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Section: Part III – The AIA versus other AI regulations around the world

AI Regulation in the UK

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Abstract: Post-Brexit (and post-Truss), the late UK Conservative government became somewhat less enthusiastic about its notion of a 'Singapore-on-Thames' liberal model for the UK economy, yet it remained keen to differentiate its approach to key policy areas from that taken by the EU. The debate over AI regulatory strategies thus provided a high-profile arena in which to juxtapose a principles-based, light-touch, and sectorally-focused regulatory framework, which requires existing regulators to both interpret and apply those principles, against the overarching and prescriptive legislative approach adopted by the EU in its new Regulation, the Artificial Intelligence Act. Following its General Election announcement on 22 May, the current UK government is unlikely to remain in office long enough to see its proposed AI regulatory framework to completion, however, as key UK regulators develop guidance on their strategic approach to AI under the framework from Spring 2024 onwards, a clearer picture of the plausibility of utilising a principles-based regulatory model for AI will start to emerge. The emergence of generative AI (GenAI) as an immediate focus for regulatory attention may provide some evidence as to how the two regulatory models will fare in encouraging innovation and addressing risks in this fast-developing area.

1. Introduction

> *Having exited the European Union we are free to establish a regulatory approach that enables us to establish the UK as an AI superpower.*[1]

For any given policy area falling within EU competency, it was not uncommon to find the UK's Conservative government (2010-2024) claiming that its decision to exit the EU in January 2020[2] permitted the UK to adopt an independent and putatively superior (for UK national interests) approach than that negotiated between the remaining 27 EU Member States. Whilst, generally, such claims might be considered, even on a generous interpretation, to have been weakly supported by the available evidence,[3] it is arguable that the area of AI regulation, outlined by the UK Government in its 2003 White Paper *A pro-innovation approach to AI regulation*,[4] might have potential to provide more robust support. Here, there is a clear divergence between the overarching and prescriptive legislative approach adopted by the EU, in the form of its recently adopted AI Act;[5] and the UK's decision to, initially at least, forego a legislative solution in favour of principles-based, light-touch, and sectorally-focused, regulatory framework, relying upon existing regulators to both contextually

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1 Rt.Hon. Michelle Donelan MP, Secretary of State for Science, Innovation and Technology, Foreword, Dept. for Science, Innovation & Technology/Office for Artificial Intelligence (2023). *AI regulation: a pro-innovation approach.* Command Paper: 815, E02886733 03/23, p.2.

2 Commonly styled 'Brexit'.

3 See, e.g. Dept for Business & Trade, *Smarter Regulation: One Year On*, May 2024.

4 Dept. for Science, Innovation & Technology (DSIT)/Office for Artificial Intelligence (OAI) (2023). *A pro-innovation approach to AI regulation.* Command Paper: 815, E02886733 03/23. See also DSIT (2024). *A pro-innovation approach to AI regulation: government response*. Command Paper:1019, E03019481 02/24.

5 Regulation (EU) 2024/1689 of the European Parliament and Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) OJ L, 2024/1689, 12.7.2024.

interpret, and then apply within their remit, a set of principles issued by government on a non-legislative basis.[6]

At the time of writing (June 2024), the EU AI Act has concluded its 3-year progression through the EU legislative process,[7] and is shortly to come into force; there is thus a significant body of academic and professional literature providing critical analysis of its scope and provisions, to which the volume containing this chapter adds. The UK regulatory regime traces its origins to a similar time period,[8] although a concrete set of regulatory proposals only went to public consultation in March 2023,[9] and the Government's response was published in February 2024.[10] Key UK regulators were asked to publish their strategy for addressing AI risks within their remit by 30 April 2024, including "set[ting] out AI-related risks in their areas, detail[ing] their current skillset and expertise to address them, and a plan for how they will regulate AI over the coming year."[11] By early May 2024, 14 regulators had provided AI strategy documents.[12] In addition to those Government initiatives, concerns about the potentially fragmentary nature of the proposed UK framework, the risk of poor alignment of regulator objectives, and the possibility of gaps between regulatory responsibilities, resulted in a private members bill being introduced into the House of Lords in November 2023 to address some of these issues. The later development of the UK's strategy means that academic coverage of the regulatory framework is necessarily less comprehensive, although there has been more discussion in professional legal circles.

