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The United Kingdom Diverges from the European Union in Its Proposed "Pro-Innovation" Approach to Regulating Artificial Intelligence

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In this article, the authors discuss the UK government's plans for regulating artificial intelligence (AI) systems, summarize its "pro-innovation" approach, and identify recent announcements from UK regulators on AI governance in their respective sectors. The authors also consider ways in which the UK's approach differs from the EU's proposals to regulate AI, and strategic considerations for businesses developing and using AI in the United Kingdom.

Against the backdrop of the EU's Artificial Intelligence (AI) Act entering the final stage of the legislative process,[1] the United Kingdom has set out its proposed framework for AI regulation. Having exited the European Union, the UK government is seeking to establish a "pro-innovation" approach that promotes the AI sector's growth while also addressing specific risks it believes are raised by AI.[2] Unlike the EU's horizontal AI Act, the UK government supports a sector-specific approach for regulating AI and does not propose introducing a new legal framework or establishing a new regulatory body to oversee the development or use of AI. Instead, the United Kingdom would require existing regulators to take responsibility for the establishment, promotion, and oversight of "responsible AI" in their respective sectors.

The UK's strategy can be contrasted with the EU's proposed AI Act. While the United Kingdom looks to adopt a non-statutory and "flexible" framework,[3] the European Union has instead sought to implement a new regulation, modeled on product-safety legislation, which would impose a detailed set of technical and organizational requirements on "providers" and "users" of "high-risk" AI systems.[4]

The UK's regulatory proposals may continue to evolve as it takes into account industry feedback and publishes an AI Regulation

Roadmap with further details later this year.[5] Now is the time for businesses developing or using AI systems in the United Kingdom to familiarize themselves with the UK's approach and gain a head start on understanding the potential impacts on their businesses.

The UK's "Pro-Innovation" Approach to AI Regulation

In March 2023, the UK government published a white paper entitled "A Pro-Innovation Approach to AI Regulation" setting out its vision for the governance of AI systems. The white paper builds on previous announcements made by the UK government, including an AI Governance and Regulation Policy Statement in 2022,[6] and confirms that the government does not intend to introduce new AI legislation. Below is a summary of the key elements in the white paper.

Scope: Defining AI

Rather than putting forward a universally applicable definition of AI, the white paper describes two functional characteristics that would put an AI system within the scope of regulation:

1. *Adaptive systems* that operate by inferring patterns in data that are often not easily discernible or envisioned by their human programmers, highlighting in particular the difficulties in explaining the logic or intent by which an output has been produced; and
2. *Autonomous systems* that can operate in dynamic environments by automating complex tasks and making decisions without the ongoing control of a human, highlighting the challenges of assigning responsibility for actions taken by AI systems.

The white paper suggests that these two characteristics are unique to AI and generate the need for a specific regulatory response. It notes that the adaptivity of AI can make it difficult to explain the intent or logic of the system's outcomes while the autonomy of AI can make it difficult to assign responsibility for outcomes. According to the white paper, the combination of

adaptivity and autonomy can potentially raise serious implications when decisions are made relating to significant matters or where there is an expectation that a decision should be justifiable in easily understood terms.

The UK government hopes that defining AI based on its unique characteristics will allow for a flexible and future-proof approach, and will encourage regulators to develop more granular and domain-specific definitions of AI. This stands in contrast to the proposed AI Act, which defines AI systems as software using one or more "techniques and approaches" and which "generate outputs such as content, predictions, recommendations or decisions influencing the environments they interact with" (Article 3).

Cross-Sectoral Principles

The white paper outlines five value-focused principles regulators across sectors will be expected to consider to guide the safe and innovative use of AI in their industries. It is envisaged that these principles will initially be placed on a non-statutory footing, meaning that the government does not currently intend to introduce new legislation. The five principles are:

1. *Safety, Security, and Robustness*—AI systems should function in a robust, secure and safe way;
2. *Transparency and Explainability*—Organizations developing and deploying AI should be able to communicate the purpose of AI systems, how they work, when they are to be used, and their decision-making processes;
3. *Fairness*—AI systems should not discriminate against individuals or undermine their rights, nor should they create unfair commercial outcomes;
4. *Accountability and Governance*—Appropriate measures should be taken to ensure effective oversight of AI systems and clarity as to those responsible for their output; and
5. *Contestability and Redress*—There must be clear routes to dispute harmful outcomes or decisions generated by AI.

