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To cite this article: Aysem Diker Vanberg (2023): Coordinating digital regulation in the UK: is the digital regulation cooperation forum (DRCF) up to the task?, International Review of Law, Computers & Technology, DOI: [10.1080/13600869.2023.2192566](https://doi.org/10.1080/13600869.2023.2192566)

To link to this article: <https://doi.org/10.1080/13600869.2023.2192566>



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Published online: 27 Mar 2023.



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Coordinating digital regulation in the UK: is the digital regulation cooperation forum (DRCF) up to the task?

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ABSTRACT

The shift to online commerce and communication in the global pandemic, the Cambridge Analytica scandal and the cancel culture exacerbated by social media platforms have demonstrated our increasing reliance on digital platforms. Digital regulation is receiving increasing scrutiny globally and, in the UK, as exemplified by the recent Digital Markets and Digital Services Act by the European Union and the establishment of the Digital Markets Unit within the Competition and Markets Authority in the UK. In July 2020, the Competition and Markets Authority, the Information Commissioner's Office and the Office of Communications formed the Digital Regulation Cooperation Forum (DRCF) to coordinate digital regulation between various regulators. In April 2021, the Financial Conduct Authority also joined the DRCF as a full member. Against this backdrop, the paper explores the coordination of digital regulation in the UK and analyses how effective the DRCF is in contributing to this objective. It is argued that to effectively respond to the challenges posed by digital technologies, coordination between various regulatory authorities must be extended and formalised to avoid fragmented enforcement. Whilst the DRCF is a step in the right direction, it needs to engage more closely with other relevant stakeholders.

KEYWORDS

Digital regulation; DRCF; joined-up regulation

Introduction

Digital technologies and access to technology have transformed our lives and changed the way we conduct business and interact with one another (the Digital Regulation Forum 2021a). As evidenced by the pandemic, digital technologies allowed us to take advantage of services and rights that were traditionally confined to offline space (Universal Rights Groups 2021). Many traditional sectors, such as finance and retail, have moved online and due to the advancement in technology, new markets such as online search, social media and online advertising have emerged (the Digital Regulation Cooperation Forum 2021a). Digital technologies brought many advantages and benefits; for instance, they made access to information easier and less costly for the benefit of online users and

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businesses. On the other hand, the shift to online commerce and communication in the global pandemic, the Cambridge Analytica scandal and the cancel culture exacerbated by social media have demonstrated our increasing reliance on digital technologies and the substantial power of digital platforms.

The digital economy creates numerous challenges for competition, data protection, consumer protection, and financial regulatory authorities. Access to unprecedented amounts of data allows digital companies such as Google, Meta, and Amazon to offer customised and improved services to their users whilst giving these companies an unprecedented amount of market power. This in turn may have adverse effects on consumers, rivals, and other businesses. For instance, in July 2019, the European Commission initiated a formal investigation against Amazon alleging that it is using the large sets of data that it collects on independent sellers to calibrate its retail decisions and to outcompete them which violates Article 102 TFEU of the Treaty on the Functioning of the European Union¹ (European Commission 2022).

As noted by Carugati, the conduct of digital companies creates a plethora of legal issues. For instance, digital companies' conduct may give rise to competition, privacy, content moderation, consumer protection and financial issues. Misleading terms and conditions and lack of transparency in terms and conditions lead to consumer protection issues, the misuse of personal data gives rise to data protection issues and the abuse of market power by tech giants violates competition laws (Carugati 2022). Hence, digital technologies bring up issues that fall under the remit of several regulators and there is indeed a need for some coordination between various regulators. Given the cross-jurisdictional nature of the digital economy, regulating digital technologies demands increased dialogue and coherence amongst government bodies (OECD 2019). The UK government defines digital regulation as the range of regulatory tools that government, regulators, businesses, and other bodies use to manage the impact of digital technologies on individuals, companies, the economy, and society and argues that due to the distinctive features that make digital businesses and applications innovative and unique, there is a need for a distinct digital regulatory approach (Department for Digital, Culture, Media, and Sport 2022a). Digital regulation requires specific institutional responses such as the establishment of thematic platforms bringing together key stakeholders, taking roles in regulatory oversight and in sharing expertise and good practices across policy areas (OECD 2019).

Recent developments in regulating digital markets in the European Union included the introduction of the much-anticipated Digital Markets Act (DMA 2021) which focuses on large platforms with a gatekeeper role and the Digital Services Act (European Commission 2021) which complements the DMA and is primarily concerned with the dissemination of illegal content. In July 2022 the European Parliament held the final vote on the DSA and the DMA following a deal reached between Parliament and Council on 23 April and 24 March respectively (European Parliament 2022). The DMA² was published in the Official Journal of the European Union on 12 October 2022. It will become applicable on 2 May 2023. After the formal adoption by the Council, the DSA will be published in the EU Official Journal and will enter into force twenty days after publication. The DSA will become directly applicable fifteen months after publication or from 1 January 2024, whichever is the latest. (Cran and Tuson 2022). Also, on 21 April 2021, the European Commission presented the Artificial Intelligence Act, which sets out rules for the development

and use of AI-driven products and services within the EU. The Draft Act combines a risk-based approach, which means a lighter legal regime will apply to AI applications with a negligible risk (Kop 2021, 1).