This chapter will trace the development of the UK regulatory framework, highlighting key issues and areas of debate and contention, from the 2023 White Paper to the present (31 June 2024). It will also consider the strategic approach documentation provided by several of the key regulators, briefly outlining and assessing their responses to the regulatory framework. The remainder of the chapter will provide, insofar as it is possible to do so, given the very different regulatory understandings and approaches, a comparative analysis of the UK regulatory framework and the EU AI Act. This will include an examination of the application of each regime to the headline AI-based technology of the moment, generative AI (GenAI),[13] to provide some insights into their possible regulatory strengths and weaknesses.

2. The UK 2023 White Paper: A pro-innovation approach to AI regulation

The UK Government's 2023 White Paper noted that the speed of development of AI regulation world-wide meant that it would need to act quickly to have any influence on the international debate on AI governance. It recognized that there were potential serious new risks arising from AI technologies and that the nature and complexity of those technologies were likely to raise public concerns and reduce trust in them.[14] However, it argued, any regulatory strategy had to address those issues without undermining the case for business investment and thus discouraging innovation. To achieve this, it was necessary to avoid what the UK

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6 DSIT/OAI, *A pro-innovation approach* CP 815*, supra* n.4, para.55.

7 See Proposal for a Regulation of the European Parliament and of the Council] laying down harmonised rules on artificial intelligence and amending certain Union legislative Acts, COM(2021) 206 final, Brussels, 21.4.2021.

8 Dept. for Digital, Culture, Media and Sport (DCMS), *Digital Regulation: driving growth and unlocking innovation (Plan for Digital Regulation)*, July 2021; DCMS/OAI, *National AI Strategy*, September 2021, p.50-61; DCMS, *Establishing a pro-innovation approach to regulating AI*, CP 728, July 2022.

9 DSIT/OAI, *A pro-innovation approach, supra* n.4.

10 DSIT, *A pro-innovation approach: Government response, supra* n.4.

11 DSIT, UK signals step change for regulators to strengthen AI leadership, Press release, 6 February 2024. https://www.gov.uk/government/news/uk-signals-step-change-for-regulators-to-strengthen-ai-leadership

12 DSIT, Regulators' strategic approaches to AI, Notice, 1 May 2024. https://www.gov.uk/government/publications/regulators-strategic-approaches-to-ai/regulators-strategic-approaches-to-ai

13 GenAI will be defined here as a type of AI which typically uses deep learning, and is trained on a large dataset, capable of creating a range of outputs including text, images or media. See e.g. House of Lords, Communications and Digital Committee (CDC), *Large language models and generative AI*, HL Paper 54, February 2024.

14 DSIT/OAI, *A pro-innovation approach* CP 815*, supra* n.4, para 4.

Government regarded as the undesirable approach of developing cumbersome rules applying to all AI technologies.[15] This, on its face, appears to be a lightly veiled criticism of the risk-based legislative approach already adopted by the EU Commission's draft EU AI Act.[16]

The issue, from the White Paper's perspective, was not that there was an absence of regulatory control of AI technologies in the UK. Rather, it argued that existing laws, augmented by other regulatory tools such as standards and guidance, already provided a framework that could address, in a proportionate manner, differing uses of AI technology in particular regulatory contexts. The regulatory focus, it suggested, should be on preventing undesirable outcomes, and not simply that an AI technology was being utilized in some fashion.[17] However, it accepted that AI technologies might be adopted and used in ways that did not necessarily fall clearly within a specific regulatory context, and thus in any given use context, a range of legal requirements could be at play. Lack of clarity in how regulation might be applied across use contexts might therefore lead to uncertainty and inconsistency as to its application, which had the potential to harm business and consumer trust in AI. The objective of the UK's AI regulatory strategy should therefore be to provide an approach capable of being applied in particular contexts, across different regulatory remits, in a coherent and consistent fashion.[18]

