UK could learn?

Strategic approach to digital regulation is a double-edged sword. The systemic digital challenges, however – as well as the opportunities – leave very little choice for all pro-competition jurisdictions. It is not an *if* but *how* question.

Evidently, there are two archetypical poles in addressing the issues of strategic digital regulation: libertarian non-interventionism of the far right, and authoritarian dirigisme of the far left. The first three decades of Internet governance were characterised by a clear-cut division: most the pro-competition jurisdictions were shaping their regulatory approaches much closer to the libertarian hands-off pole. Whereas most of the pro-intervention jurisdictions were mastering their approaches, much closer to the far-left dirigisme. The ongoing global transition from the period of Internet Optimism to the period of Internet Pragmatism is characterised by some elements of convergence and hybridisation of these approaches, and thus more voices can be heard that the pro-competition jurisdictions should try to learn not only from each other, but also to examine closer some selective models developed in the pro-intervention camp.

In my view, there are two issues, which the Parliament should be mindful of if deciding to engage with these practices in order to learn more about examples of strategic governance of digital regulation from the systems, applying historically more interventionist approach to coordination of their digital regulatory resources.

First, these prima facie useful practices may be non-transponible to democratic systems: (i) *normatively* – because many of them are too close to the red line of interventionism, protectionism and dirigisme; (ii) and *functionally* – because even if we opt for transposing some, such a transposition cannot be done easily from the technical perspective as neither the institutions nor regulatory conventions are compatible with these approaches.

Second, when doing a comparative analysis, the necessary checking should be made in order to ensure if indeed like is being compared with like. Many agencies in countries with historically more interventionist approach to digital regulation often appear to be doing their routine sectoral work in line with the highest standards of good democratic governance. However, this impression may occur simply because many 'difficult tasks', which most of the agencies in pro-competition countries are confronted with, (and which they are very fiercely criticised for) are dealt with by interventionist governments/parliaments centrally.

For example, addressing the practices of self-preferencing and default settings constitutes one of the central challenges for competition agencies in all established pro-competition jurisdictions. In many pro-interventionist countries, however, these challenges have been sorted out radically and in a command way, introducing e.g., legislation, mandating preinstallation of certain domestic applications on the first screen of all handsets distributed in that jurisdictions, removing thereby the issue from the radar of sectoral regulators outright. These agencies then do not intervene in the process of 'free competition' and do not address the 'toxic' problem of self-preferencing or default settings (and thus appear to be 'non-interventionist'). In reality, however, they do not intervene because such interventions have been made earlier, centrally and indeed in some sense 'more strategically'.

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