Regulating the Digital Economy

Feedback from techUK to the Government’s Plan for Digital Regulation and proposals to reform the Framework for Better Regulation

#### September 2021

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK’s leading technology membership organisation, with more than 850 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

**Introduction:**

techUK welcomes the Plan for Digital Regulation and the consultation to reform the framework for better regulation. Both serve as a statement of intent and part of a wider discussion on how to create well-functioning digital markets that meet the UK’s economic goals.

The Government’s openness to a wide range of policy responses - only one of which is formal regulation - is a progressive step forward and the test will now be to see how the Plan for Digital Regulation is implemented and how the consultation on the better regulation framework is taken forward for every policy area mentioned. techUK and our members see this as a significant opportunity to strike a new approach to regulating with benefits both for consumers but also for firms operating in the UK. We therefore urge the Government to put in place procedures to ensure that each phase of the Plan for Digital Regulation is completed to create a robust and predictable policy environment and this is supported by wider changes when reforming the framework for better regulation.

Doing so would improve the accessibility of policy processes to the broadest range of companies while yielding evidence which the Government needs to make good policy.

The tech sector is a diverse and expanding sector of the UK economy, with companies ranging from start-ups with as few as two or three employees to huge product manufacturers and service providers with complex supply chains. They are all, however, unified in the fact that the technology that they sell, whether hardware or software, is the unique selling point of their business.

Every year, this sector also adds new and better-paying jobs to the UK labour market. Tech jobs account for 10% of total jobs in the UK, with projections estimating that the country may add another three million by 2025. These roles are not always in what many would consider ‘tech’ specific roles and digitally intensive firms such as HR, marketing, legal, and compliance which account for about 37% of employees in the digital economy. With average annual incomes of £62,500, these workers are highly skilled and receive significantly above average incomes

Accelerating and increasing digitisation across the economy has the benefit of not only helping our businesses to grow, but also supporting higher salaries as well as producing firms more resistant to future shocks. However, with this expansion digital regulation becomes more cross cutting throughout the economy, with regulation on the use of data, competition policy in digital markets and the scope of the Online Safety Bill becoming significant to a greater and greater number of companies.

Regulation and the role of regulators has always been key for the tech sector, however, the growing focus on competition in digital markets through the creation of the Digital Markets Unit, the selection of Ofcom as the regulator in the Online Safety Bill and the creation of the cross regulator Digital Regulation Cooperation Forum (DRCF) has seen the role of regulators increase, becoming more central to the UK’s digital economy than ever before.

This is particularly important for the UK as our digital economy is dependent on digital services. Of the UK’s digitally intensive industries, 96 percent of output and 81 percent of exports is in services. For these digital service providers, the regulatory framework surrounding the research, development, marketisation and compliance requirements for digital service products is central to determining whether the UK is seen as a competitive economy within which to invest and grow the business.

Developing regulatory system which is proportionate, underpinned by strong principles and that encourages innovation, is not just good for UK tech and the wider economy as it digitises, but for consumer welfare by enabling firms to confidently digitise to deliver the latest and most innovative products to British consumers.

The Government has set out a marker for the kind policy it wants to drive in the UK through the Plan for Digital Regulation and is seeking to build on this through reforms to the framework for better regulation. In this feedback techUK provides an overview of how through these two initiatives the Government can create the right framework and principles to support a proportionate, targeted, and innovative framework for the UK’s digital economy.

However, Government should also be alive to the fact that the volume and breadth of digital regulation is increasing at the same time as government is developing a new pro-competition framework and some companies fear that the regulatory burdens will bear on them before they experience the benefits of the pro-competition regime. This increase in volume and breath emerges both from the natural impact of the UK leaving the EU, but also as a result of a significant number of changes proposed by Government, many of which have been mentioned above.

To support the proportionality aims of both the Plan for Digital Regulation and what the Government is seeking to achieve through reforms for the Framework for Better Regulation Ministers should explore and engage with the sector to identify how to help them best onboard these new requirements including through detailed guidance and seeking to sequence the implementation of new regulatory regimes.