The White Paper suggested that the most effective way of achieving that objective was not to produce new AI-focused legislation, which was claimed might dissuade innovation and be incapable of sufficient agility and flexibility to be adapted to address new technological developments in a proportionate manner. Instead, it proposed a set of non-statutory key principles that could be interpreted and applied by existing regulators. These would permit regulators to apply their particular domain knowledge and expertise to specific AI use contexts within the scope of their remit, but at the same time provide a degree of consistency in circumstances where use contexts cut across the remits of more than one regulator.[19] The principles identified as critical to AI regulation were:

- Safety, security and robustness - AI systems should function in a robust, secure and safe way throughout the AI life cycle, and risks should be continually identified, assessed and managed.
- Appropriate transparency and explainability - AI systems should be appropriately transparent and explainable.
- Fairness - AI systems should not undermine the legal rights of individuals or organisations, discriminate unfairly against individuals or create unfair market outcomes.
- Accountability and governance - Governance measures should be in place to ensure effective oversight of the supply and use of AI systems, with clear lines of accountability established across the AI life cycle.
- Contestability and redress - Where appropriate, users, impacted third parties and actors in the AI life cycle should be able to contest an AI decision or outcome that is harmful or creates material risk of harm.[20]

Initial implementation of a principles-based regulatory strategy was anticipated to require ongoing review to determine whether there were particular obstacles to the application of the principles, and whether a non-statutory approach was in fact viable. The White Paper did not rule out statutory intervention in the framework, identifying a longer-term possibility of placing a legal duty on regulators to have regard to the principles. However, it rejected suggestions that additional enforcement mechanisms might be required,

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15 *Ibid*, paras. 3 & 6.

16 *Proposal for a Regulation*, *supra* n.7.

17 DSIT/OAI, *A pro-innovation approach* CP 815*, supra* n.4, paras. 6 & 7.

18 *Ibid*, para. 7.

19 *Ibid,* para.11.

20 *Ibid*, para.10.

arguing that a legal duty to have regard to the principles would leave the regulators free to exercise discretion as to how and when the principles were applied, while having a clear mandate to do so. Even this minimal statutory intervention would not be exercised if the non-statutory framework was deemed to be sufficiently effective in practice.[21]

A key concern expressed by key stakeholders in consultations based on an earlier Office of Artificial Intelligence paper,[22] was that the proposed principle-based approach utilizing existing regulators lacked a central coordinating mechanism that would ensure effective collaboration between regulators and provide oversight of the effective function of the regulatory framework. The White Paper noted that there were a range of issues that would benefit from such a mechanism, including:

- Monitoring and evaluation of the regulatory framework's effectiveness and the implementation of the principles, especially in supporting innovation,
- Assessing and monitoring risks across the economy arising from AI,
- Conducting horizon scanning and gap analysis,
- Supporting testbeds and sandbox initiatives to help AI innovators get new technologies to market,
- Providing education and awareness to give clarity to businesses and empower citizens,
- Promoting interoperability with international regulatory frameworks.[23]

However, the White Paper considered that these functions could be provided from within government, via the Department of Science, Innovation and Technology, with some external support, and it explicitly rejected the suggestion that successfully addressing the issues raised would require the creation of a specific AI regulator.[24] Finally, it suggested that supporting innovation might achieved by means other than regulation, with tools such as assurance techniques, voluntary guidance and technical standards being used in parallel with the regulatory framework. This perhaps suggests a somewhat narrow understanding of the meaning of 'regulation', as such tools might reasonably be considered to fall within its contemporary definition in academic and professional literature.

