THE BIRTH OF PLATFORM **NEO-REGULATION IN THE UK**

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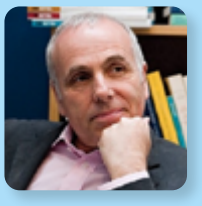

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The Birth of Platform Neo-Regulation in the UK

By Martin Kretschmer & Philip Schlesinger

Brexit – the UK's withdrawal from the European Union – has been a spur to new regulatory developments. In recent months, the British approach to dealing with big tech has become increasingly clear and the country is entering a neo-regulatory phase. This is strongly focused on regulating "online harms" and developing a pro-competition approach that engenders innovation. An Online Safety Bill is due to be imminently tabled in Parliament, following recent scrutiny of a Draft Bill by a Joint Committee of the House of Commons and the House of Lords. On the regulatory front, the need to address the wide-ranging challenges of digital dominance has provoked the creation of the Digital Regulators Cooperation Forum – a novel coalition of regulators that aims to share know-how across diverse fields as it grapples with platform regulation.

01

INTRODUCTION

A new era of tech regulation is about to begin.This is the bold claim behind the UK's "globally leading" Online Safety Bill which completed pre-legislative scrutiny in December 2021.[1] There was intense media attention on the proceedings in the Joint House of Lords/House of Commons Committee.[2] One highlight was the evidence given by Facebook whistle blower Frances Haugen on October 25, 2021[3] and a concrete scenario of unwelcome blogging offered by Graham Smith.[4] The Committee's report was issued on December 14, 2021. [5] The UK Government intends to publish the Bill in the first quarter of 2022, aiming for enactment in the current parliamentary session.

The core concept of the Online Safety legislation is the imposition of a new online duty of care on platforms, requiring the removal of illegal content. For "high-risk, high-reach" (so-called Category 1) services, this will extend to material that is lawful but harmful. Ofcom, the UK communications regulator,[6] will become the designated regulator, with enforcement powers, for platforms' "**codes of practice**." The Government itself will retain important delegated powers for the "Secretary of State" (currently Nadine Dorries).

At the same time, the UK government is consulting on the implementation of a new competition regime for digital markets. [7] This will centre on the activity of the Digital Markets Unit (DMU) which is presently in the orbit of the Competition and Markets Authority (CMA). The DMU will develop enforceable "**codes of conduct**" for firms with Strategic Market Status (SMS), which are likely to include the same platform services targeted by the Online Safety legislation. SMS designation will follow an "evidence-based assessment" identifying "those firms with substantial and entrenched market power, in at least one digital activity, providing them with a strategic position".[8]

> *"The core concept of the Online Safety legislation is the imposition of a new online duty of care on platforms, requiring the removal of illegal content*

There is a tension between these approaches: new obligations in anticipation of future harms are created. Will these encourage the flow of information, or prevent it? In each case, the state claims a stronger role, guided by an assertion of its sovereignty. The role of the executive (or national governments), the role of powerful firms in exercising state designated policing powers, and the safeguards against executive decisions need to be examined closely.

02

A GLOBAL WAVE OF REGULATION

In research undertaken for the AHRC Creative Industries Policy & Evidence Centre ("PEC"), so far we have traced the emergence of the new wave of platform regulation since 2018. We presented our initial findings to five UK agencies in February 2020 at an event at the British Institute

1 See https://www.gov.uk/government/publications/draft-online-safety-bill.

2 See https://committees.parliament.uk/committee/534/draft-online-safety-bill-joint-committee/.

3 See https://committees.parliament.uk/committee/534/draft-online-safety-bill-joint-committeenews/157979/facebook-whistleblower-frances-haugen-to-give-evidence-to-uk-parliament/.

4 See Smith, G. (November 2021) The draft Online Safety Bill concretised https://www.cyberleagle.com/2021/11/the-draft-online-safety-bill-concretised.html.

5 See https://committees.parliament.uk/publications/8206/documents/84092/default/.

6 https://www.ofcom.org.uk/home.