In Australia, the Australian Consumer and Competition Commission introduced a news media bargaining code for platforms and publishers (ACCC 2021). In the USA, there have been antitrust lawsuits against Facebook and Google for manipulation of online advertising sales (Bhuiyan 2022). The Stigler Committee on Digital Platforms argued that given the tendency of digital platforms to monopolise, there is a need for stringent regulation of potentially anticompetitive mergers and proposed the creation of a cross-sector Digital authority (Stigler Committee 2019). In June 2021, the US debate gained momentum as the House of Representatives introduced a package of antitrust bills introducing structural remedies to address the conduct of 'platform operators' (Schnitzer et al. 2021).

In the UK in 2019, the Regulatory Horizons Council was established to advise the Government on the implications of technological innovation and to provide the Government with impartial advice on the regulatory reform required to support its rapid and safe introduction (HM Government 2021). The Competition and Markets Authority published a market study pertaining to online platforms and advertising in July 2020 (Competition and Markets Authority 2020). On 7 April 2021, the Digital Markets Unit (DMU) was established to oversee a new regulatory regime for the most powerful digital firms and to promote competition and innovation in digital markets as well as protect consumers and businesses from unfair trading practices (Competition and Markets Authority 2021). The DMU will develop an enforceable code of conduct for firms with Strategic Market Status (SMS) which will target platform services that are also targeted by the Digital Markets Act (DMA) and has some overlaps with the DMA. The draft Online Safety Bill that concerns illegal and harmful content has been published and at the time of writing it is subject to scrutiny (Draft Online Safety Bill 2021). It imposes a new duty of care on platforms requiring the removal of illegal content, and the Office of Communications (Ofcom) will become the designated regulator with enforcement powers for the platforms' code of practice (Kretschmer and Schlesinger 2022, 3).

There has been some progress in the EU and the UK to foster institutional cooperation between independent regulators such as data protection authorities and competition authorities. For instance, in the German Facebook case,³ the competition regulator Bundeskartellamt worked closely with the German data protection regulator BfDI, the Federal Commissioner for Data Protection and Freedom of Information. While assessing the alleged use of Facebook's (Meta's) dominant position, the Bundeskartellamt also assessed the company's compliance with the GDPR. This was disputed by Meta suggesting that examining data protection issues is not in the remit of Bundeskartellamt. However, in its opinion Advocate General (AG) Santos concluded that 'a competition authority within the framework of its powers under the competition rules, may examine, as an incidental question, the compliance of the practices investigated with the rules of that regulation, whilst taking into account any decision or investigation of the competent supervisory authority on the basis of said regulation, informing where appropriate, consulting that authority'.⁴ The AG also stressed that competition authorities are not the competent authorities to apply the penalties provided for the GDPR and any penalty should be considered together with the competent data protection authority.⁵ The Facebook (Meta) decision clearly shows that the line between data protection and competition

law is getting blurry when it comes to digital giants such as Meta and there is a need for collaboration and coordination between regulators. In a similar vein, in 2020, the Italian 'Big Data' joint report was produced jointly by the Italian telecommunications, competition and data protection authorities (Carugati 2022). In the UK, the Digital Regulatory Co-operation Forum (DRCF), a voluntary form comprising several regulators, was set up in 2020 to create a platform for a joined-up approach to digital markets. A good example of successful regulatory cooperation between various regulatory bodies in the UK was demonstrated in the CMA's investigation into Google's 'Privacy Sandbox' browser changes⁶ which saw the ICO being involved in the privacy aspects of the case. (Geradin and Katsifis 2021, 30). On February 2022, the CMA accepted commitments from Google in relation to proposals to remove third-party cookies on Chrome and develop its Privacy Sandbox tools. (Competition and Markets Authority 2022c). In 2021, the Competition and Markets Authority and the Information Commissioner's Office published a joint statement on the interplay between competition and data protection. (Competition and Markets Authority & the Information Commissioner's Office 2021) Doubtlessly, the neo-regulatory developments in the UK have been shaped by Brexit – the UK's withdrawal from the European Union and the UK's desire to be a leading actor globally in terms of digital regulation. (Schlessinger 2022, 3).

Against this background, this paper will examine how coordinated digital regulation is in the UK and how effective the DRCF is in achieving this objective. The paper will also explore whether the DRCF will have exemplary appeal beyond the United Kingdom.

To achieve its objective, the paper is structured as follows. This first part provides a brief introduction to digital regulation and to recent developments in this area. The second part of the paper will discuss the rationale leading to the establishment of DRCF. The third part will explain how the DRCF was established and its goals and objective. The fourth part will explore the shortcomings of the DRCF. Subsequently, the paper will make some recommendations as to making the DRCF more effective. Finally, the paper will discuss whether the DRCF's model will have exemplary appeal beyond the United Kingdom and draw some conclusions.

The rationale for the establishment of the DRCF

In March 2019, the House of Lords' Communications and Digital Committee (hereinafter committee) published a report entitled 'Regulating in a digital world' (The House of Lords Communications and Digital Committee 2019). In their report, the committee pointed out the insufficiencies of the existing regulatory system in addressing digital issues. In their report, it was contended that instead of more regulation, there is a need for a more coordinated and different approach to regulation (The House of Lords Communications and Digital Committee 2019, 3). The Committee identified a range of regulators operating in the digital world such as Ofcom which oversees TV-like content and telecommunications, and the Information Commissioner's Office (ICO) which deals with the use and misuse of data. Despite the existence of a variety of regulators, the committee concluded that there were gaps in digital regulation as some issues raised by the digital economy did not fall under the remit of any regulator (The House of Lords Communications and Digital Committee 2019, par. 223). Hence, the committee recommended the creation of a new Digital Authority to coordinate regulators across different sectors and multiple