Despite the White Paper's admonition that it would be necessary to move quickly to establish a regulatory framework for AI, the consultation period and formulation of the Government's response to the representations made, took 11 months to complete. During this period, key reports were produced by Committees in the House of Commons and House of Lords addressing AI governance in general (July 2003),[25] and the governance of Large Language Models (LLMs) and generative AI (GenAI) specifically (January 2024).[26] The former noted a degree of support for the principles-based approach from industry, albeit with caution in some quarters about its practical implementation.[27] The latter reiterated the need for the UK to develop its own regulatory strategy for AI, and suggested that primary legislation aimed at LLMs was not appropriate, however it did not explicitly address the issue of the need for wider AI-focused legislation.[28] While supportive of the White Paper approach, it was critical of the slow pace at which the elements of the central coordinating mechanism were being supported, financed, and delivered, which it said left the regulators it was supposed to

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21 *Ibid*, para.12.

22 DCMS, *Establishing a pro-innovation approach to regulating AI,* CP 728, *supra*, n.8.

23 DSIT/OAI, *A pro-innovation approach* CP 815*, supra* n.4, paras.14-15.

24 *Ibid*, para.16.

25 House of Commons Science, Innovation and Technology Committee (SITC), *The governance of artificial intelligence: Interim report*, HC 1769, 31 Aug. 2023.

26 House of Lords, Communications & Digital Committee (CDC), *Large language models and generative AI*, HL Paper 54, Feb. 2024

27 HoC SITC, *Governance of AI: Interim report*, HC 1769, *supra* n.25 at paras.95-96.

28 CDC, *LLMs & Gen AI*, HL Paper 54, supra n.26 at para.198.

be coordinating in the dark about its role and remit. [29] It found that regulators were not uniformly prepared for the role envisaged by the White Paper, that their resources and enforcement powers varied widely, there were potential gaps in regulatory coverage, and there were disparate co-ordination efforts between regulators.[30] It did recommend that there should be standardized powers for the main regulators to obtain information and conduct audits, and that regulators should have meaningful sanctions to address significant breaches.[31] These insights and recommendations, while contained in a report primarily focused on GenAI, might be considered as evidence supporting the need for at least some form of legislative intervention to underpin the principles-based approach.

3. The Artificial Intelligence (Regulation) Bill

While the Conservative government was unwilling to adopt new legislation to implement aspects of its proposed regulatory framework, other parliamentarians were less reticent, and in November 2023 a Conservative peer, Lord Holmes, introduced a private member's bill,[32] the *Artificial Intelligence (Regulation) Bill*,[33] to the House of Lords. This draft legislation aimed to create a new body, the AI Authority (the Authority), with key functions relating to AI regulation generally.[34] Its primary roles would be to ensure existing regulators were engaging with AI within their remit; ensure that regulators were aligned in their approach; provide a gap analysis of AI regulatory responsibilities; coordinate a legislative review of key legislation to assess whether it was suitable to address issues raised by AI; monitor and evaluate the AI regulatory framework's effectiveness and implementation of the principles, notably with regard to supporting innovation; assess and monitor AI risks across the economy; conduct horizon scanning to inform a coordinated response to new AI trends, support testbed and sandbox initiatives for new AI technologies; accredit independent AI auditors, provide education and awareness to business and individuals; and promote the interoperability of the UK AI framework with international regulatory frameworks.[35] It would also have a key role to play in developing a public engagement programme about the pros and cons of AI, taking into account the opinions of the general public and other appropriate persons.[36]

The Bill would have required the Authority to have regard to the five principles identified in the White Paper,[37] plus an additional nine principles with regard to specific transparency, testing and legal compliance requirements on businesses developing, deploying or using AI tools,[38] and fairness criteria for AI technologies and their application.[39] Businesses would be permitted to test AI business propositions in the market with real customers under certain conditions (sandboxing) if authorised or registered with the relevant regulator, with the Authority providing assistance and oversight.[40] Businesses developing, deploying or using AI tools would have to have a designated AI officer to ensure their safe, ethical, unbiased and non-discriminatory use of AI,

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29 *Ibid* at para.195.

30 *Ibid* at paras.197-200.

31 *Ibid* at para.201.

