

THE EMERGENCE OF PLATFORM REGULATION IN THE UK

AN EMPIRICAL-LEGAL STUDY

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The emergence of platform regulation
in the UK: an empirical-legal study

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About the Creative Industries Policy and Evidence Centre (PEC)

The Creative Industries Policy and Evidence Centre (PEC) works to support the growth of the UK's Creative Industries through the production of independent and authoritative evidence and policy advice.

Led by Nesta and funded by the Arts and Humanities Research Council as part of the UK Government's Industrial Strategy, the Centre comprises a consortium of universities from across the UK (Birmingham; Cardiff; Edinburgh; Glasgow; Work Foundation at Lancaster University; LSE; Manchester; Newcastle; Sussex; Ulster). The PEC works with a diverse range of industry partners including the Creative Industries Federation.

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About the paper

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Abstract

Platforms have emerged as a new kind of regulatory object over a short period of time. There is accelerating global regulatory competition to conceptualise and govern online platforms in response to social, economic and political discontent – articulated in terms such as ‘fake news’, ‘online harms’ or ‘dark patterns’.

In this paper, we empirically map the emergence of the regulatory field of platform regulation in the UK. We focus on the 18-month period between September 2018 and February 2020 which saw an upsurge of regulatory activism. Through a legal-empirical content analysis of eight official reports issued by the UK government, parliamentary committees and regulatory agencies, we (1) code over 80 distinct online harms to which regulation is being asked to respond; we (2) identify eight areas of law referred in the reports (data protection and privacy, competition, education, media and broadcasting, consumer protection, tax law and financial regulation, intellectual property law, security law); we (3) analyse nine agencies mentioned in the reports for their statutory and accountability status in law, and identify their centrality in the regulatory network; we (4) assess their regulatory powers (advisory, investigatory, enforcement); and the regulatory toolbox of potential measures ascribed to agencies; we (5) quantify the number of mentions platform companies received in the reports analysed.

We find that Ofcom (the communications regulator) and the CMA (the Competition and Markets Authority) are the most central actors in the regulatory field, with the Information Commissioner (the data regulator) following close behind. We find that security- and terrorism-related interventions remain particularly obscure and hard to capture with a socio-legal analysis of public documents.

We find that the political focus is overwhelmingly on a handful of US multinational companies. Just two companies, Google and Facebook, account for three-quarters of the references made to firms in the documents we examined. Six Chinese firms are mentioned, and two EU firms. Not a single UK-headquartered company appears. This could be interpreted as a focus on the defence of national sovereignty that has crowded out questions of market entry or innovation in the UK.

We find that the regulatory agenda is driven by an ever-wider list of harms, with child protection, security and misinformation concerns surfacing in many different forms. We also identify an amorphous and deep disquiet with lawful but socially undesirable activities. We suggest that this ‘moral panic’ has engendered an

epistemic blind spot regarding the processual questions that should be at the core of rule-governed regulation: how to monitor (by way of information-gathering powers), trigger intervention, and remove and prevent certain kinds of content. Filtering technologies, processes of notification, redress mechanisms, transparency and audit requirements all need to be addressed. The question arises as to whether the emergent recourse to codes of practice or codes of conduct (for example delegating content moderation functions to private firms) will be appropriate to address the wide range of regulatory challenges now faced.

We delineate a further epistemic gap – the effects of platform regulation on cultural production and consumption. Platforms' roles as cultural gatekeepers in governing information flows (content identification, rankings, recommendations), and directing remuneration still remain poorly understood.

Key Words: Platform regulation, platform governance, algorithmic regulation, online harms, digital markets, theory of regulation, legal content analysis

1. Introduction: Platforms as an emerging regulatory object

Platforms are everywhere. They keep us connected, make markets, entertain and shape public opinion. A worldwide pandemic without this digital infrastructure would have unfolded quite differently. Still, the technological optimism that inflected the early years of the Internet is disappearing fast.¹ Giant digital firms are now seen as unaccountable multinational powers. They survey our private sphere and accumulate data, they dominate commerce, they mislead publics and evade democratic control.

A deep societal discontent has been engendered in new terms, such as 'fake news', 'online harms', 'dark patterns', 'predatory acquisition', 'algorithmic discrimination'. Since 2016, a flurry of policy initiatives has focused on digital platforms as a regulatory object of a novel kind. This is a global trend, with reports and interventions in major jurisdictions that compete in shaping a new regulatory regime.² It is also spawning an academic sub-discipline of platform governance, investigating the legal, economic, social, and material structures of online ordering (Gillespie 2018; Van Dijck et al. 2018; Flew et al. 2019; Gorwa 2019a/b; Suzor 2019; Zuboff 2019).

¹ According to *The Economist*, the scale has tipped from 'tech-optimism' to 'tech-lash' in 2013 (Economist 2013).

² The first legal reference to 'Online Platforms' as a distinct regulatory object is a Communication by the European Commission *Online Platforms and the Digital Single Market* (European Commission 2016). The first statutory intervention of a new kind arguably is Germany's 'Netz DG' legislation of 2017 which dispensed with the safe harbour that shielded internet intermediaries from liability for what their users do on their services (Netz DG 2017). The law defines its target as social networks with over 2 million users in Germany. In many jurisdictions, legislative interventions and inquiries have followed in close succession. In Australia, the Australian Competition and Consumer Commission conducted an inquiry into digital platforms (ACCC 2019), which led to the adoption of the News Media Bargaining Code in 2021 (News Media Bargaining Code 2021). In the EU, Art. 17 of the Copyright Directive (CDSM Directive 2019) provided for a new regime of intermediary liability for certain content sharing services, and the proposals for the Digital Services Act (European Commission 2020a) and Digital Markets Act (European Commission 2020b) outline new rules for digital platforms. In 2020, France adopted a new law on online hate speech (Avia law 2020), which was declared unconstitutional the same year. In the UK, following publication of the *Online Harms White Paper* (2019), the Government has committed to the introduction of an online duty of care, which would be overseen by an independent regulator, Ofcom (DCMS and Home Office 2020), and it has established a Digital Markets Unit under the aegis of the competition authority CMA (DBEIS and DCMS 2020). In Poland, a proposal for creation of a Council of Freedom of Speech (Rada Wolności Słowa) to police content removals online was tabled in 2021 (MS 2021). India has adopted a new set of rules for social media platforms, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021. In the US, the discussion on repeal or amendment of sec. 230 (CDA 1996) is ongoing, as is the Antitrust Subcommittee of the House Judiciary Committee inquiry into online platforms and market power.

Given that everybody is talking about platforms, it is unsettling that there is no accepted definition, certainly none that is sufficiently stable to guide a regulatory regime. Policy discourse mostly points to just a handful of US companies. In France, GAFA (Google, Apple, Facebook, Amazon) had become an acronym for American cultural imperialism by 2014 (Chibber 2014). As for the UK, we will show that in a sample of official documents that shaped public debate from 2018 to 2020, just two firms – Google and Facebook – have made up three quarters of the references to relevant enterprises.

What are platforms, this new class of regulatory objects? The concept of digital intermediaries is nothing new, with an established jurisprudence on intermediary liability developed since the mid-1990s derived from a definition of internet services.³ Broadcasting and press publishing regulators have an understanding of communication that may also apply to new media (Napoli 2019). Competition regulators rely on the concept of dominance in specific markets (Moore and Tambini 2018). These regulatory regimes all extend to tech companies that undertake relevant activities. The emergence of the new regulatory object of 'platforms' therefore requires explanation. In what respects is a platform different from an Internet intermediary, a new media company, a dominant digital firm? What social forces shape the emerging regulatory field of platform governance – one that is cluttered with competing definitions, agencies and interventions?

Here we offer a novel empirical perspective. We have conducted a socio-legal structural analysis of the emergence of the regulatory field of platform governance in the UK, using a primary dataset of eight official reports issued by the UK government, parliamentary committees and regulatory agencies during an 18-month period (September 2018 to February 2020). Through a legal content analysis of these documents, we identify over 80 distinct online harms to which regulation has been asked to respond; we identify eight subject-areas of law referred to in the reports (data protection and privacy, competition, education, media and broadcasting, consumer protection, tax law and financial regulation, intellectual property law, security law); we code nine agencies mentioned in the

³ US norms: Communications Decency Act (CDA) of 1996, Section 230: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider' (47 U.S.C. § 230); Digital Millennium Copyright Act of 1998: Section 512 specifies a formal procedure under which service providers need to respond expeditiously to requests from copyright owners to remove infringing material (notice-and-takedown). EU norms: e-Commerce directive (2000/31/EC): Articles 12-14 provide a safe harbor for service providers as conduits, caches and hosts of user information; under Art. 14, 'the service provider is not liable for the information stored at the request of a recipient of the service' if removed expeditiously upon obtaining relevant knowledge (notice-and-action); Art. 15 prevents the imposition of general monitoring obligations.

reports for their statutory and accountability status in law, and identify their centrality in how the regulatory network is conceived in official discourse (Advertising Standards Authority (ASA), British Board of Film Classification (BBFC), Competition and Market Authority (CMA), Ofcom, Information Commissioner's Office (ICO), Intellectual Property Office (IPO), Centre for Data Ethics and Innovation (CDAI), Internet Watch Foundation (IWF), Counter-Terrorism Internet Referral Unit (CTIRU)); we assess their current regulatory powers (advisory, investigatory, enforcement) and identify the regulatory tools ascribed in the reports to these agencies, and potentially imposed by agencies on their objects (such as 'transparency obligations', 'manager liability', 'duty of care', 'codes of practice', 'codes of conduct', 'complaint procedures'). Lastly, we quantify the number of mentions of platform companies in the reports, and offer an interpretation of the emerging regulatory field.

