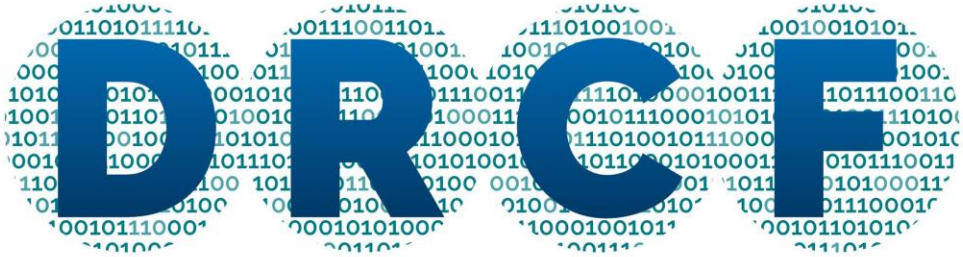

Digital Regulation Cooperation Forum

CMA Competition & Markets Authority

Ofcom making communications work for everyone

ico. Information Commissioner's Office

Digital Regulation Cooperation Forum: Embedding coherence and cooperation in the fabric of digital regulators

Introduction

1.1 Our ambitions for the DRCF represent a true innovation in the breadth and depth of cooperation between regulators. We see this cooperation as essential to ensuring that the regulation of digital services delivers fully for consumers and citizens and works well for businesses. In November of 2020, the UK Government asked the CMA, ICO and Ofcom (the members of the DRCF at that time) to give their view on the challenges of delivering effective digital regulation and whether further measures may be needed to support cooperation between digital regulators. Although the FCA joined the DRCF on 1 April 2021, this document sets out the views of the CMA, the ICO and Ofcom on these issues.

1.2 Consumers and business rightly expect regulators to be joined up and by working together, we will be better able to respond to the scale and global nature of large digital platforms and the speed at which they innovate. Through the DRCF workplan for 2021-22 we plan to engage with our key shared challenges, in the absence of legislative change, recognising this as the fastest route to securing benefits. Our cooperation through the DRCF will help us provide policy coherence in the public interest, respond strategically to industry and technological developments, and build shared skills and capabilities.

1.3 With the DRCF already up and running, we are confident that we can engage with these challenges and deliver benefits through our existing cooperation work. However, we also recognise the potential limitations of a voluntary approach. It is right to consider whether further measures are needed. To be effective, long term, we see potential barriers to our cooperation and joint working that need to be addressed, and possibly the need to develop a legislative framework that embeds cooperation in the digital regulatory landscape.

1.4 In this document we provide a summary of our ideas to address barriers to cooperation, and measures to strengthen digital regulatory cooperation in the future. In our view, the Government may want to consider measures to support cooperation between digital regulators in the following three areas:

- supporting appropriate information sharing;
- embedding coherence and cooperation in the statutory framework for digital services; and
- providing transparency and accountability.

1.5 Establishing an appropriate framework for cooperation between regulators is ultimately a matter for the Government, and we welcome further discussion on this. Below we set out further details on the areas identified above. At the end of this document we provide a summary of our recommendations.

Supporting appropriate information sharing

1.6 The ability of digital regulators to appropriately share information, where necessary to carry out their functions, will be key to effective cooperation across the digital regulatory landscape. The existing rules around legislative **'**information sharing gateways' were primarily designed to provide a vehicle for a regulator to share information for its own purposes and to allow a narrow route for information to be passed on, by request, from one agency for another agency's purposes. Information sharing gateways do not generally provide for the disclosure of information for the purposes of joint or coordinated activities.[1]

1.7 We recommend that the Government reviews the information sharing gateways between digital regulators to ensure that they are suitable for future expected cross-regulatory engagement, and appropriately supportive of regulators' actions in carrying out their functions with respect to online operators. The objectives of a revision would be to:

- maximise the potential for regulatory collaboration by facilitating the exchange of data and other information held by regulators for the purposes of cross-cutting work;
- ensure that the legitimate interests of stakeholders in respect of their information are protected, and reassure stakeholders regarding the treatment of confidential information;
- remove uncertainty and minimise legal risk in sharing information;
- facilitate development of a shared understanding of policy issues between regulators; and
- underpin any other new measures that support the aims of cooperation between digital regulators, by embedding the means for cooperation into the administrative processes of relevant regulators.

[1] There may be instances where it is appropriate for a regulator to disclose information for such activities where it is necessary for the purpose of exercising its own functions (e.g. the allocation of cases where regulators have concurrent powers).