32 "Private Members' Bills (PMBs) are bills introduced by MPs and Peers who are not government ministers. They provide backbenchers with an opportunity to address public concerns and to set a policy agenda that is not determined by the executive." Hansard Society (2022), *Guide to Private Members' Bills,* (Hansard Society: London). https://www.hansardsociety.org.uk/publications/guides/what-is-a-private-members-bill

33 Artificial Intelligence (Regulation) Bill, HL Bill 11; see also Tobin, J. *Artificial Intelligence (Regulation) Bill [HL]*, House of Lords Library Briefing, 18 March 2024.

34 AI Bill [HL], clause.1.

35 AI Bill [HL], cls.1 (2)(a)-(f).

36 AI Bill [HL], cls.6.

37 AI Bill [HL], cls.2(1)(a).

38 AI Bill [HL], cls.2(1)(b).

39 AI Bill [HL], cls.2(1)(c).

40 AI Bill [HL], cls.3.

and to ensure that data they used in any AI tool was, as far as possible, unbiased.[41] They would also have to allow accredited independent third parties to audit their processes and systems.[42] Use of training data with AI technologies would require those doing the training to provide the Authority with information about all third party data and intellectual property used in the training, and to assure the AI Authority that informed consent was received for its use and that the use was compliant with intellectual property laws.[43] Supply of an AI product or service to customers would require provision of 'health warnings', clear labelling, and the ability of customers to grant or withhold informed consent in advance.[44]

In form, the Bill was very much a 'framework' Bill in that it left much of the fine detail to be determined by ministers via regulations,[45] and included the powers to substantially rewrite the Authority's functions in cls.1 or dissolve it altogether;[46] to rewrite the regulatory principles in cls.2(1);[47] and to rewrite the definition of sandbox in cls.3(2),[48] all by means of secondary legislation. In addition to this problematic approach,[49] the Bill itself was not especially well drafted being, for UK legislation, rather broad-brush in form and not particularly coherently structured.

However, these shortcomings were perhaps largely inconsequential, as it is unlikely that its proposer expected the Bill to become law, given an explicit lack of Government support.[50] Private member's bills are largely utilised as a means of testing the waters for particular policies or, as is likely here, sending a message, sometimes to parties outside Parliament, but often to the government of the day. What the Bill reflected was a growing discontent amongst legislators of all parties with the perceived failure of the Government to provide at least some legislative footing for the proposed regulatory framework, in combination with the slow pace of development of central coordinating mechanism for the sectoral regulators, which successive parliamentary committees and stakeholders were coming to realize was likely to be a critical component in the success or failure of a non-statutory framework to meet its objectives. As its Conservative proposer noted, if the UK was not willing to provide at least some statutory footing for the regulatory framework, "…the most likely, and certainly unintended, consequence is that businesses and organisations looking for a life raft will understandably, but unfortunately, align to the EU AI Act."[51] This was hardly the result sought by a political party keen to promote the desirability of an alternative regulatory approach to that of the EU..

Whether the intended message found its mark - and the Government's response in the House of Lords reiterating its determination to continue with a non-statutory approach for the immediate future suggests that it did not - the Bill itself became moot on 22 May 2024, when the UK Prime Minister called a General Election and all contentious legislation lapsed on the dissolution of Parliament. While the Labour Party indicated that in the event that it formed the next government it would "urgently introduce binding regulation and establish a new regulatory innovation office for AI,"[52] it had already been suggested that, following the General Election in July 2024, it would likely be late 2025 before any new AI-focused legislation could be enacted.[53] Should that

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41 AI Bill [HL], cls.4.

42 AI Bill [HL], cls.5(1)(a)(iv).

43 AI Bill [HL], cls.5(1)(a)(i)-(ii).

44 AI Bill [HL], cls.5(1)(a)(iii).

45 See Tobin, *AI (Regulation) Bill*, *supra* n.33 at 26.

46 AI Bill [HL], cls. 1(3).

47 AI Bill [HL], cls. 2(2).

48 AI Bill [HL], cls. 3(2).

49 Noted in the House of Lords, Delegated Powers and Regulatory Reform Committee, 4th Report of Session 2023–24, HL Paper 31 (14 December 2023) at paras.1-6.