The focus on regulation has taken the classic form of an 'issue-attention' cycle (Downs 1972). Platform regulation is figuring highly in the news agendas of many states as well as in those of their governments and legislatures. Indeed, as questions of practical regulatory implementation continue to rise up the policy agenda, if anything the issue at the centre of attention has become more rather than less pressing. Our analysis has focused on a key moment in this cycle in the UK – one in which the 'regulatory turn' that has taken place has intensified, becoming increasingly focal to official discourse. It is the British paper-chase of reports and inquiries that we document below. The steady growth of UK governmental attention to the issue has resulted in the key steps of refining existing policy instruments, and crucially, achieving greater focus by building on the existing capacity of two key agencies – Ofcom (the Office of Communications) and the Competition and Markets Authority (CMA).

The upsurge of British regulatory activism from late 2018 to early 2020 (and beyond) has made it imperative to analyse the regulatory order. In other work for this project, on which we draw directly here, it has been suggested that we think of the world of regulatory agencies as constituting a distinctive space – a 'regulatory field' (Schlesinger 2020: 1557-1558). The French sociologist Pierre Bourdieu's analysis of how fields operate (which has been influential in shaping research on news and journalism) is highly relevant to thinking about the space of regulatory action as applied to platforms. The regulatory field may be 'defined in relation to the field of power, and in particular, to the fundamental law of this universe, which is that of the economy and power' (Bourdieu 1993: 164). For present purposes, the regulatory field

is constituted by the operations of and relations between agencies devised to regulate platforms. The field of power extends beyond competition in the economy to matters of politics and morals. Developments in platform regulation in the UK demonstrate the specific range of activities encompassed and the ways in which these are parcelled out. We are interested in the process of how the regulatory field is progressively articulated. The present piecemeal British approach to defining the regulatory scope of given agencies implies a division of labour. This, in turn, means that particular agencies have developed cooperative strategies to address the lacunae built into the emergence of the regulatory field.

2. Methodology

A useful way of thinking about how regulatory and governance problems crystallise is by considering what Downs (1972) labelled the 'issue-attention' cycle. It takes time for a societal issue to emerge that requires attention. The process of defining a matter to be resolved is commonly accompanied by a rise in public policy and media attention as well as lobbying activity by relevant interests. Centre-stage internationally are the growing and diverse attempts made by some governments to redress shifts of economic power, combat 'online harms' and more generally to reconfigure regulatory scope as media and communication systems transform in the digital revolution. How to capture the objects, purposes and means of regulation in a fast-moving technological environment is a key methodological challenge. We need to define what is within scope for observing the formation of a new regulatory field. We have taken one specific jurisdiction, that of the UK, as an instance of this process. This opens the way both to analysing its particularities and also to framing international comparative research.

To reveal the lineaments of the UK's current 'issue-attention' cycle, we selected a sample of official reports published during an 18 months period between September 2018 and February 2020. An intense period of regulatory review had followed the 2017 general election. The governing Conservative Party's election manifesto included a commitment to 'make Britain the safest place in the world to be online' (Conservative and Unionist Party 2017, A77). During the same period, the UK Brexit negotiations were led by Conservative prime ministers: first, Theresa May and after July 2019, Boris Johnson. Conservative policy increasingly became guided by a search for digital competitiveness under a regulatory framework that diverged from that of the EU.⁴ Ofcom's Discussion paper of September 2018, *Addressing harmful*

⁴ *Agreement and political declaration on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (DEEU 2019). On regulatory divergence post Brexit, see Kretschmer 2020a.

online content, can be understood as the opening gambit in a game for regulatory authority.

An intended future regulatory regime was finally set out in two government papers published in December 2020. This involved the establishment of a Digital Markets Unit under the aegis of competition regulator CMA, and the identification of communications regulator Ofcom as regulator of a new online 'duty of care'.⁵ These were extensions of existing competences.

The key reports commissioned by a range of official actors both in anticipation of and seeking to influence these decisions were published during a period beginning in September 2018. Selected primary sources for analysis include two Government-commissioned independent reports (Cairncross, Furman), a White Paper (Online harms), two parliamentary reports (DCMS Committee House of Commons, Communications Committee House of Lords), and three agency reports (Competition and Markets Authority, Ofcom, Centre for Data Ethics and Innovation). Our selection and characterisation of these sources will be explained in more detail in the following section.

A wide range of political, economic and social factors came into play. Economically, questions of competition were foregrounded. The stress on democracy and concern about 'fake news' and disinformation also figured large and have increased in importance. Finally, there are social and moral concerns – worries about the negative aspects of social media uses, related abusive behaviours and the vulnerability of young people and children to online dangers. Numerous issues related to a divided public culture, such as territorial politics, a range of inequalities in respect of race, ethnicity and class, and the emergent consequences of Brexit.

Our methodological approach assumes that during the 18-month period under investigation, a desire for more policy intervention crystallised in the UK. The agenda derived from demands, alerts, alarms from government, a range of organised interests, and to some extent concern from the public. Within the 'issue-attention' cycle identified, there has been a mix of top-down and bottom-up defining of the

⁵ *New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated* (DBEIS and DCMS 2020); *Online Harms White Paper: Full government response to the consultation* (DCMS and Home Office 2020). For an overview, exploring the relationship to EU digital market interventions, see Kretschmer 2020b and Eben 2021. For a legal analysis of the UK proposal to introduce an online duty of care, see Woods 2019 and Smith 2020.

problems. Government, parliament and agencies acquired their own momentum. For parliament, the crisis of democracy – concern about political advertising, false news, violent extremism – has been one spur. But there have been external agenda-seeking activities as well that have been reflected in official papers, such as press publishers trying to find some redress for lost revenues as well as the impact of particular media 'scandals'.

Regulation is part of social governance. It may be understood as the locus where a society's ills are going to be fixed and good conduct is going to be maintained. As we shall see, the UK has a characteristic set up of agencies, ranges of activity, and ways of securing remedies. The actual and potential actors are numerous. On a close reading of official reports, no-one is recommending less regulation.

2. 1 Reports used as primary sources

The primary sources that are at the heart of the issue-attention cycle discussed here include government-commissioned independent reports, a White Paper, two parliamentary committee reports, and three agency reports. Next, we provide a brief characterisation, in chronological order, of each of the eight official reports selected for socio-legal content analysis.

- a) Ofcom discussion paper: Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation (18 September 2018)

The purpose of this discussion paper was to shape the ongoing discussion on online content moderation, and to anticipate potential regulatory duties related to Ofcom's expertise and capacity as an established communications regulator, especially in the broadcasting area. It discussed harms to people, not the economy, and gave prominence to illegal content, misleading political advertising, 'fake news', and child protection.

- b) Cairncross Review (commissioned by Department of Digital, Culture, Media & Sport DCMS): *A sustainable future for Journalism* (12 February 2019).

The Cairncross review is an independent report prepared by Dame Frances Cairncross for the Department for Digital, Culture, Media and Sport (DCMS). It assessed the current and future market environment facing the press and high-quality journalism in the UK. It discussed media economics (in particular in relation to online advertising) and political issues (such as public-interest and fake news).

- c) House of Commons DCMS Committee: *Disinformation and 'fake news'* (18 February 2019)

This Select Committee report resulted from a political inquiry prompted by the Cambridge Analytica scandal (among others) into uses of users' data in the political and electoral context, particularly into how users' political choices might be affected and influenced by online information. The inquiry, and the report were prepared by the House of Commons Digital, Culture, Media and Sport (DCMS) Committee (chair: Damian Collins).

- d) House of Lords Communications Committee: *Regulating in a Digital World* (9 March 2019)

A parliamentary report from the House of Lords Communications Committee's inquiry into how regulation of the internet should be improved, focusing on the upper 'user services' layer of the internet, with a focus on platforms. It distinguished three categories of harmful online content: illegal, harmful but not illegal, and anti-social.

- e) Furman review (Treasury and Department for Business, Energy & Industrial Strategy [BEIS]): *Unlocking digital competition* (13 March 2019)

A report prepared by a Digital Competition Expert Panel (set up by the UK's Chancellor of the Exchequer). The panel was led by the Harvard economist Jason Furman (President Barack Obama's chair of the Council of Economic Advisers) with input from competition and technology experts. The report examined the opportunities and challenges the digital economy may pose for competition policy. It considered the effects of a small number of big players in digital markets, including in the context of mergers.