These cross-sectoral principles are built on the OECD (Organisation for Economic Co-operation and Development) AI Principles,[7] and contain parallels to the obligations imposed on developers of "high-risk" AI systems under the EU's AI Act. For

example, the AI Act requires providers to design their high-risk AI systems to enable human oversight and achieve an appropriate level of accuracy, robustness, and cybersecurity (Articles 14 and 15). Providers of "high-risk" AI systems must also provide specific information to users and adopt risk management and quality management systems (Articles 13, 9, and 17).

Regulator-Led Approach

The proposed regulatory framework is dependent on the implementation of the cross-sectoral principles by UK regulators. Over the next 12 months, regulators will be expected to issue guidance for businesses on how the principles interact with existing legislation and to support industry in applying the principles in practice. Regulators may use any tools or resources within their existing remits and powers to implement the principles. For AI use cases that cross multiple regulatory remits, regulators will be expected to cooperate with each other and issue joint guidance. The government will monitor the overall effectiveness of the principles and, if necessary, may later impose a statutory duty on regulators to have regard to the cross-sectoral principles in the performance of their tasks. However, the white paper notes that there are currently no plans to extend any regulator's remit or enforcement powers.

This approach is intended to make use of regulators' domain-specific expertise to tailor the implementation of the principles to the specific context in which AI is used. The government hopes that this will create a flexible and adaptable framework allowing the United Kingdom to respond to future technological advances quickly and proportionately. The UK's regulator-led approach can be clearly contrasted to the EU's AI Act, which will rely on a formal, coordinated network of new and established regulators, including a central European AI Board and national competent authorities for AI in each Member State.

Central Coordination and Oversight

Under the UK proposal, regulators' activities would be reinforced by the establishment of new support and oversight functions within central government. The white paper recognizes that there

are risks with a de-centralized regulatory framework, including inconsistent enforcement or guidance across regulators. To address this, the white paper proposes to create new government functions to encourage regulatory consistency and support regulators in implementing the cross-sectoral principles. The support functions include:

- Assessment of the effectiveness of the de-centralized regulatory framework, including a commitment to remain responsive and adapt the framework if necessary;
- Central monitoring of AI risks arising in the United Kingdom;
- Public education and awareness-raising around AI; and
- Testbeds and sandbox initiatives for the development of new AI-based technologies.

Further, the white paper recognizes the likely importance of technical standards as a way of providing consistent, cross-sectoral assurance that AI has been developed responsibly and safely. To this end, the government will continue to invest in the AI Standards Hub, formed in 2022, whose role is to lead the UK's contribution to the development of international standards for AI systems. Standards will also play a key role in the EU's AI Act as conformance with harmonized EU standards will create a presumption of conformity for "high-risk" AI systems (Article 40).

UK Regulators Focus on AI

The UK's regulator-led approach is already beginning to play out across a number of sectors. Regulators have responded to the government's white paper by publishing guidance and reviews into how to develop and use AI responsibly and how current laws apply to AI systems in their respective domains. Although not legally binding, the guidance provides useful insights into the AI risks regulators perceive as most challenging and most likely to be subject to scrutiny. They also offer another set of best practices for businesses to consider as they apply AI to their workplaces and services.

The following is an overview of recent announcements from UK regulators on AI.

Information Commissioner's Office

The Information Commissioner's Office (ICO) has identified AI as a strategic priority for several years. Following the white paper's release, it published updated Guidance on AI and data protection[8] (the ICO's Guidance) setting out best practices for data protection-compliant AI and explaining how it interprets data protection law in the context of AI systems that process personal data. The ICO's Guidance is structured in line with the UK General Data Protection Regulation's (UK GDPR)[9] data protection principles, and features recommendations on how the principles, including fairness, lawfulness, accountability, and security, apply when using AI systems. Key recommendations in the ICO's Guidance include:

- *Accountability and Governance Implications of AI*—Businesses should carry out a Data Protection Impact Assessment (DPIA) under the UK GDPR to assess and mitigate any data protection risks posed by the use of AI tools that process personal data. DPIAs should set out the impacts of the processing on individuals and assess trade-offs between different risks and competing interests.
- *Lawfulness, Fairness, and Transparency in AI*—Businesses should clearly document:
    1. The source of any input data;
    2. Whether the outputs of the AI system are "statistically informed guesses" as opposed to facts; and
    3. Any inaccurate input data or statistical flaw in the AI system that might affect the quality of its outputs.
  Additionally, where data is collected directly from individuals, they must receive privacy information before their data is used to train a model or a model is applied to them.
- *Assessing Security and Data Minimization*—Businesses should implement effective risk management practices, including by effectively tracking and managing training data, and ensuring "pipeline" security by separating the AI development environment from the rest of the organization's IT system.
- *Ensuring Data Subject Rights in AI Systems*—Businesses should ensure systems are in place to effectively comply with data subject rights requests. This can be achieved by designing AI systems to facilitate effective human review,

and provide sufficient training to staff to ensure they can critically assess the outputs, and understand the limitations of, the AI system.

Following the publication of its Guidance, the ICO called for businesses to address the privacy risks the ICO believes are posed by generative AI and set out a list of eight questions that it considers particularly relevant to generative AI systems that process personal data.[10] The questions and corresponding recommendations from the ICO cover similar topics to the Guidance, such as ensuring that businesses have a lawful basis for collecting and processing personal data, including data that comes from publicly accessible sources, and informing individuals what personal data is collected and how it is used. In its statement, the ICO emphasizes that existing data protection law applies to current uses of generative AI and commits to acting where businesses are "not following the law, and considering the impact on individuals." In a subsequent statement in June 2023, the ICO re-stated its willingness to take action where businesses have not addressed the privacy risks of AI services and committed to review "key businesses'" use of generative AI.[11]

Competition and Markets Authority

In May 2023, the Competition and Markets Authority (CMA) announced a review into AI foundation models, including generative AI, and their potential implications for the UK's competition and consumer protection regime.[12] The CMA's focus is on foundation models—a type of AI model trained on large amounts of data that can be adapted to a wide range of different tasks and services such as chatbots and image generators—and how their use could evolve in the future. The review will focus on three main themes:

1. Competition and barriers to entry in the development of foundation models;
2. The impact foundation models may have on competition in other markets; and
3. Potential risks to consumers arising from the use of foundation models in products and services.

As part of its evidence-gathering efforts, the CMA intends to issue "short information requests" to key players, including

"industry labs developing foundation models, developers . . . leading technology firms" and others. Following its fact-finding efforts, the CMA expects to publish a report on its findings. Potential outcomes of its review could include issuing recommendations and guidance on the competition and consumer protection principles that can best guide the ongoing development of foundation models.

Ofcom

Generative AI is also emerging as an area of focus for Ofcom, the UK's communications regulator. In June 2023, it published a note setting out "[w]hat generative AI means for the communications sector."[13] According to the statement, Ofcom is closely monitoring the development of generative AI, the risks Ofcom considers surround its use in the communications sector, and the steps that industry players are taking to mitigate those risks. Ofcom is undertaking a number of measures related to generative AI, including:

- Working with businesses using generative AI that may fall in scope of the UK's forthcoming Online Safety Bill[14] to understand how businesses are proactively implementing safeguards to protect users form potential harms;
- Publishing guidance to UK broadcasters explaining how the use of synthetic media, such as "deepfakes," is subject to the Broadcasting Code and existing rules like ensuring news content is reported with due accuracy and protecting audiences from misleading material;[15] and
- Reviewing the evidence surrounding detection techniques that could be used to distinguish between real and AI-generated images and video content.

Contrasting the UK's Approach to the EU's AI Regulation Proposals

The UK's "pro-innovation," non-statutory approach to AI regulation diverges from the EU's proposals for AI regulation in a number of key respects.

First, the European Commission's proposed AI Act represents a legislative framework and imposes legislative obligations at various stages of an AI system's life cycle; from data governance, training,

testing and validation, to conformity assessments, risk management systems, and post-market monitoring. The United Kingdom has chosen to diverge from this prescriptive approach by opting not to introduce further legislation at this stage.

Second, the UK's cross-sectoral AI principles will be implemented by existing regulators, based on existing laws, while oversight and enforcement of the AI Act will rely on a network of new and established regulators, including a new centralized "European Artificial Intelligence Board" and national competent authorities for AI in each Member State.[16]

Third, the UK's approach focuses on guidance for specific sectors and risks the UK government believes are presented by AI. In contrast, the AI Act would apply horizontally across sectors, focusing primarily on specified "prohibited" and "high-risk" AI systems.