50 Viscount Camrose (Con), AI (Regulation) Bill [HL] – 3rd Reading, Hansard Vol. 838, Col. 347-350 at 350

51 Lord Holmes (Con), AI (Regulation) Bill [HL] – 3rd Reading, Hansard Vol. 838, Col. 347-350 at 348.

52 Lord Leong (Lab), AI (Regulation) Bill [HL] – 3rd Reading, Hansard Vol. 838, Col. 347-350 at 348.

53 HoC SITC, *Governance of AI: Interim report*, HC 1769, *supra* n.25 at para.105.

be the case, then continuing to develop and support the non-statutory regime is likely to be an incoming UK government's primary policy option until 2026.

4. After the White Paper

The public consultation on the White Paper generated 409 written responses from various stakeholders, including industry representatives, academia, civil society organizations, and the public.[54] While many stakeholders were positive about the government's commitment to fostering AI innovation, a range of criticisms were raised regarding its proposed regulatory approach. These can be broadly categorized as:

- lack of specificity and clarity in the principles-based approach, which could lead to ambiguity and inconsistent application across sectors; while the principles mentioned fairness, transparency, and accountability, these areas needed to be addressed in more detail.
- concerns that implementation of the principles through existing legal frameworks would not fairly and effectively allocate legal responsibility for AI across its use life cycle.
- lack of detail on monitoring and enforcement, with a perceived lack of robust enforcement mechanisms to ensure compliance and mitigate risks associated with AI deployment.
- insufficient measures to ensure that the regulatory approach did not hinder startups and SMEs with disproportionate compliance burdens, reducing scope for innovation and competition.
- limited consideration of ethical and social issues, which were acknowledged as important, but for which no specific measures to address issues like bias and discrimination were proposed.
- risk of divergence from international norms, such as the EU AI Act, and frameworks established by organizations such as the OECD and ISO.
- uncertainty around the necessary funding and resources available to regulators to enable them to fulfil their roles under the new framework, and the need for investment in training and capacity building for regulators to ensure they can keep pace with rapid technological advances.
- lack of specific measures for inclusive engagement with a diverse range of stakeholders, including marginalized communities and smaller businesses, and a need for broader public awareness and education initiatives to inform citizens about AI benefits, risks, and safeguards.

In its Response to these criticisms, the Government reiterated its initial commitment to the non-statutory principles-based regulatory framework, noting that it remained "committed to a context-based approach that avoids unnecessary blanket rules that apply to all AI technologies, regardless of how they are used".[55] However, it accepted that, in the longer term, targeted legal intervention would be required should the existing regulatory interventions, and voluntary measures adopted by system developers prove inadequate to address the continuing growth of AI capabilities.[56] The Response also altered tack somewhat by identifying 3 key categories of AI systems deemed to of particular interest:

- Highly capable general-purpose AI (e.g. cutting-edge Large Language Models (LLMs))
- Highly capable narrow AI (e.g. AI models for bioengineering)
- Agentic AI or AI agents

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54 DSIT, *A pro-innovation approach: Government response, supra* n.4.

55 Ibid at para.11.

56 Ibid at paras.72-76. The Government had obtained commitments from leading AI companies developing highly capable AI systems that they would produce and publish their voluntary safety and transparency measures, and that they would collaborate with the new UK AI Safety Institute to test their AI systems pre- and post-deployment. Department for Science, Innovation and Technology (2023). Leading frontier AI companies publish safety policies [Press Release] 27 October 2023. https://www.gov.uk/government/news/leading-frontier-ai-companies-publish-safety-policies

Of these, the Response identified "highly capable general-purpose AI"[57] as a key focus of the UK's regulatory regime, but also the most likely to potentially require targeted legal intervention, insofar as such systems could challenge the context-based approach, as risks to which they contribute might not be effectively mitigated by application of existing UK regulation. The Response did not provide detail on when and how such systems might need specific regulation, proposing to leave this to future discussion with industry, academia and civil society.