1.8 By sharing relevant information, regulators will be able to work jointly on cross-cutting issues or share expertise. As set out in our workplan, we already intend to update our Memoranda of Understanding (or 'MoUs') to ensure that they reflect any new responsibilities for digital regulation, the potential for multilateral joint projects, and the aims of coordination in online regulation. However, MoUs are voluntary agreements between regulators, intended to provide clarity for regulators and their stakeholders. They do not change the underlying legal frameworks for information sharing.

1.9 In order to maximise the potential of joint work on strategic projects and specific regulatory activities, as well as deliver innovative and impactful outcomes, improved provisions for information sharing are needed. At the least, this might require a change to the Enterprise Act to add an information gateway for the purposes of cooperating on digital regulatory matters, listing the relevant functions of the ICO, Ofcom and the DMU.

1.10 A more expansive approach to revising gateways aimed at supporting collaboration across the wider regulatory landscape could also be considered. For example, putting in place legislative provisions to support information sharing for the purposes of joint or coordinated working between a wider range of digital regulators. However, the implications for industry confidence and clarity as well as any impact on the function of other regulators would need to be carefully considered in conjunction with any benefits for digital regulatory cooperation.

1.11 In making any changes to information sharing gateways, the Government would need to ensure that there remain appropriate checks and balances on information disclosure. Such controls are essential to ensure that the companies who are required to share information with us have full confidence that their legitimate interests are protected with respect to confidential information. Appropriate controls on information sharing and the treatment of confidential information are already recognised in legislation and any wider sharing of information beyond the purpose for which it was collected should be similarly subject to controls.

Current information sharing arrangements between ICO, CMA and Ofcom

Part 9 of the Enterprise Act 2002 ('the Act') imposes a general restriction on the disclosure of information relating to the affairs of an individual or any business of an undertaking ('specified information') by a public authority, which it acquires in connection with the exercise of its functions under the Act or any of the legislation listed in Schedule 14 to the Act, which includes the Competition Act 1998.

Public authorities are permitted to disclose specified information via certain 'gateways', including (i) with the consent of the individual or business that provided the information; (ii) to a person for the purpose of facilitating the exercise by the authority of any of its own statutory functions, or (iii) to a person for the purpose of facilitating the exercise by that person of any function he has under the Act or any of the legislation listed in Schedule 15 to the Act, which includes the Competition Act 1998 and the Communications Act 2003. The information must not be used by the person to whom it is disclosed for any other purpose than in relation to those statutory functions.

When disclosing specified information, the public authority must exclude any information whose disclosure (i) it regards as contrary to the public interest, (ii) it thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or (iii) it considers might significantly harm the interests of the private individual to whom it relates. The authority must also consider the extent to which the disclosure of the information is necessary for the purpose for which it is permitted to make the disclosure.

By virtue of these legislative provisions, the CMA and Ofcom may disclose specified information to each other in order to facilitate the other's exercise of its functions under the Act or other specified legislation. However, the list of specified legislation does not include the ICO's functions under UKGDPR or the Data Protection Act 2018, so the ability of the ICO to receive and disclose information is inconsistent with that of the other DRCF partners. Ofcom also has specific gateways for information sharing under the Communications Act 2003 but again these are limited to facilitate the carrying out of particular functions by Ofcom or another person, rather than to enable joint or coordinated working.

The disclosure of information by the ICO is governed by the Data Protection Act 2018, which prohibits the disclosure of confidential information which has come to the ICO in the course of carrying out its functions unless it is made with lawful authority. Lawful authority includes (among other things) a disclosure that is made for the purposes of, and is necessary for, the discharge of the Commissioner's functions or where, having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest. The Data Protection Act 2018 also confirms that in most circumstances no other law which prohibits or restricts the disclosure of information will preclude the sharing of information with the ICO where to do so is necessary for the discharge of the Commissioner's functions.

Embedding coherence and cooperation in the statutory framework for digital services

1.12 The duties and objectives of regulators play an essential role in setting out the scope of issues that individual regulators can consider as they exercise their functions. We recommend that the Government adopts measures to incorporate regulatory coherence and cooperation into the duties of digital regulators. The objective of such changes would be to:

- address any risks that the duties and objectives of digital regulators impede the delivery of coherent regulatory decisions; and
- ensure that digital regulators are incentivised and empowered to put in place mechanisms to support cooperation in the future.

1.13 The objectives of the CMA, the ICO and Ofcom span areas such as promoting competition, the regulation of communications services, and the protection of people's data rights. This means that as we carry out our work, potential interactions will need to be appropriately surfaced and addressed to make sure that our individual regulatory solutions take due account of our range of perspectives. For example, the CMA's Google Privacy Sandbox investigation, described in our workplan, presents interlinkages between data protection and competition.