government departments. The committee suggested that the Digital Authority should establish an internal centre of expertise on digital trends to assess emerging risks and gaps in regulation as well as help regulators implement the law effectively and in the public interest. (The House of Lords Communications and Digital Committee 2019, par. 238). The committee also proposed that the newly established Digital Authority should provide a pool of investigators to be consulted by regulators for specific investigations (The House of Lords Communications and Digital Committee, par. 238). In paragraph 242 of the report, the committee anticipated that the Digital Authority should be politically impartial and independent of the Government and comprise chief executives of relevant regulators as well as independent non-executives and be chaired by an independent non-executive (The House of Lords Communications and Digital Committee 2019, par. 242). Furthermore, the committee proposed that the Digital Authority should assess regulation in the digital world and make recommendations on where additional powers are needed to fill gaps, raise awareness of issues connected to the digital world among the public, inform Parliament, the government and the public bodies of technological developments and finally engage with the tech sector and liaise with European and international bodies responsible for internet regulation. (The House of Lords Communications and Digital Committee 2019, par. 238). The committee contended that the Digital Authority should instruct regulators to address specific problems or areas. Another key function of the Digital Authority is to have mechanisms in place to cooperate with European and international authorities, particularly in the aftermath of Brexit (The House of Lords Select Committee on Communications 2019, par. 241). In its response published in March 2022, the government rejected the idea of creating a Digital Authority with powers to direct regulators as it was believed that this might cause issues with regard to regulator independence and accountability and inappropriately delegate a power which should be addressed by the government working with the legislature (Department for Digital, Culture, Media, and Sport 2022b). Arguably this is a misconception, as a Digital Authority with overarching authority could have been more independent and more accountable than existing regulators and it could have worked harmoniously with existing regulators.

Following the committee's 2019 report, the regulatory landscape became more complex as the remit of existing regulators has been extended dramatically. For instance, as discussed above Ofcom has been designated as the online safety regulator (Draft Online Safety Bill 2021) and the ICO has been entrusted with the task of enforcing the Children's Code or Age-Appropriate Design Code (ICO 2021) extending the role of ICO to children's activities, which clearly overlaps with the remit of the Children's Commissioner. This highlights that there is a need for effective coordination and collaboration between different regulators to avoid duplication of resources and avoid adverse outcomes for different stakeholders. For instance, a decision that concerns Google can be a good decision from a competition law perspective, but it may have unintended consequences for privacy or consumer protection and as a result, it is important for different regulatory bodies to work jointly and harmoniously when it comes to digital markets.

Establishing the Digital Regulation Cooperation Forum

Towards the backdrop of the above regulatory developments, in July 2020, the Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO) and

the Office of Communications (Ofcom) formed the DRCF. In April 2021, the Financial Conduct Authority (FCA) also joined DRCF as a full member. In setting up the DRCF, a voluntary forum, the regulators aimed to support cooperation and coordination between themselves as achieving a coherent and responsive regulation of the UK digital economy that serves people and enhances the global impact of the UK. In November 2021, Gill Whitehead, a former member of Google's UK Management Group, was appointed DRCF Chief Executive, to collaborate with other regulators CEOs to ensure that regulatory policy is developed in a responsive and holistic way (Schlessinger 2022, 56). This appointment did not have any Parliamentary scrutiny, and this arguably exemplifies the DRCF's unaccountable status (Schlessinger 2021, 56).

On 13 December 2021, the committee published a follow-up report entitled 'Digital regulation: joined-up and accountable' (the House of Lords Communications and Digital Committee 2021). In their report, the Committee commended the establishment of the DRCF but raised some concerns concerning the newly formed DRCF. (The House of Lords Communications and Digital Committee 2021). Amongst other concerns, the committee noted that the DRCF as a non-statutory body has no power to direct its members and is not directly accountable to Parliament.

The DRCF has three goals; to promote greater coherence where regulatory regimes overlap, to work collaboratively on areas of common interests and to work together to build the necessary capacities and share best practices (OFCOM 2020). The six objectives of the DRCF are (1) to collaborate to advance a coherent regulatory approach, (2) to inform regulatory policy making, (3) to enhance regulatory capabilities, (4) to anticipate future developments, (5) to promote innovation, and (6) to strengthen international engagement (The Digital Regulation Cooperation Forum 2021b).

In its first annual report the DRCF explained how it intends to respond strategically to industry and technological developments such as algorithmic processing and end-to-end encryption; developing joined-up regulatory approaches between various regulatory bodies and building skills and capabilities. In its plan of work for 2022–2023, the DRCF set out its priorities based on three key headings namely Coherence, Collaboration, and Capability. (The Digital Regulation Cooperation Forum 2022b). In relation to coherence, the key priorities of the DRCF are protecting children online and promoting competition and privacy in online advertising as well as undertaking work to ensure a coherent approach across the member organisations (The Digital Regulation Forum 2022b, 6). Pertaining to collaboration DRCF will focus on supporting improvements in algorithmic transparency and auditing as well as enabling innovation in industries regulated by DRCF members (the Digital Regulation Forum 2022b, 7). Finally, the DRCF will work on improving knowledge sharing through expert networks; build on synergies and bridge gaps in their horizon scanning across the regulators as well as recruiting and retaining specialist talent to deliver on current digital responsibilities (the Digital Regulation Forum 2022b, 7). The DRCF's creation has been a strategic response to the complex, dynamic and wide-ranging challenges of platform regulation, as it has become clear that there is a need for a one-stop shop where joint project teams share sources and expertise and engage once with stakeholders rather than separately (Schlessinger 2022, 55). Arguably, the DRCF's days of development 'behind the scenes' are over as there are various regulators and stakeholders that want to engage and be involved with the work of the DRCF (Kretschmer and Schlesinger 2022, 25).