In this feedback techUK and our members suggest steps the Government can take through the implementation of the Plan for Digital Regulation and the consultation on reforming the better regulation framework to make a positive step change in the way the UK regulates its digital economy with benefits both for consumers and UK businesses.

**Our feedback is broken down into two parts:**

* Part 1: The Plan for Digital Regulation (pgs 5 – 8)
* Part 2: Reforming the framework for better regulation (pgs 9 – 11)

**Part 1: The Plan for Digital Regulation**

techUK is encouraged to see that the Plan clearly states how ‘digital technologies and activities demand a distinct regulatory approach’ given the ‘distinctive features which make digital businesses and applications unique and innovative’. This focus is welcome and sees the plan build on a growing discussion within Government and UK regulators around innovation enabling regulation.

Any regulatory system must seek to balance the prevention of harms to consumers and the public while also enabling businesses to innovate and create new products that ultimately will bring consumer and public benefit in the future. At the heart of this balance is a robust assessment of the need for intervention, consideration of all available options and careful decision-making about the appropriate regulatory action to address existing or past harms balanced against future consumer benefits that may be lost due to premature regulation.

Enabling innovation and striking the right balance between harm prevention while also supporting the development of products and services that deliver future consumer benefits means making sure regulatory interventions are proportionately targeted and risk-based while also enabling coordination across the economy so that innovation at the boundaries of sectors can be enabled. This balance should include a range of options from taking no intervention but engaging in dialogue with the market and providing political support to industry-led approaches that can achieve the same outcomes without the need for regulation. The principles set out in the Plan for Digital Regulation make a good start, however how these are put into practice will be key.

One of the true values of the Plan for Digital Regulation is the ability to use the principles and the statement to hold Government to account as it implements new policy. techUK will be following this closely and will seek to examine one year on from its implementation what impact the Plan for Digital Regulation has had on Government policy making.

Below techUK provides some feedback on each principle including our perspective on the principle as drafted, suggestions for any improvements and reflections on whether existing Government regulation supports these principles.

**Principle 1 – actively promote innovation:**

The purpose of embedding innovation as a core principle should be to facilitate the right balance between regulators and policymakers taking action to address harms and a proactive discursive approach with the companies being regulated to explore non-regulatory product-based resolutions to consumers harms.

Principle 1 should aim to ensure that ahead of interventions regulators have a framework to consider the impacts any action would have on how future innovation and product development could instead address the harm identified as well as boosting consumer welfare in the round. This would help create a more defined system to weigh up the impact on consumer welfare of immediate regulatory action versus challenging the market to address the harms identified.

An innovation principle should not be interpreted as a replacement for regulatory action but support the more evidence-led and targeted approach to regulating that means interventions in the market are only taken where reasonable alternatives have been exhausted.

Such an approach is being suggested in the Government’s reforms to the Framework for Better Regulation, Pro-competition regime for digital markets and suggestions for reform of wider consumer rights and competition policy. We believe this has benefits for both the regulator, as it will support a close engagement and better understanding of the sectors they regulate, and for businesses as such could support consumer harms can be addressed iteratively rather than through onerous and procedural market studies and fines.

**Reflections on the Online Safety Bill:**

In relation to the draft Online Safety Bill, there is an intention to support principle 1 of the Plan for Digital Regulation to actively promote innovation. The Draft Bill seeks to align with this principle through supporting proportionality and following systems and processes which should enable regulation to be agile in a fast-moving sector. It has provided helpful clarity on the scope of the legislation for the many companies who are now clearly exempt from the regulation. Yet the legislation has still not gone far enough to provide levels of clarity for those that are in scope. In practice there are still thousands of companies in scope and this has the potential for ripple effects in the UK economy which could adversely impact competition and innovation in the digital ecosystem.

The Government’s impact assessment notes how the Bill will impact 24,000 tech businesses with estimated costs of £2.1 billion. The businesses included vary from discussion forums to online marketplaces to professional platforms and social media and the costs span a range of different sized companies that are part of an inventive, fast moving and constantly evolving tech sector. There are various provisions within the Draft Bill which do not support innovation and investment for diverse tech businesses. These should be addressed and policymakers should reflect and learn how to avoid this in future decision making.