- f) Online Harms White Paper (DCMS & Home Office) (8 April 2019)

A White Paper presented by two government departments, the Department for Digital, Culture, Media and Sport (DCMS) and the Home Office, setting out proposals for future legislation. The White Paper sought to identify a comprehensive spectrum of online harms, and proposed a new regulatory framework for those harms. The aim of making the UK the safest place in the world to go online and grow digital business was articulated as the underlying rationale.

g) Competition & Markets Authority (CMA) market study: Online platforms and digital advertising (interim report, 18 December 2019)

The report is the result of a formal market study into online platforms and digital advertising. It focused on search advertising, dominated by Google and display advertising, dominated by Facebook. The report aimed to understand the advertising-funded platforms' business models and challenges they might pose. This was an interim report. It is conventional in competition inquiries to expose factual findings and potential recommendations to challenges in this form. The final report was published on 3 July 2020.⁶

h) Centre for Data Ethics and Innovation: Review of online targeting (4 February 2020)

The Centre for Data Ethics and Innovation is an advisory body established within the Department for Digital, Culture, Media and Sport (DCMS). The report focused on the use of data in targeting and shaping users' experience online. It investigated users' attitudes towards online targeting, current regulatory mechanisms and solutions, and whether they could be made consistent with public values and law.

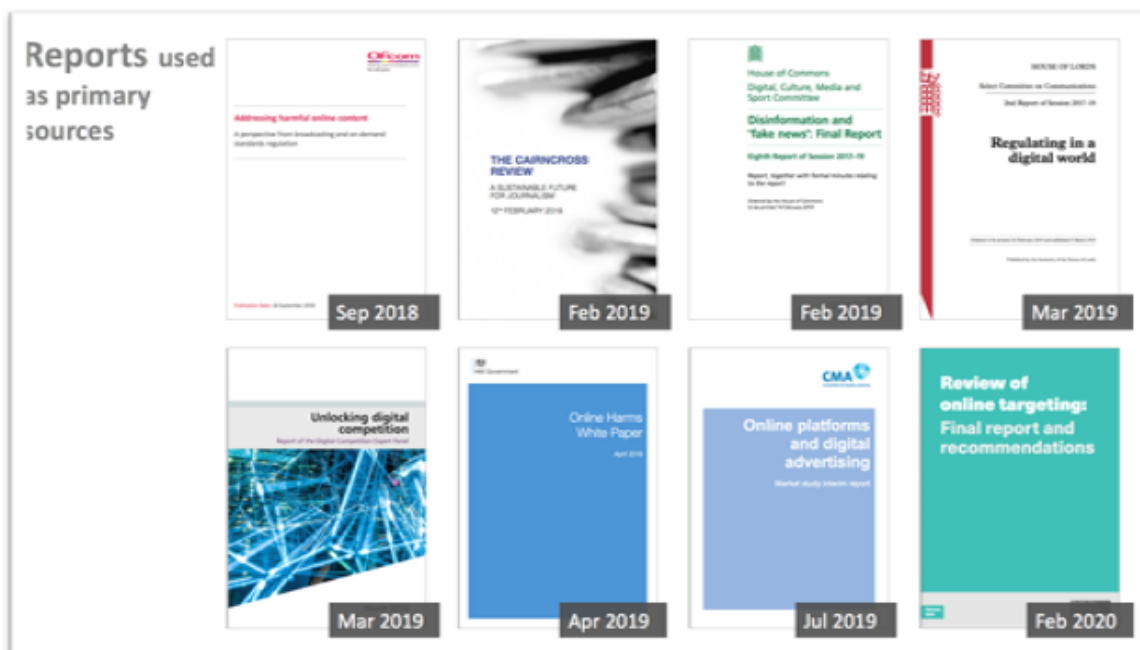


Figure 2

⁶ For the purposes of content analysis, we rely on the interim report (283pp) which contains the core diagnostic assessment and was published within the 18 months period under investigation. The final report extends to 437 pages, including the wider case for a new pro-competitive regulatory regime and proposed interventions. It may have skewed the sample.

2.2 The steps taken

Following the identification of reports (sample selection), seven sequential steps were initially taken in order to reveal the implicit definitions circumscribing an emerging regulatory field, and to clarify the key actors and forces shaping the field.

The analysis was conducted by reading and manually coding all eight reports. Applying orthodox content analysis techniques (Krippendorff 2018), pilot coding categories were developed iteratively by all three researchers, and applied by one of the researchers. Unresolved coding was reviewed by all three researchers, acting as experts. This first round of coding produced quantitative data in spreadsheet form. A secondary analysis was then performed, drawing on material external to the reports. The steps taken are summarised in the following sequence.

1. Identify problems that are stated as in need of solution (content analysis: 'harms' as a proxy for emerging social issues)
2. Identify legal subject-areas (content analysis: expert legal coding)
3. Identify agencies (content analysis: secondary research on scale and geography)
4. Identify centrality of agencies (cross-referencing of agencies between reports, permitting a network analysis)
5. Identify statutory basis and powers of agencies (expert legal coding, using secondary legal sources)
6. Identify regulatory tools (content analysis: expert legal coding)
7. Identify regulatory objects (content analysis: citation frequency of firms)

The results of the content analysis were presented to representatives of five key UK regulatory agencies at an event hosted on 26 February 2020 by the British Institute of International and Comparative Law in London (CREATe 2020). According to our methodology, the presentation of results to insiders is an important check on insiders' views. Consequent reflexive deliberation is a form of validation by those whose practices are being analysed (Schlesinger et al. 2015). The sample selection which was presented as capturing one 'issue-attention' cycle that had led to regulatory intervention was not challenged.

Participants accepted the expert coding applied as well as the portrayal represented by the quantitative results. At the same time, they commented in ways that offered important qualitative insights into the self-conceptions held by given agencies as well as emphasising the interconnectedness of the regulatory field that

this kind of external analysis could not have elicited. The oral comments made on the day – signed off by email when confirming the online documentation of the event (CREATe 2020) – should therefore be understood as additional primary material. It has guided the interpretation of findings in the concluding section of this paper.

3. Findings

In this section we present the findings of the content analysis in tabular form, following the sequence of the seven method steps taken.

3.1 Online Harms

In line with the issue-attention perspective, we begin by extracting a list of online issues that are considered to be problematic in the reports, and therefore as in need of a remedial response. We label these 'harms'.

- a) Ofcom discussion paper: Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation (18 September 2018)

In the Ofcom discussion paper, 16 distinct harms are identified. They touch upon a broad spectrum of issues. While the main focus of the report is on societal harms, such as people's exposure to harmful or age-inappropriate content, Ofcom also takes note of market concerns, security and intellectual property.

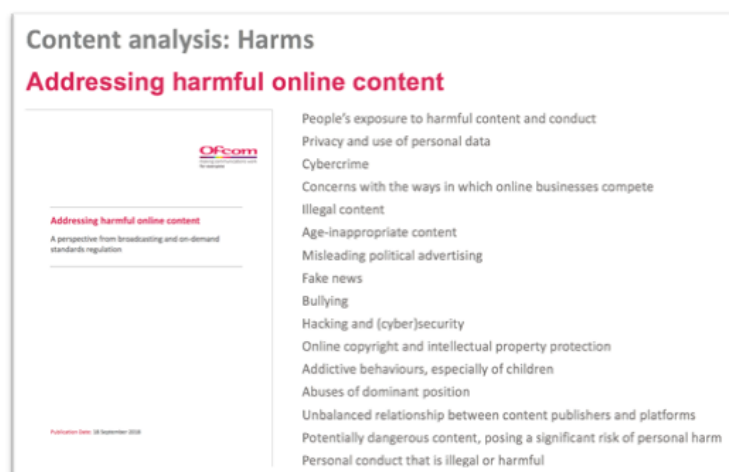


Figure 2

b) Cairncross Review (commissioned by Department of Digital, Culture, Media & Sport DCMS): A sustainable future for Journalism (12 February 2019)

The diagnosis of the Cairncross report focuses on the effects of search engines and news aggregation services on the press publishing market and identifies an unbalanced relationship between press publishers and platforms as a threat to sustainable quality journalism. Press publishers' loss of advertising revenue is seen as contributing to disinformation and a decline in public-interest reporting.



Figure 3

c) House of Commons DCMS Committee: Disinformation and 'fake news' (18 February 2019)

The report prepared by the House of Commons Digital, Culture, Media and Sport Committee has a political focus, with a particular emphasis on the electoral influence of platforms. It is concerned with the effects of digital campaigning and advertising on political discourse, with the distortion and aggravation of people's views, and also extends to mental health issues. Market-related harms are mentioned in an ancillary manner.



Figure 4

d) House of Lords Communications Committee: Regulating in a Digital World (9 March 2019)

The Report distinguishes three categories of harmful online content: illegal, harmful but not illegal (which nevertheless is inappropriate, for example for children), and anti-social. Harms listed are mostly societal, such as child-abusive sexual content and cyberbullying. The infringement of intellectual property rights is mentioned as an economic harm.