Shortcomings of the DRCF

In this section key criticisms of the DRCF will be discussed.

The DRCF is a non-statutory voluntary body

The DRCF is a non-statutory voluntary body and as such there are some limitations to its remit and to what it can achieve. In a policy paper dated April 2021, Ofcom, ICO and the CMA also acknowledged that there may be some potential limitations of a voluntary approach and suggested that the government adopt measures to incorporate regulatory cooperation and joint working, such as aligned supplementary duties including promoting benefits for consumers and data subjects and duties to consult and cooperate (The Digital Regulation Cooperation Forum 2021c).

As a voluntary forum, DRCF facilitates dialogue between regulators that concerns digital issues. However, it does not provide formal advice or direction to its members. (Competition and Markets Authority 2022a). This is quite problematic as in case of a disagreement or potential conflict between two regulatory bodies the DRCF is not able to give guidance and direction to avoid deadlock. This adversely affects its ability to promote coherence and collaboration where regulatory regimes overlap.

The House of Lords Communications and Digital Committee welcomed the creation of the DRCF and noted that this was a small step in the right direction. However, the committee suggested that DRCF's current approach to cooperation between its members should be formalised with the introduction of statutory measures such as new duties to consult, and the creation of statutory information-sharing mechanisms between these four regulators (the House of Lords Communications and Digital Committee 2021). The non-statutory and voluntary nature of the DRCF can be seen to represent an inherent potential for unresolved conflict to the detriment of outcomes as it is not clear how the DRCF would ensure alignment on policy priorities between regulators and manage potentially conflicting objectives between various regulators. For instance, in a case like Google's 'Privacy Sandbox' browser changes, if there is any potential conflict between the ICO and the CMA, the DRCF cannot resolve the issue and cannot determine which regulator should take precedence.

Both the House of Lords Communications Authority and Digital Committee advocated the establishment of a statutory body to coordinate digital regulation to prevent the gaps between the remit of different regulators (Newson 2022). The Government rejected this suggestion and argued that non-statutory forms of coordination have an important role to play in delivering more joined-up and effective regulatory interventions, however, it acknowledged that there may be situations where statutory coordination measures may be necessary (Newson 2022).

Only four regulators are included in the DRCF

Currently, the full members of the DRCF are the Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO), the Office of Communications (OFCOM) and the Office of Financial Conduct Authority (FCA). As noted by the LSE's Law, Technology and Society Research Group, the formation of the DRCF has not only

led to the consolidation of power amongst the big four regulators, but it also represents a missed opportunity to have access to the resources and perspectives of other bodies that have relevant expertise in digital issues (LSE Law, Technology and Society Research Group 2021, par. 3). As noted by Professor Andrew Murray,

In their workplan, the DRCF are talking about things relating to children and children's rights, but there is no seat at the table for the Children's Commissioner, who has a statutory duty to represent the interests of children in England and Wales. (Evans and Murray 2021)

As pointed out by the LSE Law, Technology and Society Group the DRCF members could have included several bodies and regulators with expertise and interests in digital issues: including the Centre for Data Ethics and Innovation, the Alan Turing Institute, regulators such as the Children's Commissioner, the Advertising Standards Authority, the Gambling Commission, and the Internet Watch Foundation. (LSE Law, Technology and Society Research Group 2021, 17). In addition, it is not clear why at its inception only three regulators are involved in DRCF, whilst some obvious candidates such as National Cyber Security Centre (NCSC) are not (Sutherland 2021, 4). In other words, the fact that the DRCF is a rather exclusive body is concerning as it suggests that the DRCF is unlikely to achieve its objective of collaboration with the many various stakeholders that have expertise on diverse digital issues.

As mentioned by Abrusci, the four regulators are legally bound by their remits and this limits their ability to extend their work to new adjacent areas and diminishes the possibility of them filling possible gaps (Abrusci 2021, par. 4).

According to the DRCF terms of reference, the DRCF membership is open to independent public sector bodies with statutory powers for regulating digital services where there is a significant overlap with the work of the full DRCF members (Competition and Markets Authority 2022a). Where the eligibility criteria are met, whether to accept a new regulator is at the discretion of the existing four members and the decision requires unanimous agreement from member regulators (Competition and Markets Authority 2022c). Arguably, the unanimous agreement requirement is too burdensome, and it may make it very difficult for new members to join DRCF. Instead, a new member could have been accepted by a simple majority of the four regulators. This is likely to have an adverse impact on the DRCF as it may not be able to tap into the expertise and capacities of other regulators to carry out its functions effectively. Furthermore, the fact that DRCF membership is only open to independent public sector bodies with statutory powers significantly limits DRCF's ability to tap into relevant expertise.

To ensure that relevant expertise is included with the DRCF, other regulators and relevant stakeholders should be able to be invited to DRCF meetings and let their views be known. In this regard, if full membership is not a possibility, perhaps some key stakeholders can act in an advisory capacity with clearly defined rights and obligations. Furthermore, moving forward there should be some detailed guidance which clarifies how, and through which means other stakeholders could engage with the DRCF and share their expertise.