The first lesson from the Draft Bill is the need for future regulation to consider the cost of establishing compliance teams and developing capacity to moderate content. For many smaller businesses they may need to divert staff away from venture investment or source additional funding to resource compliance. This can have implications on the ability of smaller companies to compete with their larger comparators and creates the need to consider attendant regulatory cost in addition to other economic implications of the legislation.

Second – although considered as a last resort in the Online Safety Bill – policymakers should avoid proposals to include criminal sanctions for senior managers as this risks having a chilling effect on smaller companies and investment in the UK digital economy, For some companies, the very existence of turnover fines may be sufficient to deter investment with knock on effects for competition between firms and choice for consumers. This would be a poor outcome and conflict with the Government’s broader goal for the digital economy set out in many strategies including the Plan for Digital Regulation.

Third, policymakers must address the possible unintended consequences of proposals on the design and development of innovative technology. The Draft Bill has provision which have the potential to stall the growth of investment and innovation across a wide range of in scope services. For example, Part 4 allows Ofcom to require a service to use an accredited technology to scan and remove illegal content. This risks disincentivising in scope services from developing more innovative technology and could give rise to unintended consequences. Those intending to cause harm through platforms may look for loopholes in technology to persist with criminal or otherwise harmful online activity. Providers need to be able to adapt their technological solutions to keep ahead of the constant and evolving threats and mandating specific technology solutions will run counter to this, by locking companies into solutions that bad actors will be able to easily learn and exploit to their advantage.

techUK urges policy makers to reflect on the challenges of the current drafting of the Online Safety Bill for innovation and investment and to avoid duplicating approaches which have the potential to disincentivise technology creation.

**Principle 2 – achieve forward looking and coherent outcomes:**

Remaining outcomes focused is a fundamental part of creating effective and coherent regulation. Outcomes focused approaches, rather than directive-based regulation relies on clear definitions of the harms Government wants to protect consumers from, guidance from the regulator and an ongoing dialogue with businesses.

There are various upcoming consultations which have the potential to see this principle become a reality, ranging from the competition regime to the DCMS Online Advertising Programme to the Government’s recently announced consultation on reform of the UK’s data protection regime.

Conversely, there are calls from society and Parliamentarians around the Online Safety Bill which have the potential to override this principle. These calls relate to extending the scope of the Online Safety Bill to include online paid for advertising and specifically economic crimes.

techUK agrees there is a need for a new action plan to address potential harm to consumers arising from online fraud. However, extending the scope of the Bill at this stage would lack the detailed investigation of the market needed to identify the specific harms that are being addressed and create additional layers of complexity and uncertainty around already very complex legislation. Rather, the solutions would be better found by collaborative and coordinated action within digital supply chains and between enforcement authorities.

Similarly, principle 2 of the Plan for Digital Regulation provides a helpful starting point for policymakers to ensure ‘that regulation is outcomes focused’, yet there is no clarity on how adding economic crimes to the Online Safety Bill will stop online fraudsters from operating in the UK. The Bill was not written with the intention of regulating economic crimes, it was designed to focus on user-generated content. An extension of scope to include economic crimes and paid for advertising has the potential to take the Bill’s attention away from the objectives to provide greater protection for children while enabling freedom of expression and supporting innovation. It would also bring in a much larger set of businesses into scope from various sectors who are required to disrupt the journey of online fraudsters.

An outcome focuses approach should mean that all Government policy begins with up front evidence gathering, cross departmental engagement to ensure relevant factors are considered at the start (for example the intersection with competition and consumer policy, international developments). In the context of the Online Safety Bill and online Fraud this means allowing the recently launched Home Office 2022 – 2025 Fraud Action Plan and DCMS Online Advertising Programme to remain the vehicles to gather evidence and begin the process of devising ways to address economic crimes and advertising regulation.