7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

8 https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

of International and Comparative Law.[9] Representatives from Ofcom, the CMA, the Information Commissioner's Office ("ICO"),[10] the Intellectual Property Office ("IPO"),[11] and the Centre for Data Ethics and Innovation ("CDEI") responded.[12] In June 2021, we published a detailed analysis of the state of the regulatory field as a PEC discussion paper[13] and policy brief.[14]

In follow-ups to this analysis of the first phase of platform regulation, two new working papers written by members of CREATe, have traced what we consider to be a "neo-regulatory" second phase in the development of the regulatory field. It is neo-regulation because it has responded, first, to the new realities due to Brexit; and second, because it has driven regulatory innovation that is focused on how to address platform power – by coalescing agencies' powers. It is important to mark these differences of context and practice, and so to understand how the UK is now arming itself to undertake platform regulation. We also need to raise some questions posed by this approach.

There is undoubtedly a global wave of concern about how to regulate the major platforms. This widely distributed "regulatory turn" has produced a plethora of documentation. Yet, so far as the UK is concerned, if you read through the major reports published in the UK in the past couple of years you will find that the key reference points are still the EU (and sometimes key member states, notably Germany), the U.S., and Australia.

A distinct British approach has crystallized in this global context. Given the UK's Government's promotion of its post-Brexit "Global-British" vision, to succeed in regulatory innovation is seen as having the advantage of potential "convening power" – in short, as offering an influential route for shaping the institutional changes to be negotiated internationally.

Yet, the geo-political repositioning undertaken by Prime Minister Johnson's Government has set up a conundrum. The Global-British path is meant to be distinctive and unique, a liberation from unwanted trammels, and in particular to diverge manifestly from the EU's course and practice.[15] But, at the same time, the more the UK diverges, the less can it rely on its previous regulatory equivalence with the world's largest trading bloc.[16] Recourse to bilateral arrangements is one approach to this potential impasse, as has now become evident in the UK Government's thinking about trade in data (DCMS 2021).[17] Moreover, it is amply clear that no state is capable of regulating major platforms on its own. Regulatory collaboration and coordination are needed. The UK's regulators are explicit on this matter, often in ways that cut against the prevailing Governmental rhetoric about controlling the borders and exercising sovereignty.

03

THE UK'S NEO-REGULATORY APPROACH

In 2020, the UK entered a consolidating phase in its development of platform regulation. The demand for expanded regulation has resulted in two key focuses: "online harms" (encompassing mainly social and political

9 https://www.create.ac.uk/platform-regulation-resource-page/.

10 https://ico.org.uk/.

11 https://www.gov.uk/government/organisations/intellectual-property-office.

12 https://www.gov.uk/government/organisations/centre-for-data-ethics-and-innovation.

13 Kretschmer, M., U. Furgał, & P. Schlesinger (June 2021) The emergence of platform regulation in the UK: an empirical-legal study, available at https://pec.ac.uk/discussion-papers/the-emergence-of-platform-regulation-in-the-uk.

14 AHRC Creative Industries Policy & Evidence Centre (PEC) Discussion Paper Kretschmer, M., U. Furgał, & P. Schlesinger (June 2021) The regulation of online platforms: Mapping an emergent regulatory field, available at https://pec.ac.uk/policy-briefings/the-regulation-of-online-platforms-mapping-an-emergent-regulatory-field.

15 Kretschmer, M. (July 2020) UK sovereignty: A challenge for the creative industries https://pec.ac.uk/blog/uk-sovereignty-a-challenge-for-the-creative-industries, available at https://pec.ac.uk/blog/uk-sovereignty-a-challenge-for-the-creative-industries.

16 Di Novo, S., G. Fazio, N. Wessel (March 2020) 12 facts about the UK's international trade in creative goods and services AHRC Creative Industries Policy & Evidence Centre (PEC) Research Report, available at https://pec.ac.uk/assets/publications/12-facts-about-the-UK%E2%80%99s-international-trade-in-creative-goods-and-services.pdf.