The DRCF does not have enforcement power

As the DRCF only acts as a voluntary forum, it does not have any enforcement power as its opinion is merely advisory. This, arguably, makes the DRCF a toothless body and makes it

hard to achieve its key objectives pertaining to coherence and collaboration. For instance, in an ongoing case, if the ICO refuses to share information with the CMA or collaborate with the CMA or vice versa, DRCF cannot step in to ensure coherence and collaboration. Besides, there is a real risk that a company may be subject to investigation by several regulators as the conduct in question may violate various laws such as data protection and competition law and the remedies suggested by different regulators may conflict and even undermine the impact of the other regulator.

As a result, there may be a significant duplication in enforcement costs. If the DRCF had enforcement power, all regulatory bodies could have been consulted and following the consultation a final decision could be enforced by the DRCF which could significantly reduce costs, the risk of over-enforcement and conflicting decisions. In other words, to be an effective body the DRCF should be able to act as a one-stop shop. In an issue that concerns the remit of several regulators, DRCF should be able to act as an overarching regulatory body and should be able to make the final decision for an effective regulatory response to digital issues. Alternatively, where there is a divergence/disagreement between various regulators the DRCF should be able to act as a mediator to resolve the issue.

The DRCF and its members do not have any accountability to the Parliament, and the DRCF does not have an independent chair

As the remit of the regulators in the online sphere extends continuously (as demonstrated in the case of Ofcom and the ICO entrusted with additional and very significant responsibilities) these bodies including the DRCF must be held accountable. As put forward by Normanton, regulators have a liability to explain and justify what they do and how they undertake their responsibility (Normanton 1971). Regulators should be accountable for cost-effective regulation which meets well-defined and sensible objectives. (The House of Lords Select Committee on Constitution 2004). Regulators' accountability can be achieved by the duty to explain; by exposing them to scrutiny and by the possibility of an independent review (House of Lords Select Committee on Constitution 2004). However, as evidenced in the case of OFCOM, there is a systematic problem of regulatory accountability and in particular accountability to the Parliament. (LSE Law, Technology and Society Group 2021, par. 25). All regulators in the UK are quite transparent in the way they perform their tasks. For instance, all regulators publish policy statements, position papers, annual reports and workplans but none of these substitute or override the accountability and oversight requirements. (LSE Law, Technology and Society Research Group 2021, par. 26). There is currently no functional accountability framework for any regulator in the digital space, and transparency is not a replacement for accountability and oversight (LSE Law, Technology and Society Research Group 2021, par. 26).

DRCF also lacks accountability as it lacks statutory footing and merely acts as a voluntary forum. Currently, the DRCF publishes a workplan and all its work is quite transparent but its workplan and the work undertaken by the DRCF are not subject to Parliamentary scrutiny and oversight.

Furthermore, as it is currently designed the DRCF may suffer from a power imbalance between regulators and without an independent chair or procedures in place such power imbalances may not be effectively addressed (Abrusci 2021, par. 5).

DRCF's horizon scanning ability is limited

As put forward by the House of Lords Communications and Digital Committee, to keep pace with technological changes and to determine future challenges forecasting/horizon scanning is needed (The House of Lords Communications and Digital Committee 2021, par. 11). In this regard the DRCF has indeed a very important role to play.

The DRCF stated that they would be 'pooling' their existing horizon scanning activities as individual regulators to take a comprehensive view of developments across digital markets to spot gaps and to coordinate their regulatory response (Digital Regulation Cooperation Forum 2021a). This is a welcome development in terms of achieving collaboration and coordinated action. However, as agreed by DRCF witnesses Stephen Almond, Director of Technology and Innovation at Information Commissioner's Office and Kate Davies, Public Policy Director at Ofcom, there is room for improvement with regards to expanding DRCF's horizon scanning activities particularly when it comes to recruiting experts with the right skill set. (Communications and Digital Committee 2021a, Q1). As mentioned by several witnesses, recruiting the right people to work in DRCF and the other four regulators remains a challenge as these bodies cannot match the salary offered by big-tech companies (Communications and Digital Committee 2021a, Q6). Tabitha Goldstaub, Chair of the AI Council, also pointed out that regulators do not have the right skillsets to deal with all the new problems posed by new technologies such as AI. (Communications and Digital Committee 2021b, Q44) Nevertheless, Professor Andrew Murray pointed out that a lot of horizon scanning activities are undertaken by universities and academic establishments and that there are highly skilled people who will not work for the regulators (Evans and Murray 2021, Q19). Hence the DRCF needs to find a way to incorporate and use the expertise of others such as academics more effectively without duplicating existing work.

Another issue concerning the horizon scanning ability of the DRCF is that when conducting horizon scanning on digital regulation, the DRCF's views are prominently shaped by the views of the four regulators. Hence, there is a need to enhance DRCF's horizon scanning capabilities beyond leveraging existing expertise by solidifying relationships with international partners as well as by engaging with key stakeholders such as platforms, consumers, academics, and NGOs. (Communications and Digital Committee 2021a, Q1).

How to make the DRCF more effective?

Below some ways of making the DRCF more appealing and effective will be discussed.

The DRCF should be placed on a statutory footing with a duty on regulators to cooperate, coordinate and share information

As argued by the Committee, as a voluntary forum DRCF may not achieve its goals of promoting greater coherence where regulatory regimes overlap, as well as achieving collaboration between regulators and facilitating information sharing, as there is no statutory duty for the four regulators to do so.