**Principle 3 – exploit opportunities and address challenges:**

As well as protecting consumers regulators have also played a central role in creating schemes to support innovation in the tech sector. Good regulatory initiatives have already shown their ability to help foster entirely new markets with the FCA’s Sandbox and new proposed Scalebox providing a strong model for how regulators can enable innovation.

This has practical benefits with techUK members telling us that sandboxing and a regulator which supports innovation can contribute to reduced development costs. Good practice can also make it easier to raise investment for products which are supported by sandboxes or where the regulator is seen as engaged and has a good understanding of the market.

While this general principle is accepted across many sectors the Government needs to be alive to some sector specific challenges. For example, in the utilities sector the right environment for innovation at scale is based deploying products in relatively fixed market conditions. The Energy Systems Catapult’s experimental “Living Lab” approach has yielded good insights through testing and development with real consumers in real homes. For example, it allows innovators to identify true interoperability in a commercial environment and that can be more useful than a sandbox in this sector.

Sanboxes, scaleboxes and living lab approaches support regulators to engage with the sector on upcoming product developments this helps prepare the UK’s regulatory system to be prepared to exploit new opportunities and innovations and receive early warning of challenges coming down the track, creating the space for solutions which can support innovation in the market and better outcomes for consumers.

By also seeking to develop memoranda of understanding and bilateral sandboxes between the UK and international trading partners the benefits of such a system can be expanded. These solutions also have the benefit of being able to be negotiated without the sometimes-rigid time tables of negotiating free trade agreements.

To support principle 3 the Government should therefore seek to expand the use of sandboxes and testbed schemes such as the Living Lab approach to drive innovation across multiple sectors. A specific example in relation to autonomous systems is used in part 2.

**Part 2: Reforming the framework for better regulation**

The Government’s consultation on reforming the framework for better regulation sets out a number of proposals to change the legal and philosophical underpinnings of the UK’s approach to regulation now that the UK has left the EU. These proposals contain a number of suggestions which many businesses have called for years such as moving the basis for regulation from a directive based to a common law approach and exploring the possibility of a proportionality principle to replace the precautionary principle.

Below techUK provides feedback on a number of these proposals, however while not addressed directly in the consultation members have repeatedly raised the need for the Government to consider how, as the UK reforms its regulatory system, this ensures non-tariff barriers to trade such as regulation remain low.

Many businesses which operate in the UK are global businesses or businesses growing in the UK have the aspiration to become global businesses. A global business will need to adjust its regulatory compliance posture to fit new markets, and in the services sector that can increasingly mean a global scale. Ensuring the UK has a regulatory system which effectively meshes with other key markets does not mean restricting how the UK regulates but under the principles outlined in the Reforming the framework for better regulation consultation and the Government’s Plan for Digital Regulation ensuring UK regulation is updated and the principles are compatible to reduce friction.

This helps businesses achieve better outcomes for consumers in a world where regulation is inherently cross border and enables increased innovation through greater competition between global and UK firms in the UK market and UK and global firms in other markets. The Government’s consultation, Data: A new direction makes a number of suggestions around how to allow the UK deliver a tailored regulatory system for the UK, while also supporting compliance and reducing barriers to trade with countries with similar high standard regimes for example the New Zealand and the European Union data protection regimes.

The Government and regulators will also need to take into account the time limits some tech businesses need to implement such measures where development cycles are tight and usually require at least 6 -12 month’s notice to design, implement and test significant changes.

**Common law approach to regulation:** techUK in principle supports a shift toward a common law approach to regulation. The Government’s consultation on reform of the UK data protection system contains a number of proposals in this vein such as the creation of a new privacy management programme allowing companies to design a more outcomes focused rather than proscriptive approach to data protection as an interesting exploration of this concept. techUK will look at the details of this proposal further as part of the Government’s consultation *Data: a new direction.*

However, while there is support for this common law approach, in some areas, particularly in digital regulation, more specific definition is key to give businesses and consumers the confidence about how the technology works and what their rights are.