Figure 5

e) Furman review (Treasury and Department for Business, Energy & Industrial Strategy BEIS): Unlocking digital competition (March 2019)

The report focuses on economic harms, stemming from the negative effects of a small number of big players on digital markets, including the abuse of dominant positions and anti-competitive behaviour. Societal harms, such as users' limited control over collection and management of their personal data, are also highlighted.



Figure 6

f) Online Harms White Paper (DCMS & Home Office) (8 April 2019)

The harms identified in the document focus on the activities harmful to individuals and society, not the economy or organisations. Harms are divided into three categories, according to the clarity of their definition. Prominent are activities harmful to children, such as child sexual exploitation and abuse, sexting, advocacy of self-harm, and access to pornography. Also noted are the spread of terrorist content and incitement to violence, as well as disinformation, and the sale of illegal goods.

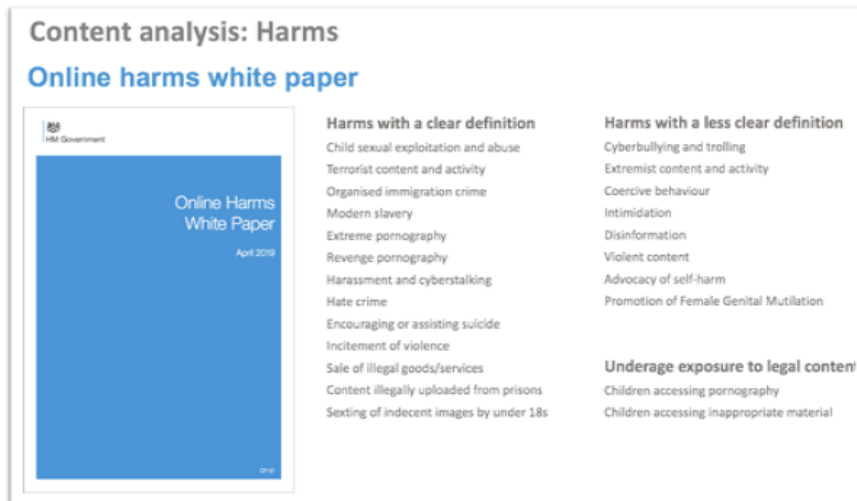


Figure 7

- g) Competition & Markets Authority (CMA) market study: Online platforms and digital advertising (interim report, 18 December 2019)
- The report includes a consumer-focused list of harms (data extraction and encouraging consumers to share too much data), as well as harms stemming from platforms' dominant positions in the market, such as a change of core services without notice, and restrictions on the interoperability of services.

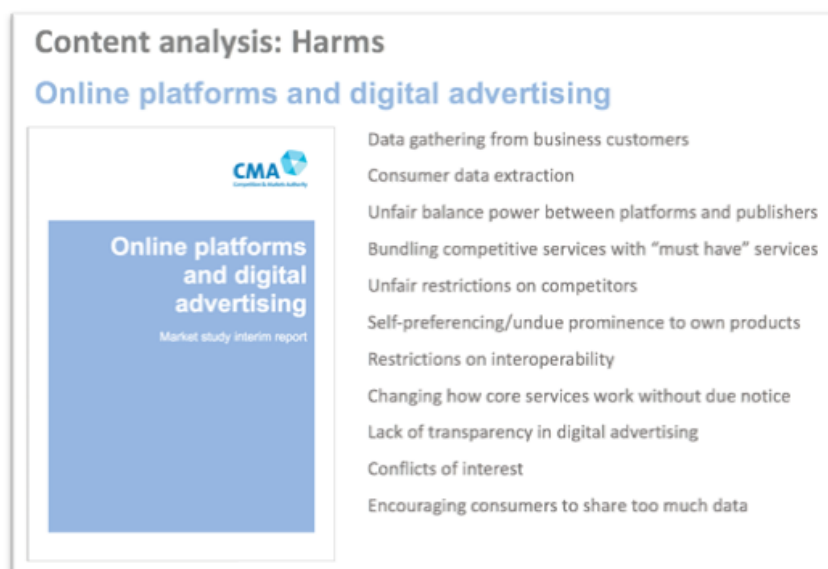


Figure 8

- h) Centre for Data Ethics and Innovation: Review of online targeting (4 February 2020)

The report distinguishes harmful and illegal behaviour. Listed harms concern individuals, not organisations, and include harms affecting children, such as sexual abuse and exploitation, as well as disinformation, polarisation and bias in content recommendation, and unlawful discrimination.

Content analysis: Harms																			
Review of online targeting																			
Review of online targeting: Final report and recommendations	<table border="0"> <thead> <tr> <th style="text-align: left;">Harmful</th> <th style="text-align: left;">Illegal</th> </tr> </thead> <tbody> <tr> <td>Trolling</td> <td>Child sexual exploitation and abus</td> </tr> <tr> <td>Bullying</td> <td>Promotion of terrorism</td> </tr> <tr> <td>Promotion of extreme, violent content, radicalisation</td> <td>Hate speech</td> </tr> <tr> <td>Disinformation</td> <td>Incitement to violence</td> </tr> <tr> <td>Polarisation</td> <td>Selling of illegal goods</td> </tr> <tr> <td>Exploitation of vulnerability</td> <td>Fraud</td> </tr> <tr> <td>Bias in content recommendation</td> <td>Harassment</td> </tr> <tr> <td>Unlawful discrimination</td> <td></td> </tr> </tbody> </table>	Harmful	Illegal	Trolling	Child sexual exploitation and abus	Bullying	Promotion of terrorism	Promotion of extreme, violent content, radicalisation	Hate speech	Disinformation	Incitement to violence	Polarisation	Selling of illegal goods	Exploitation of vulnerability	Fraud	Bias in content recommendation	Harassment	Unlawful discrimination	
Harmful	Illegal																		
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Promotion of extreme, violent content, radicalisation	Hate speech																		
Disinformation	Incitement to violence																		
Polarisation	Selling of illegal goods																		
Exploitation of vulnerability	Fraud																		
Bias in content recommendation	Harassment																		
Unlawful discrimination																			

Figure 9

In total, over 80 distinct harms are identified across the reports analysed. While there are broad overlaps relating to child protection, security and misinformation, the harms are articulated quite differently depending on the specific configurations of political, economic or societal concerns that have shaped each document. In particular, the regulatory agenda now seems to be driven by growing disquiet that has been crystallised in an ever-widening list of lawful but socially undesirable activities.

3.2 Areas of legal subject-matter

The previous section presented the range of issues (articulated as harms) that are perceived as in need of regulatory attention. We now turn to proposed solutions. The next step of our analysis was to identify and code the legal subject-areas mentioned in the eight reports. Our assumption is that by mentioning a body of existing law, the drafters of a report expect that specific (existing or new) legal provisions in the subject-area will offer solutions to the problem identified. Coding was based on the qualitative judgements of a legal expert. If in doubt, coding was reviewed by the research team as a whole. In most cases, the decision was straightforward. For example, when a specific area of law or statute was directly cited, such as the EU General Data Protection Regulation (GDPR) this would be coded under 'data protection and privacy'. Some areas of law are less clearly defined, and rely on

multiple legal provisions. Such is the case of media literacy. The decision to code media literacy under 'education' was motivated by the context in which it was mentioned: the education of pupils and improvement of school curriculum. Following an iterative process, we settled on eight areas of law that offered a degree of coherent jurisprudence in the UK context. These are (i) data protection and privacy; (ii) competition law; (iii) education law; (iv) media and broadcasting law; (v) consumer protection law; (vi) tax law and financial regulation; (vii) intellectual property law; and (viii) security law.

The following table shows where these subject-areas are represented in the sampled reports .



Figure 10

It should be noted that these areas of law are conceptually distinct, with very different traditions and underlying principles. Some are private law provisions that regulate behaviour between individuals or firms (intellectual property rights are such private rights). Others are public law provisions that involve the relationship between the state and individuals (such as tax law). And some are both public and private. For example, certain competition law provisions are enforced by the state, others can be pursued as private actions. For some subject-areas, the sources of law are in common law jurisprudence; for others, sources are recent European Union law.⁷

The areas of law can also be distinguished by their underlying rationales, be they economic, social, or fundamental rights based. Are the underlying principles

⁷ Following Brexit, EU Law has been converted into UK law, with the exception of the Charter on Fundamental Rights. Cf. *The Status of 'Retained EU Law'* (House of Commons Library 2019).

commensurable? Or do choices have to be made?⁸ For the purposes of this paper, it is revealing that data and competition solutions have been foregrounded. No proposed intervention evades these areas of law. The consumer law perspective is comparatively weak, as are interventions through the fiscal system. Security interventions lack explicit articulation.