1.14 We see a risk that the current statutory framework may impede digital regulators' ability to cooperate effectively and deliver coherent solutions. One concern is that digital regulators' duties and objectives could limit how effectively they can give due weight to policy concerns outside of their remit, even where such concerns are relevant to supporting coherent outcomes.

1.15 To make sure that the regulation of digital services is fit for purpose in the future it may also be appropriate to embed the aims of cooperation into the statutory framework. This would ensure that identifying, surfacing and addressing interlinkages between digital policy issues continues to be a priority for digital regulators, and that they are empowered to put in place the appropriate mechanisms for cooperating to support this goal.

1.16 We have considered the following potential options:

- aligned supplementary duties;
- duties to consult; and
- duties to cooperate.

1.17 We explain these duties in more detail below, as well as further considerations for the implementation of any new duties to support cooperation.

Aligned supplementary duties

1.18 As described above, an important challenge for effective digital regulation will be ensuring coherence between the regulatory actions taken by different regulators that effect digital services. Government could consider taking action to ensure that, in pursuit of their own objectives, regulators are able to take into account the impact of their actions on other regulatory objectives outside of their functions. One approach to delivering this would be through a common set of supplementary duties, for example to 'promote the interests of consumers and citizens.' Together with the duty to cooperate (set out further below) this could provide regulators with a strong basis to work together to deliver outcomes in the overarching interests of consumers and citizens.

1.19 Currently the duties of the CMA, the ICO and Ofcom vary, both in their broad purpose and as to whether they require regulators to consider benefits to consumers (CMA), consumers and citizens (Ofcom) or data subjects (ICO). This reflects the scope and purpose of our respective functions. For example, the duties of the CMA reflect its role in promoting competition across the economy, while the duties of the ICO reflect its role in upholding people's information rights. As set out in our implementation considerations below, careful consideration would be needed to ensure that any new aligned supplementary duty is implemented in a way that did not unduly impact the scope or focus of regulators regarding their existing functions and duties.

1.20 The Digital Markets Taskforce (DMT) also considered this issue in its advice to government on a new Digital Markets Unit (DMU). The DMT explained that the DMU might need to consider a range of issues beyond promoting competition. For example, the DMU might need to take into account where action to promote competition could have implications for citizen's data rights. For this reason, the DMT suggested that that regime should have a duty to promote the interest of consumers and citizens through competition and innovation.[2]

1.21 Ofcom's principal duty provides a useful example of how a duty to 'promote the interests of citizens and consumers' can link across a range of policy objectives that affect the users of communications services and society as a whole.[3] Under Ofcom's principal duty, it can take into account a range of policy objectives, such as ensuring that there is effective competition between telecoms service providers and making sure that there is a range of companies providing quality television and radio programmes that appeal to diverse audiences in the UK.

Duty to consult

1.22 To support the transparency and effectiveness of consultations between regulators, the Government may wish to consider the benefits of specific obligations on regulators to consult with, and take account of, other agencies with expertise relevant to the decision being made.

1.23 As described above, there will be circumstances where regulators need to work together to deliver coherent outcomes. For example, where a competition authority, in pursuing pro-competition measures, needs to consider potential interactions with data protection, as noted in our workplan for 2021-22. We are, of course, alive to such concerns and each have clear legal obligations to undertake impact assessments as part of any consideration of a new action. We also have a general duty to consult and it is possible for individual agencies to respond to relevant consultations. More generally, we expect our close working through the DRCF to help expose issues which raise cross-regulatory policy concerns.

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[2] CMA, December 2020, A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce.

[3] UK Government, The Communications Act 2003, Section 3: General Duties of Ofcom. The Act outlines that Ofcom's principal duty, in carrying out its functions shall be—
(a)to further the interests of citizens in relation to communications matters; and
(b)to further the interests of consumers in relevant markets, where appropriate by promoting competition.

1.24 Despite our general duties to consult, we expect that there might be circumstances where specific formal engagement between regulators on a proposed action may be warranted. For example, where specific expertise or evidence plays an important role in a regulatory decision. In these cases, it will be important for consumers and for industry that such engagement is transparent, and that affected parties are able to understand and engage with these regulatory considerations. A duty to consult could also create better legal certainty for industry and regulators regarding the circumstances under which digital regulators may take into account the impact of their actions on wider policy concerns outside of their direct remit.

1.25 A specific duty for digital regulators to consult each other, where appropriate, regarding digital regulatory matters could ensure that these processes are carried out and with due transparency.