For example, in the same consultation, *Data: a new direction,* the Government identified other areas where specific changes to the data protection framework for example when looking to change the legal bases for data processing under the legitimate interest test requires a more explicit and directive approach. The initial proposals on this have been welcomed by members. This contrasts with the Online Safety Bill where definitions are left highly uncertain, but strong legal penalties still exist.

Overall, we suggest a common law approach remains the preferable structure for regulation, but that specificity is still needed in certain cases. Government can help identify this by engaging with industry specifically around questions of proportionality and scope and where more clarity is needed in legislation for the benefit of both businesses and consumers.

**Embedding a responsibility to consider competition and innovation into regulators’ duties:** techUK members are supportive of duties to support competition and innovation however any such addition duties will need to be closely linked to the regulators objective to promote consumer outcomes rather than being more general duties.

For example, as outlined in Part 1 a regulator should have consider innovation when it is taking action where the issue could be resolved through non-regulatory action if the target firm were to change/innovate their product to address the harm.

Regulators beyond purely competition related investigations should consider the possible impacts of their decisions on the wider market. For example, heavy regulatory initiatives such as the AADC have raised concern about competition impacts on smaller firms who will bear proportionately higher compliance costs and may force customers to use large platforms as they are more likely to comply in the early stages of the regulation launching.

**Proportionality principle:** the emphasis on the consistent application of the existing proportionality principle has been supported by members with the shift to a balance of risks approach under this standard viewed as more supportive for supporting innovation and is more likely to tilt regulators toward engaging closer with market either via an approach based on determining how regulation is proportionate to the risk or based on outcomes as suggested in options 1 and 2 in the consultation. techUK would support a blend of both options where a risk based approach is taken by Government during the design and consultation phase when regulatory principles are set, including a consideration for both whether the measures being put in place are proportionate to the harm being addressed as well as the burden they place on business. With an outcomes-based approach utilised in relation to compliance and enforcement.

The Government however needs to be mindful of the increased role that its proposed approach to shift the UK to a more common law-based approach to regulation and one that has a greater focus on outcomes will place a greater role on guidance from individual regulators. In particular this will mean that engagement with industry and consumers as guidance is developed (where these apply) the strategic steers given to regulators by Government will be of increasing importance.

**Support for initiatives such as sandboxes and regulatory taskforces:** as highlighted in Part 1 techUK members are supportive of sandboxes. Sanboxes not only drive down development costs but also incentivise investment into companies which are in sandboxing cohorts. However due to the limited number of spaces and limited number of sandboxes these benefits are being seized upon by small cohorts of companies.

By expanding both the number of sandboxes in different regulators as well as cohort sizes where these exist already (for example in the FCA and ICO) this can help drive up investment into a larger pool of innovative UK firms. Sandboxes are also useful for regulators as they create a feedback loop between the regulator and the latest product ideas from the most innovate parts of their market.

***Example, a regulatory taskforce for autonomous systems:*** Regulation also has enormous impacts on developing markets, e.g. autonomous systems. Getting ahead on certification schemes and creating the space for test beds can unlock significant amounts of private capital. The Government therefore could seek to build on the innovation strategy with a number of regulatory taskforces to set early guiding principles in emerging markets and create more consistent approaches across regulators.

Autonomous systems will be critical to the UK's competitiveness in the near future, as this technology has the potential to revolutionise manufacturing, medicine, the military, and transportation.

However, the sector has been particularly difficult in the UK to engage in the experimentation, creation and commercialisation of new and innovative autonomous products, as the regulatory landscape is perceived to be complicated and uncoordinated by the industry. This is in addition to the numerous ethical, moral, and legal considerations that should be considered in the development of these technologies.

By developing a taskforce driven by the Department for Business that brings together academia, government, and industry to develop best practises and a new modern regulatory framework, capable of competing internationally, that attracts investment and allows us to not miss out on the opportunity to be global leaders in Autonomous systems.

The UK is missing an opportunity here with a significant amount of expertise and the global industry based in the UK, more streamlined regulatory and certification processes could unlock significant amounts of private investment.