As pointed out by Abrusci drawing inspiration from the financial sector,⁷ some statutory duties could be introduced for DRCF regulators such as a duty to cooperate and coordinate, which could make collaboration between regulators more sustainable (Abrusci 2021, par. 4). The introduction of statutory duties is also supported by the committee and the DRCF itself. In its written evidence pertaining to the House of Lords Communications and Digital Committee inquiry into Digital Regulation, DRCF acknowledged that some additional mechanisms to support appropriate information sharing and proactively consult partner regulators on matters relevant to their regulatory objectives may be required to dismantle potential barriers to joint working (Digital Regulation Cooperation Forum 2021a, par. 51).

Therefore, DRCF members should have statutory duties to cooperate, consult with each other as well as share information. This would allow them to share their powers and jointly regulate when there is an overlap. Furthermore, to avoid potential divergence/disagreements between various regulators DRCF could have a statutory duty to act as a mediator to attempt to resolve issues. Unless these statutory duties are formalised in future legislation the scope of joint work between regulators may be predictably limited.

The membership of DRCF should be extended to other statutory regulators and beyond

As noted above, for the time being, the full members of the DRCF are the Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO), the Office of Communications (Ofcom) and the Financial Conduct Authority (FCA). To make the DRCF an inclusive body and to improve its ability to tap into the expertise and enhance its horizon scanning abilities, there is a need to increase the number of full members. As mentioned by the LSE Law, Technology and Society Research Group other bodies and regulators such as the Centre for Data Ethics and Innovation, the Alan Turing Institute, the Children's Commissioner, the Advertising Standards Authority, the Gambling Commission, the Internet Watch Foundation are all bodies that have expertise and interest in digital issues which could have been offered a place at the table (LSE, Law, Technology and Society Group 2021, par. 17). In addition to other bodies and regulators there are a significant number of NGOs and non-profit companies such as Privacy International, the Open Rights Foundation, the Open Data Institute which can support and contribute to the work of the DRCF.

In the light of above, even if full membership could not be granted to all relevant stakeholders such as the NGOs, academics, and digital companies, it should be possible to grant these stakeholders observer status and set up regulator meetings between the DRCF and them to enhance the collaboration and dialogue where their expertise and experience is required. DRCF could arrange quarterly (or more frequent meetings) inviting academics working in the field of data protection, finance, emerging technologies, competition law, and artificial intelligence to their meetings and invite their opinion on digital issues depending on the meeting. For instance, if the discussion involves the right to privacy and data, the Open Data Institute and Privacy International could join the meeting and share their views and expertise with the DRCF. Furthermore, thematic research grants could be allocated to researchers and universities to conduct research on pertinent digital issues.

The DRCF should have enforcement powers

Arguably, to have effective regulation in the digital sphere, rather than being merely a coordinator, DRCF should have the power to make decisions and enforce them. As discussed earlier, in a case involving data protection and competition law the DRCF should be able to consult with all stakeholders, determine the remedy and enforce it against the relevant technology company.

This proposition is likely to be quite challenging as the regulators are likely to oppose this for the fear of losing remit and power. Nevertheless, in the long run, to make the DRCF an effective body there is a need for a broader enquiry and a process to ascertain a more robust mandate for the DRCF.

The DRCF should be accountable to Parliament

As mentioned above the DRCF does not provide formal advice or direction to its members (Competition and Markets Authority 2022a). As such DRCF is not accountable for the delivery of its functions. Hence, there is clearly a need for creating a robust oversight and reporting framework for both statutory and non-statutory bodies (the LSE Law, Technology and Society Research Group 2021, par. 9). For instance, as recommended by the committee Report (the House of Lords Communications and Digital Committee 2019, par. 244) the DRCF could create quarterly reports, and this could be overseen by a joint committee of the Parliament to overcome accountability and oversight problems. The government stated that it agreed with the committee that parliamentary oversight has an important role in scrutinising the development of digital regulation but there would be a risk of duplication of the work of existing committees in both Houses if a new joint committee is launched. (Department for Digital, Culture, Media and Sport 2022b, par. 23) This is an unfortunate statement as a new committee that is devoted to digital regulation is sorely needed and the new committee could build on the work of existing committees rather than duplicating their work.

Furthermore, to assure DRCFs impartiality and accountability, independent non-executive members should be appointed, including an independent chair (The House of Lords Communications and Digital Committee 2021, 2).

DRCF's horizon scanning must be extended beyond the four regulators

As discussed above to improve its horizon scanning powers the DRCF should appeal to people with the right skill set. As the government may struggle to compete with digital tech companies in terms of salary other non-financial incentives such as flexible working, part time work can be offered to make working at the DRCF and other regulators more appealing. Also, people with the right skillset could work for the DRCF in an advisory capacity on a temporary basis rather than on a permanent basis.

Furthermore, the horizon scanning ability of DRCF is limited as DRCF's views are prominently shaped by the views of the four regulators as well as the other regulators. Hence, it is paramount that DRCF engages with other relevant stakeholders in its horizon scanning efforts and has a regular dialogue with them.

In its workplan for 2022–2023, DRCF agreed that its engagement with the wider regulatory stakeholders is crucial (Digital Regulation Cooperation Forum 2022b). Until now DRCF had engaged with regulators outside the DRCF membership via quarterly roundtables. Since September 2021, three meetings were held with various regulators. (Digital Regulation Cooperation Forum 2022a). Perhaps the frequency of these meetings could be increased. Roundtables with different regulators and relevant stakeholders could take place every two months to increase the dialogue and tap into the expertise of other regulators.