Duty to cooperate

1.26 The Government could further support regulatory coherence through placing a duty to cooperate on digital regulators. As described above, we see effective cooperation between digital regulators as essential for delivering coherent outcomes for people using digital services. Aligned supplementary duties combined with a duty to consult could help digital regulators formally seek input from each other and appropriately take account of responses. However, we recognise that digital regulators are likely to need to cooperate beyond this formal consultation. For example, to share information where appropriate and the ability to seek advice outside of formal consultation approaches.

1.27 Any duty to cooperate should provide explicit recognition of the need to take such action and support regulators in putting in place appropriate mechanisms to deliver coherent digital policy and ensure that they remain a priority in the future. Explicit duties to cooperate have been used in other regulatory situations. For example, cooperation is embedded in the legislation of regulatory authorities in the financial sector.[4]

[4] The Financial Service and Markets Act 2000 has a number of specific articles that embed cooperation into the heart of the duties of the FCA, PRA and Bank of England.

Duties to cooperate included in the Financial Services and Markets Act

Section 3q Co-operation by FCA with Bank of England
(1) The FCA must take such steps as it considers appropriate to co-operate with the Bank of England in connection with—
(a) the pursuit by the Bank of its Financial Stability Objective, and
(b) the Bank's compliance with its duties under sections 58 and 59 of the Financial Services Act 2012 (duty to notify Treasury of possible need for public funds and of subsequent changes).
(2) Co-operation under subsection (1) may include the sharing of information that the FCA is not preventing from disclosing

Section 13D Duty of FCA and PRA to ensure co-ordinated exercise of functions

(1) The regulators must co-ordinate the exercise of their respective functions conferred by or under this Act with a view to ensuring—
(a) that each regulator consults the other regulator (where not otherwise required to do so) in connection with any proposed exercise of a function in a way that may have a material adverse effect on the advancement by the other regulator of any of its objectives.
(b) that where appropriate each regulator obtains information and advice from the other regulator in connection with the exercise of its functions in relation to matters of common regulatory interest in cases where the other regulator may be expected to have relevant information or relevant expertise.
(c) that where either regulator exercises functions in relation to matters of common regulatory interest, both regulators comply with their respective duties under section 1B(5)(a) or 2H(1)(a), so far as relating to the regulatory principles in section 3B(1)(a) and (b).
(2) The duty in subsection (1) applies only to the extent that compliance with the duty—
(a) is compatible with the advancement by each regulator of any of its objectives, and
(b) does not impose a burden on the regulators that is disproportionate to the benefits of compliance.
(3) A function conferred on either regulator by or under this Act relates to matters of common regulatory interest if—
(a) the other regulator exercises similar or related functions in relation to the same persons,
(b) the other regulator exercises functions which relate to different persons but relate to similar subject-matter, or
(c) its exercise could affect the advancement by the other regulator of any of its objectives.
(4) “Objectives”, in relation to the FCA, means operational objectives.

Implementing new duties

1.28 The implementation of any new duties or objectives to support cooperation would require careful consideration to avoid unintended consequences. This includes ensuring coherence between any new duties or objectives, ensuring that there was no conflict or ambiguity with respect to the existing legislative frameworks of relevant regulators, and avoiding undue increases in the burden on regulators and associated impacts on decision-making time.

1.29 Any new duties would also need to be implemented in a way that provided clarity that there is no intention to expand the scope of the individual regulator’s functions beyond their primary purpose. The duties should act to inform the scope of considerations that can be

taken into account in the performance of those functions and the use of the regulatory tools provided. However, the justification for action should always remain rooted in regulators' primary functions (i.e. competition authorities to act in the interest of promoting competition and innovation and privacy regulators to protect privacy rights etc).

1.30 Digital regulators should also be obliged to provide transparency regarding where and how any wider considerations outside of their primary remit are taken into account. For example, where any of Ofcom's general duties conflict with each other, Ofcom is empowered to resolve that conflict in the manner that they think best in the circumstances. Where this is an important case it must publish a statement setting out: (a) the nature of the conflict; (b) the manner in which it has decided to resolve it; and (c) the reasons for its decision to resolve it in that manner. It may be appropriate for digital regulators to also be obliged to provide similar transparency on important matters.[5]

1.31 The Government may also need to consider how any additional duties, such as a duty to consult other digital regulators, are implemented in ways that do not unduly hamper regulators working efficiently to deliver timely decisions. One way to streamline any additional consultations would be to ensure that they are conducted concurrently with any industry consultation. We also anticipate that it would be necessary to limit the scope of any duties to appropriate 'digital matters.' Given potential challenges in defining digital matters, ensuring proportionality may also require allowing for regulatory discretion. For example, with regard to a duty to consult, regulators may need discretion to determine which issues require such consultation, perhaps with an additional obligation to explain where, in the regulator's view, consultation was not appropriate.