3.3 Regulatory agencies

We now turn to the regulatory actors. Four pieces of analysis were performed. The first was a straightforward content analysis of the reports, with yes/no coding for each actor. Was a regulator or agency mentioned? The nine most-mentioned agencies were then selected for geographical and institutional profiling. In a third step, cross-tabulation of all mentions of these agencies across the reports were coded in order to identify the centrality of a regulator in the network. Finally, the legal status, accountability, and regulatory powers (advisory, investigatory, enforcement) of each regulatory agency was assessed.

The nine most prominent agencies are (in alphabetical order):



Figure 11

⁸ Contrast for example the balancing of fundamental rights underpinning the EU GDPR of 2016 with the innovation and minimal government considerations implicit in the liability shield of Section 230 of the US Communications Decency Act of 1996.

Regulation (EU) 2016/679 Recital (4): 'The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.'

Section 230 of the Communications Decency Act of 1996, 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.' This has been referred to as 'the twenty-six words that created the Internet' (Kosseff 2019).

a) ASA: Advertising Standards Authority

The ASA is an independent UK regulator of advertising, established in 1962. It is funded by a voluntary levy on the advertising space paid for by the industry. ASA sets standards for broadcast and non-broadcast advertising in the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP) and the UK Code of Broadcast Advertising (BCAP), and provides guidelines on their application.

b) BBFC: British Board for Film Classification

The BBFC is a film and video classification body. It issues classification certificates to audiovisual works distributed in the UK, pursuant to its classification guidelines. Films distributed in the UK need to be classified by the BBFC. The BBFC was founded by the industry in 1912 as the British Board of Film Censors. Its scope has grown considerably since the 1980s.

c) CDEI: Centre for Data Ethics and Innovation

CDEI is an expert committee of the Department for Digital, Culture, Media & Sport (DCMS), currently in its pre-statutory phase. It was set up in 2019 to provide the government with access to independent, impartial and expert advice on the ethical and innovative deployment of data and artificial intelligence. Together with its advisory role, CDEI seeks to analyse and anticipate risks and opportunities for strengthening ethical and innovative uses of data and AI, and to agree and articulate best practice for the responsible use of data and AI.

d) CMA: Competition and Markets Authority

The CMA is the UK competition regulator, a designated national competition authority. It was founded in 2013, and took over the roles of the Competition Commission and the Office of Fair Trading. The CMA is responsible, among others, for investigating mergers, conducting market studies, and making inquiries into anti-competitive behaviour. The CMA seeks to promote competition, both within and outside the United Kingdom, for the benefit of consumers.

e) CTIRU: Counter-Terrorism Internet Referral Unit

CTIRU is formally a part of the Metropolitan Police Service. CTIRU's aim is to work globally in cooperation with industry and private sector companies to

remove illegal online content that breaches the UK's terrorism provisions. CTIRU issues notices requesting removal of content which is in breach of websites' Terms of Service (ToS). Public information on the CTIRU is very limited, due to its national security status.

f) ICO: Information Commissioner's Office

The Information Commissioner's Office is an independent body. The Commissioner is an official appointed by the Crown, set up to uphold information rights and safeguard individuals' privacy. The ICO deals with the Data Protection Act 2018 (which implements the EU General Data Protection Regulation GDPR).

g) IPO: Intellectual Property Office

Formerly the UK Patent Office, the IPO is responsible for intellectual property rights in the UK, including patents, designs, trademarks and copyright. The IPO is an executive agency of the Department for Business, Energy & Industrial Strategy (BEIS).

h) IWF: Internet Watch Foundation

The IWF is an independent, self-regulatory body working towards the goal of eliminating child sexual content abuse online. It prepares Uniform Resource Locator (URL) lists of webpages with child sexual abuse images and videos, and sends take-down notifications to hosting companies. The IWF actively searches for abusive content online and provides a hotline for the reporting of abusive content.

i) Ofcom: Office of Communications

Ofcom is the UK communications regulator. It regulates the TV, radio and video on-demand sectors, fixed line telecoms, mobiles, postal services, and the airwaves over which wireless devices operate.

Looking at the geographical profile and labour force of these agencies, it is evident that regulatory power is London-centric, with a minor presence in the UK's devolved nations (Scotland, Wales, Northern Ireland). The Intellectual Property Office is an outlier. Almost all the IPO's employees deal with the administration of registered rights (patents, trade marks, designs) out of its office in Newport in south Wales rather than considering regulatory issues. It is noteworthy that no public details about the labour force of the Counter-Terrorism Internet Referral Unit (CTIRU) are available. In

total, fewer than 3000 staff are employed in regulatory agencies that we have identified as broadly relating to platforms. For comparative context, we might note that Facebook employs about 35,000 human content moderators (who are mostly outsourced).⁹ The resources required to install a functioning governance system for platform activities on this scale would be considerable.

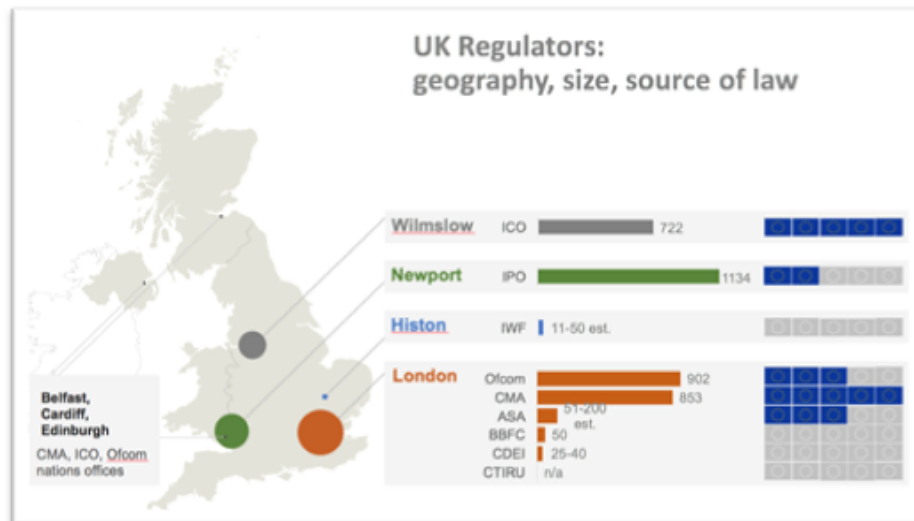


Figure 12: Size of circle corresponds to bar (n = number of employees); EU flags (scale 1-5) illustrative for dependence on European legislation

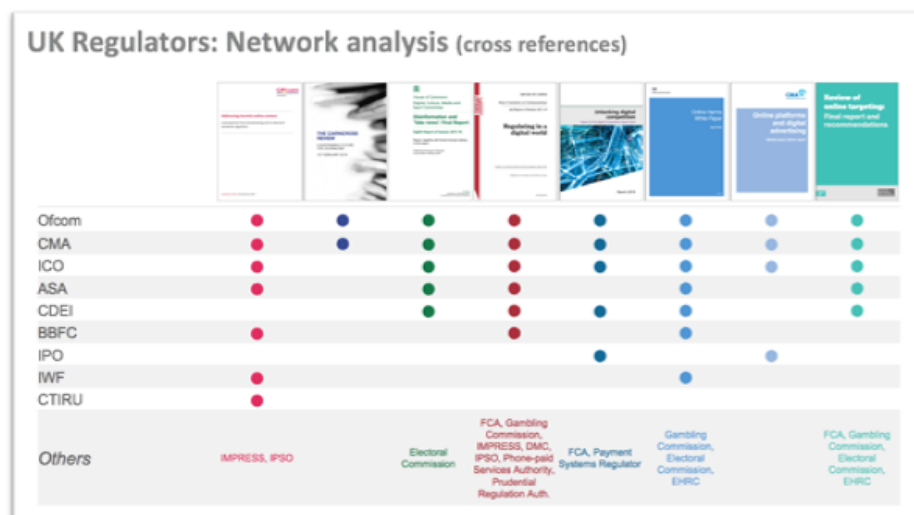


Figure 13: Nine most cited regulatory agencies across eight official reports; Bottom row lists other agencies mentioned

Having identified the regulatory players in the emerging field and their network centrality, we coded their statutory basis, accountability and powers. This was done

⁹ For working conditions, see Newton (2019).

through doctrinal (legal expert) analysis, based on secondary legal sources. This approach has enabled us to visualise the functions of regulatory agencies by reference to key dimensions of the UK's political system, resulting in a taxonomy of regulators. This reflects the fluid British system of government, which lacks a formal written constitution. Executive regulatory powers may sometimes emerge by a single pen stroke by the minister. This contrasts with the more formal civil law traditions of continental Europe, where administrative law is prominent, and there may be less executive discretion.