17 Department for Digital, Culture, Media & Sport (August 2021) UK Unveils Post-Brexit Global Data Plans to Boost Growth, Increase Trade and Improve Healthcare, available at https://www.gov.uk/government/news/uk-unveils-post-brexit-global-data-plans-to-boost-growth-increase-trade-and-improve-healthcare.

issues), and a "pro-competition" approach (which concerns the malfunctioning of the market, supporting consumer interests, and engendering innovation). While the subject of "online harms" has had most focus in parliamentary, media and public debate, in our view, it is the economic dimension of regulation – its focus on competition and innovation – that promises to be the leading edge of present developments.

In the first of our two recent CREATe analyses, Philip Schlesinger's paper on the UK's distinctive approach shows how, at a framing level, recent policy innovation – not least the centrality of a pro-competition stance – has been given new impetus by Brexit.[18] However, the institutional flesh on the bones has been provided by the Digital Regulators Cooperation Forum ("DRCF").[19] This grouping, first set up in July 2020, comprises the CMA, the ICO, Ofcom, and the Financial Conduct Authority ("FCA"). In November 2021, the DRCF's status as a new-style regulatory consortium was underlined by the appointment of its CEO, ex-Google senior executive, Gill Whitehead.[20] The forum will have an integrated secretariat, clearly crucial for undertaking business in a coherent way. However, the unaccountable growth of the DRCF has become a bugbear of the House of Lords Communications and Digital Committee which, in a report published on December 13, argued that parliamentary scrutiny is now needed as well as putting the forum on a formal footing as a "Digital Regulation Board", with an independent chair.[21]

Schlesinger's CREATe paper provides a detailed account of how the new collaborative arrangements were set up, and notably how the CMA has taken a leading role in shaping the policy discourse and institutional arrangements. He also shows how the 2019 Furman Report (strongly supported by the CMA) was highly influential in securing the creation of yet another regulator – one, as yet, not in the DRCF.[22] The Digital Markets Unit ("DMU"), which still awaits statutory underpinning, led by Catherine Batchelor, has been set up to spearhead the pro-competition agenda.[23] Its target will be what Furman has identified as "significant market power" in the digital marketplace.

> ***In 2020, the UK entered a consolidating phase in its development of platform regulation***

Magali Eben, in the second of our CREATe papers on neo-regulation, examines how the DMU might strive to promote competition in digital markets.[24] The new regulator has been conceived to target firms and activities considered to cause greatest harm, those designated as firms with Strategic Market Status (SMS). That means the DMU must identify firms with SMS, who would then be subject to a code of conduct. It will be empowered to undertake "pro-competitive interventions." In her paper, Eben asks just what kind of economic power an SMS designation is meant to cover, and how the DMU will actually go about its task of identification, what methods it might employ for identifying relevant "activities," "alternatives," and "core components"?

Her analysis suggests a lack of clarity about the criteria that are used to identify a firm as possessing SMS. She questions whether such a firm will be judged to have relative market power or not. She also argues that as major digital firms operate across jurisdictions, how regulators in other countries define market power also matters greatly, especially where cross-border collaboration is an issue. As she notes, this is precisely the kind of approach open to the EU under the 2002 Framework Directive(recast 2018).[25] Eben calls for more clarity in the use of evidence and in the definition of what a market is for the purposes of regulation.

Eben's work opens up questions about how the DMU will operate. Quite where the DMU will fit into the DRCF's future activities remains unclear. For his part, Schlesinger wonders how the Digital Regulators Cooperation Forum ("DRCF") will operate as a cohesive entity, now that after its short, mostly unnoticed existence, it is being propelled into the

18 Schlesinger, P. (November 2021) The neo-regulation of internet platforms in the UK. CREATe working paper 2021/11.

19 https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum.

20 https://www.ofcom.org.uk/news-centre/2021/gill-whitehead-appointed-digital-regulators-forum-chief-executive.

21 Communications and Digital Committee. "Digital Regulation: Joined up and Accountable." HL Paper 126, December 13, 2021.

22 Furman, J. (March 2019) Unlocking digital competition: Report of the Digital Competition Expert Panel. Treasury and Department for Business, Energy & Industrial Strategy https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

23 https://www.gov.uk/government/collections/digital-markets-unit.