Transparency and accountability

1.32 Transparency and accountability are important levers to ensure that cooperation between digital regulators is effective, and deliver results for consumers, data subjects and citizens. By understanding and engaging with our agenda, industry and the wider public can have clarity on the scope of our work and help provide a challenge function. Our public workplan for 2021-22 sets the tone for our increasing public engagement and we expect increasing input and engagement from industry, wider stakeholders and the public. We will continue to build on this approach through an annual planning and reporting process, so that our plans for cooperation are clear, and we are held to account on our ambitions.

1.33 We also see merit in the Government considering mechanisms to enable it to input on its strategic priorities as they relate to digital services and platforms. There are existing established approaches for the Government to set out its strategic priorities that are relevant for regulators, such as the Statement of Strategic Priorities that the Government produces in relation to telecommunications, the management of radio spectrum, and postal services. Ofcom has duties to take into account such statements when carrying out relevant functions, explain what it intends to do as a consequence of these statements, and publish a

[5] UK Government, The Communications Act 2003, Section 3: General Duties of Ofcom.

review of progress over the relevant period.[6] This approach is clear and transparent and does not create additional risk in terms of regulators' ability to reach independent decisions.

1.34 Our suggestions for formalising regulatory objectives and duties could also enhance the transparency and accountability of our cooperation, for example setting out a clear articulation of the Government's view of the desirable scope of digital regulatory cooperation, and by clearly setting out how and when regulators address interactions between different regulatory remits.

Other mechanisms for supporting coherence in digital regulation

1.35 Prior to the introduction of the DRCF, the House of Lords recommended establishing a new Digital Authority[7] and Doteveryone proposed a new body called the Office for Responsible Technology.[8] The proposed objectives of these new digital bodies include building digital regulatory capacity, bringing together different policy perspectives to horizon scan and support coherence, and providing transparency, accountability and oversight of digital regulation.

1.36 As set out in this document, we see a real need for digital regulatory policy to be considered holistically and that shared challenges are addressed collectively. However, we also see risks associated with establishing a new digital body. To be effective, a new digital body would need appropriate expertise. There is a risk that building this capacity results in inefficient duplication and missed opportunities to leverage the existing skills of digital regulators. A new body focused solely on digital matters may also miss connections with the regulation of traditional sectors and services. In a fast-moving industry and policy context, additional layers of input and decision-making risk inadvertently slow down regulatory approaches and reduce clarity and certainty for industry.

1.37 In our view, an approach built on cooperation between digital regulators, such as the DRCF, is likely to be more efficient and effective. The DRCF will remain inherently plugged in to the concerns of people using digital services through its member's activities and research, can leverage their industry engagement, and can build on existing regulatory skills and capabilities. By harnessing our collective expertise, we can ensure that the digital landscape is regulated effectively, coherently and efficiently and that regulatory policy is developed in a responsive and holistic way. As described in our DRCF workplan, we see our cooperation bringing benefits for consumers, for businesses and to innovation. To support the ongoing transparency and accountability of the DRCF, we will publish an update and report on progress on our DRCF workplan for 2021-22 in 12 months.[9]

[6] UK Government, The Communications Act 2003, 2A Statement of strategic priorities.
[7] UK Parliament, 2019, Chapter 6: The Digital Authority.
[8] Doteveryone, 2018, Regulating for Responsible Technology: Capacity, Evidence and Redress: a new system for a fairer future.
[9] DRCF, March 2021, Plan of work for 2021-2022.

Summary of recommendations and options

1.38 The DRCF will allow us to be agile and to act with pace to deliver coherent regulation in the public interest, while still providing transparency and accountability for industry and wider stakeholders. Building on this approach, through further measures to strengthen this cooperation, could help ensure that the digital regulatory landscape is fit for purpose in the future. Our recommended actions and options for the Government to consider are set out below.

Recommendation 1: that the Government review information sharing gateways of digital regulators to ensure that they are suitable for expected cross-regulatory engagement in the future, and support the actions of our regulators in their functions with respect to online markets.

Recommendation 2: that the Government adopts measures to incorporate regulatory coherence and cooperation in the duties of digital regulators. Options include:

- aligned supplementary duties, for example to promote benefits for consumers, data subjects and citizens;
- duties to consult; and
- duties to cooperate.

We also see merit in the Government considering mechanisms that allow it to provide input on its strategic priorities with respect to digital services and platforms.