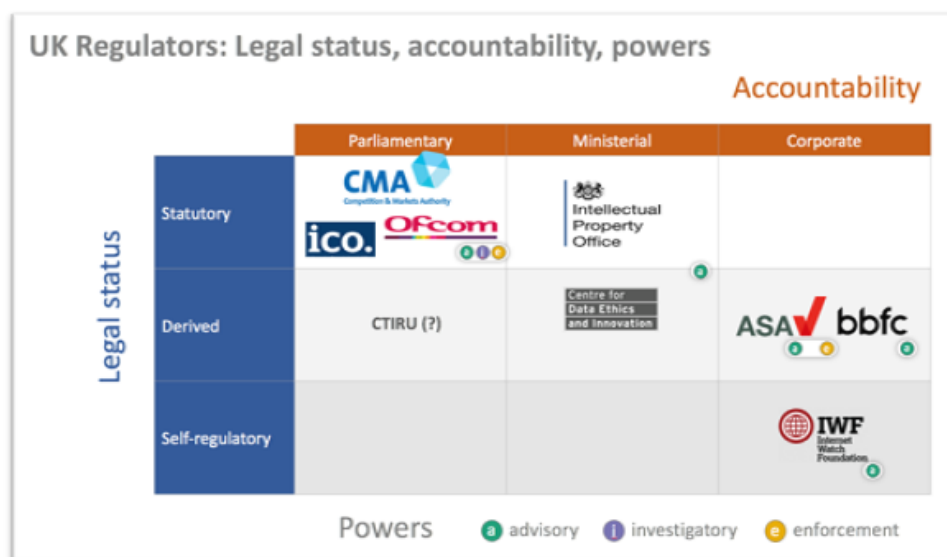


Figure 14: Regulatory agencies by legal status, accountability, power

Three UK regulators (Ofcom, the CMA, and the ICO) have a secure statutory basis, report to the Westminster parliament, and exercise enforcement powers. As we have seen, each also has a considerable labour force (Ofcom: 902; CMA: 853; ICO: 722) and multi-disciplinary expertise. Arguably, these are the agencies that are best-equipped to be scaled up.¹⁰

Agencies that have evolved with a strong sectoral focus (film censorship, advertising standards) have an institutional set-up that is less in the public eye: the British Board of Film Classification (BBFC) and the Advertising Standards Agency (ASA) are funded by industry, but not quite self-regulatory (in the case of ASA its powers are derived from three different statutes). It will be interesting to see how their roles reconfigure in

¹⁰ The announcements by the UK government in December 2020 of the Digital Market Unit within CMA (DBEIS and DCMS 2020) and Ofcom's role as Online harms regulator (DCMS and Home Office 2020) could have been predicted from this analysis of earlier reports. This offers support for our methodological approach, locating the issue-attention cycle over a period of 18 months early in the parliamentary period.

the context of growing platform regulation. For example, the ASA has started to issue guidance with respect to online influencers (ASA 2020).

AI regulation is likely to become more prominent. The Centre for Data Ethics and Innovation (CDEI) is a recent arrival on the regulatory scene (with 25-40 staff). The Government has committed itself to provide CDEI with statutory footing following its current pre-statutory phase (CDEI 2019).

The role of the Intellectual Property Office (IPO), an executive agency of the Department for Business, Energy & Industrial Strategy (BEIS), operates separately from other forms of platform regulation: it lacks distinct investigatory and enforcement powers. This is despite the fact that copyright-related content moderation from online platforms accounts for most take-down actions.¹¹ In its own self-understanding, the IPO is not a regulator.

There is very little public information on the legal-institutional set-up and operations of the Counter-Terrorism Internet Referral Unit (CTIRU). This appears to be an executive unit without any clear statutory legitimacy. We do know that CTIRU is a part of the Metropolitan Police Service (Met), a territorial police unit responsible for law-enforcement in the London boroughs. The unit was created in 2010, most likely by an administrative (rather than a legislative) act. Formally, CTIRU as part of the Met might be accountable to the same body as the Met. According to the Police Reform and Social Responsibility Act 2011, this is the Mayor of London (or to be more precise, the Mayor's Office for Policing and Crime). This is unlikely to reflect the reality with respect to an issue of UK national security.

The Open Rights Group has shed some light on the workings of CTIRU.¹² First, CTIRU compiles a blacklist of overseas URLs, the hosting and distribution of which has given rise to criminal liability under the provisions of the Terrorism Act 2006. The list, managed by the Home Office, is provided to companies which supply filtering and firewall products to the public estate, which includes schools and libraries. As of 2016, schools and organisations that provide care for children under the age of 18 in the UK, are obliged to restrict access to the URLs included on the CTIRU list, pursuant

¹¹ Google's transparency report (visited 12 March 2021), reports that over 5 billion URLs have been delisted due to alleged copyright infringement (Google 2021). European legislation envisages a new role for certain platforms classified as Online Content Sharing Service Providers (OCSSPs). They become responsible for content uploaded by their users, and will enter a complex new regime of best effort and redress under regulatory oversight (Art. 17, Directive (EU) 2019/790).

¹² Open Rights Group is a UK-based organisation working to protect user rights and privacy online. Its ORG Wiki provides information on digital rights in the UK (Open Rights Group 2021a).

to their Prevent duty. This duty, imposed by the Counter-Terrorism and Security Act 2015, requires schools and early education establishments to prevent people from being drawn into terrorism (Home Office 2015). There is no formal appeal process in the event of a URL being included on the blacklist.

Secondly, CTIRU operates a notification regime. It notifies platforms that they host illegal content, issues requests to review according to their Terms of Service (ToS), and eventually pursues content removal. From examples of take-down requests made available via the Lumen database it seems that CTIRU assesses the illegality of content on the basis of UK terrorism legislation (the Terrorism Acts 2000 and 2006).¹³ The notification regime operates without an explicit legal basis, and CTIRU sees it as voluntary. However, a detailed notification filed by CTIRU can strip a platform of the liability protection provided by the eCommerce Directive (Directive 2000/31/EC), as it provides the platform with actual knowledge of potentially illegal content.

CTIRU appears to have close to an unaccountable censorship role. There are statutory reference points, but there is weak parliamentary accountability. CTIRU is anomalous within our taxonomy. It has evidently emerged out of informal organisation within the police. It is therefore formally coded as self-regulatory (which it cannot be in practice). This wide discretionary role is an interesting finding in itself.

The Internet Watch Foundation (IWF) also is classified as a self-regulatory body but it enjoys an 'executive privilege': a report on child-abusing content made to the IWF is considered to be a report to the relevant authority (Crown Prosecution Service 2004). Additionally, the IWF is exempt from criminal responsibility when it deals with abusive content for the purposes of preventing, reporting and investigating the abuse.

3.4 Regulatory tools

Having identified perceived issues ('harms'), areas of law and actors (their legal status and powers), the analysis now seeks to extract proposed solutions that take the form of specific regulatory tools. Some of these are new responses to digital challenges (such as blocking lists), some are well known (such as imposing fines or manager liability). The following diagram lists the tools identified for use in the sample of official reports. These are colour coded for each report. The sole exception to this analysis is Ofcom's 2018 Discussion Paper. Ofcom's document initiated the

¹³ Lumen is a project by Berkman Klein Center for Internet & Society at Harvard University which collects and analyses requests for content removal. ORG has compiled a list of requests filed by CTIRU and available in the Lumen database (Open Rights Group 2021b).

issue-attention cycle in September 2018 and carefully avoided making any concrete proposals that might have prejudiced its future regulatory role.



Figure 15: Proposed regulatory tools by official report

The list of regulatory tools was extracted using legal expert coding, closely following the terminology employed in the documentary corpus. Within the scope of the present paper, there is no room for a detailed discussion of the history, legal basis and novelty of the proposed interventions. Nor are we constructing (or applying) a taxonomy, familiar from the law and economics literatures, such as the distinction between rules and standards (Kaplow 1992), or between structural and behavioural remedies developed in competition (antitrust) law (Maier-Rigaud and Loertscher 2020).

As a general trend, we note that transparency obligations imposed on firms and, vice versa, information-gathering powers by regulatory actors receive plenty of attention. There is also a resurgence of a particularly British style of intervention: the use of codes of conduct or codes of practice that remain flexible and responsive, and hover on the border between self-regulation and state enforcement.¹⁴

3.5 Regulatory objects

In this subsection, we report the results of simple frequency statistics derived from searching the eight reports in the sample for references made to given firms. We assume that any mention of a firm in the context of platform regulation will tell us

¹⁴ Here are potentially rich pickings for regulation theory. Does the regulatory field emerge as law giving content *ex ante* (specifying rules), or *ex post* (leaving courts or regulators to apply standards to unforeseen and unforeseeable scenarios)? How do private rules (such as 'terms of service') become enforceable under state powers? We intend to address some of these issues in the next phase of our larger research project on platform regulation.

something significant about the potential regulatory objects that have been identified as visible within the emerging field.

The following figure offers a word-cloud representation, with firms tagged by their national headquarters. 3320 (76%) of 4325 references made are to two US firms and their subsidiaries. Google (including YouTube) accounts for 1585 references; Facebook (including Instagram, WhatsApp and Messenger) accounts for 1735 references. Only two platforms headquartered in Europe are mentioned (Spotify and Ecosia). Chinese firms are referenced 61 times. Not a single UK-headquartered firm figures.