In their workplan, DRCF also stressed that they will strengthen and broaden engagement with other stakeholders by building stronger connections with academia and continuing to engage with international partners, as well as meeting with civil society groups to raise awareness of their work and continue to engage with the Government and the Parliament to ensure a joined-up approach to digital regulatory issues (Digital Regulation Cooperation Forum 2022b). This is very reassuring, nevertheless, there is clearly a need for more detail as to how this agenda is to be realised and how the DRCF would strengthen and formalise links with industry and academia and other relevant stakeholders. For instance, to strengthen links with academics and the industry, the DRCF could create a database with the name of experts, their affiliation and their contact details and reach out to them when their expertise is needed.

The DRCF launched a new digital regulation research portal in April 2022. At the time of writing, this portal brings together 131 reports produced by the DRCF and other regulatory bodies pertaining to emerging and future digital developments such as the benefits and harms of algorithms and emerging technologies shaping the future of communications (Competition and Markets Authority 2022b). This is a very useful initiative toward collaboration with other regulatory bodies. It should be noted that there are quite a few academics, NGOs and other civil society organisations researching digital regulation and there is a vast number of reports and studies in this field. Hence an ‘open-source curation role’ for the DRCF research portal could give visibility to important work across stakeholder groups, and it could be a particularly useful tool to enhance dialogue and joint work between diverse stakeholders and regulators.

Furthermore, there should be clear mechanisms and procedures in place to ensure that important findings that result from the DRCF’s horizon scanning activities are communicated to the government and Parliament in a timely manner to inform policy making and to enable effective regulatory development.

More importantly, particularly in the aftermath of Brexit, it is very important for DRCF to liaise with other European bodies such as the European Commission, the European Data Protection Board, national European regulators, and other international bodies to stay abreast of new developments in the EU and other parts of the globe, as digital issues are not constrained to one jurisdiction. The full members of the DRCF, such as the ICO, have links to other international bodies such as the European Data Protection Board but there is a need for the DRCF to also have these links with relevant European and international counterparts without relying on its members as its members can change over time. Hence the DRCF should explain in its next workplan how it intends to collaborate with international partners and make some concrete proposals as to how its international collaboration can be strengthened and expanded.

Could the work of the DRCF have appeal beyond the UK?

As pointed out by the LSE Law, Technology and Society Group, a Digital Authority as suggested by the House of Lords Communications Authority could have been more inclusive, and it could have addressed accountability and oversight problems faced by the DRCF as well as provided global leadership in regulatory co-operation. (LSE Law, Technology and Society Research Group 2021, par. 10) Arguably, in its current form DRCF has limited appeal to other jurisdictions, as it has no international horizon scanning capability as exhibited by the European Data Protection Board pertaining to data protection. (LSE Law, Technology and Society Research Group 2021, par. 12). As pointed out by Sally Sfeir- Tait there is strong international coordination in financial services regulation, however, the area of digital regulation is still in its infancy and developing international standards pertaining to digital regulation will be the biggest challenge for the next 10 years (Communications and Digital Committee 2021c, Q12).

Subsequent to the establishment of the DRCF, the Netherlands also followed suit. In the Netherlands, on October 2021, Netherlands Authority for Consumers and Markets (ACM), the Dutch Data Protection Authority (AP), the Dutch Authority for the Financial Markets (AFM), and the Dutch Media Authority (CvdM) launched the Digital Regulation Cooperation Forum (SDT) to work more closely to strengthen oversight of digital and online activities (Authority for Consumers and Markets 2021). However, like the DRCF, CvdM has limited members, and this may adversely impact its horizon scanning capabilities and its ability to tap into the expertise of other regulators.

Furthermore, on March 2022, the Australian Competition & Consumer Commission (ACCC), Australian Communications and Media Authority, Office of the Australian Information Commissioner and Office of the eSafety Commissioner jointly formed the Digital Platform Regulators Forum (Australian Competition & Consumer Commission 2022). The main aim of the Digital Platform Regulators Forum is to enhance cooperation and information sharing between digital platform regulators including approaches to regulation (Australian Competition & Consumer Commission 2022).

It is submitted that to have an international appeal all these regulatory bodies need to be more inclusive and have better processes in place to enhance dialogue and collaboration with all key stakeholders including statutory regulators, non-statutory regulators, academics, NGOs, companies, civil society, and other relevant stakeholders.

As argued by Marcus, the DRCF could be an inspiration for the EU and the EU could also put in place a coordination body similar to DRCF either in a separate legislative measure or as an amendment to the existing legislative measures (for instance, the Artificial Intelligence Act), as this body will have the potential to mitigate the risk of loss of coherence amongst both existing and expected legislation of digital services as well as the risks of lack of coherence between the Member States and the EU institutions (Marcus 2022, 5).

As all the above are relatively new bodies, time will show whether other jurisdictions including the EU and USA will have similar bodies to enhance cooperation between various regulators, or if alternative routes or solutions will be explored. However, given the need to have coordinated and coherent approaches to digital issues, it is expected that there will be more bodies mirroring the work of the DRCF in other jurisdictions.

Conclusion

The Digital Authority, designated to be an inclusive, open, and accountable body, was perhaps the best option to achieve collaboration in digital regulation. Arguably, this is a missed opportunity for the UK to be a pioneer in digital regulation.

Nevertheless, establishing a Digital Authority in addition to the DRCF would have added an additional layer and further complexity to the already congested regulatory space. (Abrusci 2021, par 9). As suggested by Carnegie UK, the government's focus should be on getting on with the regulation itself, not the distraction and costs of establishing new organisations which could also disrupt the productivity of the existing regulators (Carnegie Mellon 2021, par. 19).