Fourth, the Commission's AI Act regime proposes penalties of up to €30 million or 2-6% of global annual turnover depending on the violation,[17] whereas the United Kingdom has no plans to introduce new penalties or enforcement powers for regulators at this stage.

Finally, the white paper does not propose introducing changes to the UK's liability regime for cases involving AI systems. By contrast, in September 2022, the European Union introduced new liability rules for AI systems in the form of a proposed directive on adapting non-contractual civil liability rules to AI, the AI Liability Directive (AILD).[18] The AILD is aimed at complementing the AI Act by introducing new rules for non-contractual, fault-based civil claims involving AI systems. Additionally, the European Commission proposed updating the EU's Product Liability Directive to harmonize rules for no-fault liability claims by persons who suffer physical injury or damage to property caused by defective products.[19] Software, including AI systems, are explicitly named as "products" under the proposal, meaning that an injured person can claim compensation for damage caused by a defective AI system.

Strategic Considerations for Businesses Developing or Deploying AI in the United Kingdom

For many businesses that develop and use AI across multiple jurisdictions, a key challenge will be developing a consistent and

sustainable global approach to AI governance and compliance that satisfies diverging regulatory standards. At a practical level, the UK's non-statutory approach may raise questions about enforcement and what incentive there will be on businesses to comply with guidance that is not legally binding. The EU's approach, on the other hand, is likely to be seen as imposing significantly higher compliance requirements and could require AI developers and deployers to materially alter their services and practices to align with EU-specific rules, including risk assessments, testing and record-keeping obligations, and post-market monitoring. Importantly, the AI Act would apply to AI systems placed on the market or put into service in the European Union (irrespective of where the developer or deployer is established) and to AI systems whose outputs are used in the European Union.[20] This broad territorial scope renders the EU's approach and legislative requirements particularly relevant to United Kingdom and other non-EU businesses.

While the regulatory frameworks in the United Kingdom and European Union are yet to be finalized, there are common themes, such as transparency, accountability, safety, and security, and increasing regulatory guidance emerging for businesses to begin preparing for the new requirements that lie ahead.

Notes

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1. The European Commission's proposal for a Regulation laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) (the AI Act) is available at https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-european-approach-artificial-intelligence. References to provisions in the EU's AI Act in this article are to the European Commission's text, unless otherwise stated.

2. The UK government's white paper "A Pro-Innovation Approach to AI regulation" is available at https://assets.publishing.service.gov.uk/

government/uploads/system/uploads/attachment_data/file/1146542/a_pro-innovation_approach_to_AI_regulation.pdf.

3. White paper, *supra* note 2, at 3.

4. These are all terms defined in the EU's AI Act: "provider" (Article 3(1)) and "user" (Article 3(4)) of a "high-risk" (Article 6) AI system.

5. White paper, *supra* note 2, at 72.

6. Available at https://www.gov.uk/government/publications/establishing-a-pro-innovation-approach-to-regulating-ai/establishing-a-pro-innovation-approach-to-regulating-ai-policy-statement.

7. Available at https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449.

8. The ICO's Guidance is available at https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/guidance-on-ai-and-data-protection/.

9. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation) (Text with EEA relevance) (Retained EU Legislation).

10. Available at https://ico.org.uk/about-the-ico/media-centre/blog-generative-ai-eight-questions-that-developers-and-users-need-to-ask/.

11. Available at https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/06/don-t-be-blind-to-ai-risks-in-rush-to-see-opportunity/.

12. Available at https://www.gov.uk/government/news/cma-launches-initial-review-of-artificial-intelligence-models.

13. Available at https://www.ofcom.org.uk/news-centre/2023/what-generative-ai-means-for-communications-sector.

14. Available at https://bills.parliament.uk/bills/3137.

15. Available at https://www.ofcom.org.uk/__data/assets/pdf_file/0028/256339/Note-to-Broadcasters-Synthetic-media-including-deepfakes-.pdf.

16. Article 56 of the AI Act.

17. Article 71 of the AI Act.

18. Available at https://commission.europa.eu/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/liability-rules-artificial-intelligence_en.

19. Available at https://single-market-economy.ec.europa.eu/document/3193da9a-cecb-44ad-9a9c-7b6b23220bcd_en.

20. Article 2 of the AI Act.

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