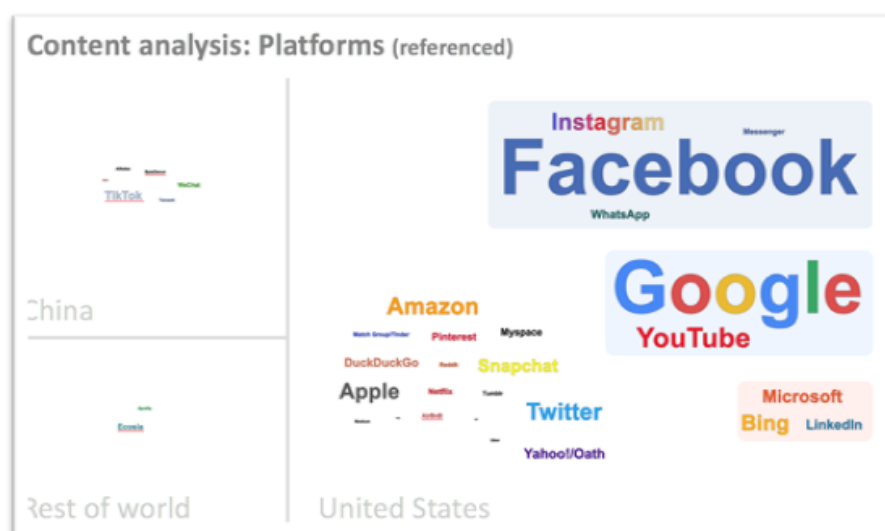


Figure 16: Firm frequency citations by country headquarter in eight official reports

The regulatory landscape in the UK is being profoundly shaped in response to the perceived social and economic harms caused by the activities of just two multinational companies, Google and Facebook. This points to a structural issue that has influenced the evolution of the field that any future regulatory intervention will need to take on board.

4. Discussion

In this paper, we have made the development of the UK's regulatory agenda the focal point of our analysis. The question of platform regulation has risen up the policy priorities of many states. As we write, Australia, the EU (in its supranational guise as well as in the shape of policies pursued by key member states such as France and Germany), India and the USA are all actively seeking solutions and debating options

for platform regulation. There is no common global agenda regarding platform regulation but there is certainly a widespread international preoccupation that is playing out distinctively in different jurisdictions.

In the UK, at the time of writing the active implementation of policy by the key agencies tasked with regulation is still pending. We have shown that the agenda has been substantially dominated by an ever-growing list of harms attributed to a small number of multinational tech giants. Brexit initiated the entrée into a pandemic-afflicted 2021 in the UK. While this profound reorientation is a particular attempt to reassert political sovereignty, the question of state regulation of platforms is certainly not limited to the UK. It is a global trend.

Within the emerging regulatory field, whose UK-specific dimensions we have set out, consumer interests have not obviously driven the agenda, neither indeed has an explicit policy concern with innovation as such, nor has a focus on creativity. Inasmuch as innovation figures, it becomes treated as a problem because it has created a disruptive challenge to 'legacy' systems. Innovation, then, is seen as embodied in the big tech players' strategies and performance. It will take the inception of a new regulatory order that is more confidently focused on spreading the potential benefits of innovation for a different approach to be established.

We have sought to make especially visible the network centrality of three agencies – Ofcom, the CMA and the ICO. This triad, especially the first two, has become the weight-bearing structure for the development of distinct new regulatory powers relating to content, data and markets. But the additive approach taken to complementing the scope of existing regulatory actors means that there has been no comprehensive standing back and rethinking of the regulatory field. Consequently, the UK is faced with solving the issue of potentially incommensurable rules pursued by different regulators defined by different logics. Each of intermediary liability (for content), data protection (within digital interactions), and competition law (addressing market dominance) has a quite different rationale.

Technological developments typical of online platforms, such as algorithmic identification, targeting and recommender systems may have effects that cut across agency territories, with wide-ranging cultural, innovation and fundamental rights effects. The UK's evolving approach points to pursuing pragmatic coordination effected between multiple agencies, for example by creating a new Digital

Regulation Cooperation Forum.¹⁵ There are agreements in place between different agencies to try and make this work. This kind of pragmatic incrementalism is the chosen route rather than one seeking to formalise a hierarchy of actors with a 'super-regulator' at the apex. That is not to say that the latter solution would be better. It would certainly both concentrate powers and become a clearer and more singular target for praise or blame. It could also make the political culture more vulnerable to centralised executive decision-making. We have mooted this point, though, because the idea of overarching regulation sets up the question of how the regulatory field could evolve, whether in the UK or elsewhere. It should be possible to track the 'super-regulator' question in international comparison, and in particular to see how the rationalisation of regulation might vary according to various types of regime and political culture.

Much regulatory discussion in the UK has focused on harms, with agencies positioning themselves for regulatory jurisdiction and powers. In many ways, this is an obvious response to immediate pressures and emergent surprises. For instance, the question of disinformation is one thing when it plays out in the context of party-political conflict. It takes on another shape in a pandemic such as that of Covid-19: public confidence (or lack of it) in the state's health policies is a different kind of battleground. Reflecting an approach derived from considerations of national security, there is a governmental interest in the validation of scientific expertise against vaccine refusal and even more so, the outright denial of viral danger.

In the quest for ready-made solutions, it is regrettable but not entirely surprising that there has been less public reflection on matters of process. A concern with the detail of making regulation work garners no headlines. But that does not mean that we should therefore overlook questions that are central to the implementation of policies recognisably coming under 'the rule of law'. Key issues we identify include how to monitor what platforms are doing (information gathering powers), as well as seeking clarity regarding the circumstances that should trigger an intervention. These matters require detailed engagement with filtering technologies, notification processes, and how to secure redress for problematic interventions. And then there is

¹⁵ The plan of work for the Digital Regulation Cooperation Forum (CMA 2021), published low key as a CMA policy paper on 10 March 2021, identifies three benefits for CMA, Ofcom and ICO from 'joined-up' approaches: (1) Providing coherent digital regulation in the public interest; (2) Responding strategically to industry and technological developments (building 'a comprehensive view of industry trends and technological innovations that have regulatory implications'; (3) Building shared skills and capabilities, with an emphasis 'to develop and make use of shared resources'.

the far from negligible matter of assessing compliance in relation to clearly stated and broadly supported criteria (transparency).

The British approach to innovating the regulatory toolbox now appears to favour establishing a range of new codes of conduct, ethics or practice. The ruling idea is to hold platforms to their own rules (such as their terms of service). Of course, this presumes the bona fides of the regulated. The codes presently envisaged, which are negotiated agreements open to revision, do not appear to have any clear-cut legal standing and would require as yet untested enforcement methods. There is an obvious spill-over from such codes to other current toolbox proposals, such as the imposition of financial penalties for rule-breaking. Delegating state powers to firms, even on the basis of mutually-agreed rules, can be deeply problematic. The question of the relative power of the parties to an agreement is key to the balance of a negotiated outcome. What has failed to emerge so far in the present phase of regulatory rethinking is a fundamental debate about the relationship in this domain between the state and private bodies.

Finally, evolving regulatory concerns in the UK appear to be largely unaware of the effects of platform regulation on cultural production and the related questions of inclusion, equality and diversity in the creative industries which have become so prominent in current debate about culture. The creative economy has been a centerpiece of UK government strategy both for global competition and the exercise of soft power. The role of platforms' ranking and recommendation algorithms have considerable outcomes in shaping choices and decisions. However, that seems to be a completely different policy agenda from the one that presently predominates. Platforms may rightly be understood to be major cultural actors in respect of their roles as aggregators, gatekeepers of social exchanges, and curators of highly varied content. But you really would not know this from the kind of analysis we have conducted.

References

Bourdieu, P. (1993) *The field of cultural production*, New York: Columbia University Press.

Chibber, K. (2014) 'American cultural imperialism has a new name: GAFAs', *Quartz*. Available at: <https://qz.com/303947/us-cultural-imperialism-has-a-new-name-gafa/> (accessed 19 March 2021).

Conservative and Unionist Party (2017) *UK General Election Manifesto 2017*.

CREATe (2020) *Platform Regulation Resource Page*. Available at <https://www.create.ac.uk/platform-regulation-resource-page/> (accessed 19 March 2021).

Downs, A. (1972) 'Up and down with ecology—The "issue-attention cycle"', *The Public Interest*, 28, 38-51.

Eben, M. (2021) *Gating the Gatekeepers (2): Competition 2.0?*, CREATE blog.

Available at:

<https://www.create.ac.uk/blog/2021/03/23/gating-the-gatekeepers-2-competition-2-0/> (accessed 15 April 2021).

Flew, T., Martin, F. and Suzor, N. (2019) 'Internet regulation as media policy: Rethinking the question of digital communication platform governance', *Journal of Digital Media & Policy*, 10(1), 33-50.

Gillespie, T. (2018) *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media*, New Haven: Yale University Press

Google (2021) *Google's transparency report*. Available at:

https://transparencyreport.google.com/copyright/overview?hl=en_GB (accessed 12 March 2021).