24 Eben, M. (November 2021) The interpretation of a "'Strategic Market Status': A response to the public consultation by the UK Government on 'A new pro-competition regime for digital markets.'" https://zenodo.org/record/5575183#.YbzVNr3P3Ms.

25 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972.

regulatory limelight.[26] Indeed, the DRCF's days of largely private development are over as it has become a focus of other regulators and interests wishing to have a seat at the table. The Lords report has cautioned against the DRCF becoming a converged regulator for platforms – as Ofcom did for communications when it was first set up in 2003. Its future formalization and performance will be a matter of major public interest – not least for the UK government's ambition of leading in global "convening power."

In our first empirical study on the emergence of the regulatory field of platform regulation, published by the PEC in June 2021, we had already diagnosed the issue of how to coordinate regulation. We termed it "the super-regulator problem."[27] That question is now playing out in the Digital Regulators Cooperation Forum.

A second key finding from that initial study relates to the process of implementation – how to translate regulatory rules into behavioral changes. We identified "codes of practice" or "codes of conduct" as typical interventions in the British regulatory toolbox. Such codes are often developed in cooperation with the objects of regulation, and can respond flexibly and quickly to emerging issues (such as the targeting of videos at minors). Codes of practice or conduct, however, also tend to have weak statutory underpinnings and are not readily susceptible to public scrutiny.

The Online Safety Bill as well as the consultation on the Digital Markets Unit are open to discussion on this count. Magali Eben's paper highlights the potential discretion exercised in the designation of Strategic Market Status firms. The draft Online Safety Bill came with a Memorandum of no less than 87 pages, explaining deferred powers, i.e. the mechanisms that describe how the new *ex ante* duties for platforms will be formulated, implemented and policed.[28] Unless this changes as the Bill makes its way through Parliament, the executive, in the form of the Secretary of State, will retain an unusually wide range of powers. Independent predictable regulation it is not. It remains to be be seen how these contentious matters are addressed in the Bill's second reading and in future legislation on digital competition.

04

CONCLUSION

We define UK neo-regulation as an inter-agency, executive-led approach, oscillating between digital libertarianism and digital authoritarianism in an under-examined space that is taking shape during the initial stage of Brexit.

At the libertarian end, the Government promotes innovation and transparency: the Online Safety Bill "will increase transparency around companies' moderation processes, and ensure they are held to account for consistent enforcement of their terms of service." The Government is also considering giving the competition authorities (via the Digital Markets Unit) "powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets" (both quotes from the Government's response to the House of Lords Communications and Digital Committee's report on Freedom of Expression in the Digital Age, October 2021).[29]

At the authoritarian end, the key regulatory agencies are located in a space that may allow them to operate almost beyond the law, and potentially subject to the direct instruction of the Government. Twitter's evidence to the Joint Committee put it thus (October 2021): "These issues are further complicated by the discretion given to the Secretary of State in the Bill to not just modify codes of practice, but to also designate (at any stage) what constitutes 'legal but harmful' content – even that which goes beyond the already ambiguous definition of harm set out (content for which there is a 'material risk' of having 'significant adverse physical or psychological impact on an adult of ordinary sensibilities')."[30]

We are on the brink of a moment in which online platforms are about to become the proxies for the exercise of regulatory and state power via new duties and codes of practice/conduct that are now going to be devised. The UK's heady mix of innovation-promoting and harm-preventing interventions will have a profound effect on the production and consumption of culture – and the public sphere.

26 https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum.

27 https://pec.ac.uk/discussion-papers/the-emergence-of-platform-regulation-in-the-uk.

28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985030/Delegated_Powers_Memorandum_Web_Accessible.pdf.

29 https://committees.parliament.uk/publications/7704/documents/80449/default/.

30 Twitter (October 2021) Written evidence submitted by Twitter (OSB0072) to the Joint Select Committee (Draft Online Safety Bill) https://committees.parliament.uk/writtenevidence/39199/pdf/.

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