As noted by several commentators (Evans and Murray 2021; Carnegie UK 2021; Abrusci 2021 and Terzis and Veale 2021) the DRCF is a small but important step in the right direction in terms of achieving a joined-up approach to digital regulation. It could indeed be a very successful forum for discussing emerging regulatory needs on digital technologies. Nevertheless, in its current form, it may not fully achieve its objectives of promoting greater coherence and collaboration and may not be well placed to anticipate future developments.

Some shortcomings of the DRCF need to be addressed

First, the DRCF needs to be placed on a statutory footing and certain statutory duties such as a duty to coordinate, a duty to cooperate, a duty to consult with each other and a duty to inform should be introduced. Furthermore, the DRCF should be able to act as a mediator when needed to resolve any disputes or divergence between various regulators. In addition, to inform and influence policy making pertaining to digital issues the DRCF should prepare quarterly/regular reports to be considered by the government and the Parliament.

Second, the DRCF membership should be extended to other regulatory bodies, non-statutory bodies, and other relevant stakeholders such as digital companies, academics, and NGOs, to improve its horizon scanning capacity. Even if full membership could not be granted to all relevant stakeholders, there should be some processes in place to strengthen and formalise links with other stakeholders including industry and academia. These stakeholders could be consulted by the DRCF when necessary and on a regular basis. If full membership is not a possibility, perhaps some key stakeholders can act in an advisory capacity with clearly defined rights and obligations. As discussed earlier, relevant stakeholders could be granted an observer member status depending on the digital issue to ensure transparency and encourage collaboration. For instance, if the digital issue revolves around the misuse of data, relevant stakeholders such as the Centre for Data Ethics and Innovation, the Open Data Institute and representatives of digital companies could be offered a place at the table. Only in this way, the DRCF can achieve its objective of collaboration and sharing of best practices. Hence, it would be immensely useful if the DRCF could publish a document detailing how it intends to engage and consult with its community of stakeholders.

Third, where there is overlap between the remit of various regulators, the DRCF should be equipped with enforcement powers to avoid duplication of resources and act as a

'one-stop shop'. This will ensure that the same company will not be subject to several different investigations for the very same conduct and that the remedies proposed are well coordinated and well crafted. For instance, in a conflict that involves data protection and competition law, DRCF can consult with both ICO and CMA and a final decision on the issue can be made by the DRCF, which will reduce enforcement costs and burdensome/ conflicting remedies by different regulators. However, it is acknowledged that this is a difficult proposition as none of the regulators would want to lose their remit and power. Hence, if there is a discrepancy or disagreement between two regulators, the DRCF should at least be able to act as a mediator to attempt to resolve the issue, and its decisions should be followed by the relevant regulatory body/bodies.

Fourth, the DRCF needs to be accountable to the Parliament. As recommended by the Committee Report, the DRCF should create quarterly reports, and this should be overseen by a joint committee of the Parliament (the House of Lords Select Committee 2019, par. 244). Despite the current reluctance of the government to establish a joint committee devoted to digital regulation that oversees the work of DRCF and other regulators, it is necessary to revisit this position to have a well-functioning digital regulatory system. In addition, the appointment of an independent chair and independent non-executives would also contribute to making the DRCF an impartial body free from Government pressure.

Finally, the DRCF's horizon scanning capability needs to be strengthened and expanded by recruiting staff with relevant expertise working directly for the DRCF, but more importantly by taking into consideration the views of other stakeholders including statutory, non-statutory regulatory authorities, the industry, and academics. As noted above, in this regard the DRCF's digital regulation research portal could serve an important role here as it can be used to curate and give visibility to work produced by other relevant stakeholders such as academics and NGOs. To enhance its horizon scanning ability, the DRCF should publish procedures and detail how links with other stakeholders will be established, how these relations are to be formalised and whether some funding could be made available to academia and NGOs to conduct research in pertinent digital issues such as AI, encryption etc. Furthermore, to have exemplary appeal beyond the UK, the DRCF should have international horizon scanning capacity and establish stronger links with the existing European and international bodies working on digital regulation to exchange views and share best practices. As mentioned earlier, both the Netherlands and Australia have launched a digital regulators forum to enhance cooperation in digital matters. Hence the DRCF should have a regular dialogue with these two bodies to exchange views and share best practices. Given the pressing need for coherence and collaboration regarding digital issues, it is likely that other jurisdictions will follow suit and there will be other international bodies that DRCF can engage with in the near future.

It is worth noting that the DRCF was only established in July 2020, hence it is certainly premature to assess how successful it has been in terms of achieving its objectives. Perhaps a five-to-ten-year perspective will be more sensible to assess whether the DRCF has been successful in coordinating digital regulation. One very clear thing is that pressures to change the form and functioning of the DRCF will intensify (Schlessinger 2022, 59).

To conclude, the jury is out on whether the DRCF will have exemplary appeal beyond the UK. However, if the above shortcomings are addressed and its capacity to work with European and international partners is enhanced, this is still very much a possibility.

Notes

1. Article 102 TFEU prohibits the abuse of a dominant position.
2. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
3. See Bundeskartellamt B6-2216 Facebook Inc. i.a. – The use of abusive business terms pursuant to Section 19 (1) GWB. English version of the decision. https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=69BFDBC781FAB4798A23B4B3307FEFD5.1_cid362?__blob=publicationFile&v=5.
4. See Case- 252/21, Facebook and Others para 78.
5. Ibid.
6. Case Number 509072.
7. In the financial sector, there is currently a duty to cooperate for the Payment Systems Regulator, Prudential Regulation Authority Bank of England and Financial Conduct Authority.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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