Gorwa, R. (2019a) 'What is platform governance?', *Information, Communication & Society*, 22(6), 854-871.

Gorwa, R. (2019b) 'The platform governance triangle: Conceptualising the information regulation of online content', *Internet Policy Review*, 8(2), 1-22.

Kaplow, L. (1992) 'Rules versus Standards: An Economic Analysis', *Duke Law Journal*, 42(3), 557-629.

Kosseff, J. (2019) *The Twenty-Six Words That Created the Internet*. Ithaca and London: Cornell University Press.

Kretschmer, M. (2020a) 'Regulatory divergence post Brexit: Copyright law as an indicator for what is to come', *EU Law Analysis*. Available at: <http://eulawanalysis.blogspot.com/2020/02/regulatory-divergence-post-brexit.html> (accessed 19 March 2021).

Kretschmer, M. (2020b) 'Gating the Gatekeepers', *AHRC Creative Industries Policy & Evidence Centre*. Available at: <https://pec.ac.uk/blog/gating-the-gatekeepers> (accessed 19 March 2021).

Krippendorff, K. (2018) *Content Analysis: An Introduction to Its Methodology*, 4th edition, Los Angeles: SAGE.

Maier-Rigaud, F. and Loertscher B. (2020) 'Structural vs. Behavioural Remedies', *Competition Policy International*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569642 (accessed 15 April 2021).

Moore, M. and Tambini, D. (Eds.) (2018), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple*, New York: Oxford University Press.

Napoli, P.H. (2019) *Social Media and Public Interest. Media Regulation in the Disinformation Age*. Columbia University Press.

Newton, C. (2019) 'The Trauma Floor: The secret lives of Facebook moderators in America', *The Verge*. Available at: <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> (accessed 19 March 2021).

Open Rights Group (2021 a) *Counter-Terrorism Internet Referral Unit*. Available at: https://wiki.openrightsgroup.org/wiki/Counter-Terrorism_Internet_Referral_Unit (accessed 18 March 2021).

Open Rights Group (2021 b) *Counter-Terrorism Internet Referral Unit/Lumen reports*. Available at: https://wiki.openrightsgroup.org/wiki/Counter-Terrorism_Internet_Referral_Unit/Lumen_reports (accessed 18 March 2021).

Schlesinger, P., Selfe, M. and Munro, E. (2015) *Curators of Cultural Enterprise: A Critical Analysis of a Creative Business Intermediary*. Palgrave Macmillan.

Schlesinger, P. (2020) 'After the post-public sphere', *Media, Culture & Society*, 42(7–8), 1545–1563.

Smith, G. (2020) 'The Online Harms edifice takes shape', CyberEagle blog. Available at:

<https://www.cyberleagle.com/2020/12/the-online-harms-edifice-takes-shape.html>

(accessed 18 March 2021).

Suzor, N. (2019) *Lawless: The Secret Rules That Govern Our Digital Lives*. Cambridge University Press.

Van Dijck, J., De Waal, M. and Poell, T. (2018) *The Platform Society: Public Values in a Connective World*. New York: Oxford University Press.

Woods, L. (2019) 'The duty of care in the Online Harms White Paper', *Journal of Media Law*, 11(1), 6-17.

Zuboff, S. (2019) *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. London: Profile Books Ltd.

Legal and governmental sources:

ASA (2020) *Recognising ads: Social media and influencer marketing*. Available at <https://www.asa.org.uk/advice-online/recognising-ads-social-media.html> (accessed 18 March 2021).

Australia – ACCC (2019) *Digital Platforms Inquiry. Final Report*. Available at:

<https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

(accessed 18 March 2021).

Australia – 'Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021' (2021) Bills Digest No. 48, 2020–21. Available at:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2021a/21bd048 (accessed 18 March 2021).

Cairncross Review (2019) (commissioned by Department of Digital, Culture, Media & Sport DCMS) *A sustainable future for Journalism* (12 February 2019). Available at:

<https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism> (accessed 18 March 2021).

CDEI (2019) *Centre for Data Ethics (CDEI) 2 Year Strategy*. Available at: <https://www.gov.uk/government/publications/the-centre-for-data-ethics-and-innovation-cdei-2-year-strategy/centre-for-data-ethics-cdei-2-year-strategy> (accessed 18 March 2021).

CDEI Centre for Data Ethics and Innovation (2020) *Review of online targeting* (4 February 2020). Available at: <https://www.gov.uk/government/publications/cdei-review-of-online-targeting> (accessed 18 March 2021).

CMA Competition & Markets Authority (2019) *Market Study: Online platforms and digital advertising* (interim report, 18 December 2019). Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (accessed 18 March 2021).

CMA Competition & Markets Authority (2020) *Market Study: Online platforms and digital advertising* (final report, 3 July 2020) Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (accessed 18 March 2021).

CMA Competition & Markets Authority (2021) *Policy Paper: Digital Regulation Cooperation Forum (DRCF) work plan for 2021/22* (10 March 2021). Available at: <https://www.gov.uk/government/publications/digital-regulation-cooperation-forum-workplan-202122> (accessed 15 April 2021).

CPS (2004) *Memorandum of Understanding Between the Crown Prosecution Service (CPS) and the National Police Chiefs' Council (NPCC) concerning Section 46 Sexual Offences Act 2003*. Available at: <https://www.cps.gov.uk/publication/memorandum-understanding-between-crown-prosecution-service-cps-and-national-police> (accessed 18 March 2021).

DBEIS and DCMS (2020) *New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated*. Available at: <https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated> (accessed 19 March 2021).

DCMS and Home Office (2019) *Online Harms White Paper* (8 April 2019). Available at: <https://www.gov.uk/government/consultations/online-harms-white-paper> (accessed 19 March 2021).

DCMS and Home Office (2020) *Online Harms White Paper: Full government response to the consultation*. Available at:

<https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response> (accessed 19 March 2021)

DEEU (2019) *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*. Available at:

<https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> (accessed 19 March 2021).

European Commission (2016) *Communication from the European Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions – Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe*. (COM/2016/0288 final). Available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0288> (accessed 19 March 2021).

European Commission (2020a) *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*. (COM/2020/825 final). Available at:

<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN> (accessed 19 March 2021).

European Commission (2020b) *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. (COM/2020/842 final). Available at:

<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN> (accessed 19 March 2021).

EU – 'Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')' (2000) Official Journal L178.

EU – 'Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC' (2019) Official Journal L130.

France – 'LOI n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet' (2020) JORF n°0156. Available at:

https://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_haine_internet
(accessed 19 March 2021).

Furman Review (2019) (commissioned by Treasury and Department for Business, Energy & Industrial Strategy BEIS) *Unlocking digital competition* (March 2019)

Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

(accessed 19 March 2021).

Germany – ‘Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG)’ (2017) BGBl. I S. 3352. Available at:

https://www.bmji.de/DE/Themen/FokusThemen/NetzDG/NetzDG_node.html

(accessed 18 March 2021).

Home Office (2015) *Prevent duty guidance*. Available at:

<https://www.gov.uk/government/publications/prevent-duty-guidance> (accessed 18

March 2021).

House of Commons DCMS Committee (2019) *Disinformation and ‘fake news’* (18 February 2019). Available at:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmcdmeds/1791/1791.pdf> (accessed 18 March 2021).

House of Commons Library (2019) *The Status of ‘Retained EU Law’*. Briefing Paper No 08375, 30 July 2019. Available at:

<https://commonslibrary.parliament.uk/research-briefings/cbp-8375/> (accessed 18

March 2021).

House of Lords Communications Committee (2019) *Regulating in a Digital World* (9 March 2019). Available at:

<https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf>

(accessed 18 March 2021).

Ofcom (2018) *Discussion Paper: Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation* (18 September 2018).

Available at:

https://www.ofcom.org.uk/data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf (accessed 18 March 2021).

Poland – MS (2021) Projekt z dnia 15 stycznia 2021. Ustawa o ochronie wolności słowa w internetowych serwisach społecznościowych. Available at:

<https://www.gov.pl/web/sprawiedliwosc/zachecamy-do-zapoznania-sie-z-projektem-ustawy-o-ochronie-wolnosc-i-uzytkownikow-serwisow-spoecznościowych>

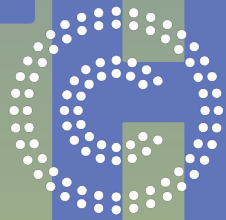
(accessed 19 March 2021).

The PEC Consortium

The PEC is led by innovation foundation Nesta and involves a consortium of UK-wide universities, comprising Birmingham; Cardiff; Edinburgh; Glasgow; Work Foundation at Lancaster University; LSE; Manchester; Newcastle; Sussex, and Ulster. The PEC's Director and Principal Investigator is Hasan Bakhshi, who is also Executive Director, Creative Economy and Data Analytics at Nesta.

For more details visit <http://www.pec.ac.uk> and [@CreativePEC](#)





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