The principles themselves remained unchanged, with the Government resisting suggestions that the scope of the principles should be broadened to include principles such as human rights, as it argued these were already sufficiently accounted for in existing statutes and regulatory schemes.[58] With regard to concerns about lack of specificity and clarity, it moved to incorporate more detailed guidelines and sector-specific regulations within the principles-based framework,[59] and to seek updates on how regulators were developing their strategic approaches to AI.[60] Extra funding was provided to enable regulators to develop capabilities and tools and to engage in R&D activities,[61] a steering committee with government representatives and key regulators to support knowledge exchange and coordination on AI governance was proposed, and a new cross-regulatory pilot advisory hub to support AI innovators, the DRCF AI and Digital Hub, was established.[62]

In sum, the Response to the White Paper did not suggest any significant re-evaluation of the proposed regulatory framework on the part of the Government in the short-medium term. The developing framework remained principles-based, non-statutory, and cross-sector, applying existing technology-neutral regulation to AI. As such there was still no definition of AI, with the focus being an outcomes-based approach premised on potential risks arising from the adaptivity and autonomy of AI systems in specific sectors and contexts, although there was now recognition of the need to differentiate between the three key categories of AI systems. The three elements of the regulatory framework were identified as being the utilisation of existing regulatory authorities and frameworks; the establishment of a Central Risk Function (CRF - previously the 'central coordinating mechanism') at the Dept. for Science, Innovation & Technology (DIST) to facilitate effective risk monitoring and regulatory coordination; and support of innovation via the DRCF AI and Digital Hub.

Despite the pressure to establish a statutorily empowered regulatory body, per the *Artificial Intelligence (Regulation) Bill,* no such body or new AI regulator was envisaged. The role of the Central Function was clarified as being to monitor and evaluate AI risks, and promote coherence and address regulatory gaps. To that end it would be required to carry out an ongoing review of regulatory powers and remits, develop a cross-economy AI risk register, and collaborate with existing regulatory forums, e.g. the DRCF. The role of the AI and Digital Hub would be to help organisations to comply with relevant legal and regulatory obligations before product launch. Its task was to facilitate compliance, and enhance cooperation between regulators. The implementation of the principles by regulators, and the requirement for them to collaborate with each other, would remain non-legally binding obligations, although a legal duty on regulators to give due consideration to the framework's principles might be created in the future.

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57 Defined as "foundation models that can perform a wide variety of tasks and match or exceed the capabilities present in today's most advanced models" Ibid at para.61. Also referred to as 'Frontier AI', see Dept. for Science, Innovation & Technology (2023) *Emerging Processes for Frontier AI Safety,* October 2023.

58 DSIT, *A pro-innovation approach: Government response, supra* n.4 at 43.

59 Dept. for Science, Innovation & Technology (2024). *Implementing the UK's AI Regulatory Principles: Initial Guidance for Regulators*, Feb. 2024. The next phase of Guidance was expected in mid-late 2024.

60 Dept. for Science, Innovation & Technology *et al* (2024). Request for regulators to publish an update on their strategic approach to AI: Secretary of State letter, 15 February 2024.

61 Although the £10 million Regulator's AI Capability Fund allocated for this purpose is likely to spread between, at the very least, 14 different regulators.

62 Digital Regulation Cooperation Forum (DRCF) AI and Digital Hub https://www.drcf.org.uk/ai-and-digital-hub The DRFC was set up in 2020 by the Competition and Markets Authority (CMA), the Financial Conduct Authority (FCA), the Information Commissioner's Office (ICO) and Ofcom to collaborate on digital regulatory matters.

It was noted by at least one commentator that while the EU AIA was barely mentioned in the Response, the US was highlighted as a potential key partner, suggesting that the UK Government was still more inclined to the US approach to AI regulation than that of the EU.[63]

B y this point the UK Government was clearly altering its position on the issue of highly capable general-purpose AI (HCGPAI). As with the EU's expansion of the AIA to address GPAI, the rapid development of LLMs and their expansion/incorporation into mainstream business practices and consumer technologies forced a reconsideration of the need for future targeted regulatory intervention above and beyond the existing voluntary commitments made by the leading AI companies. Any such intervention would address failures of existing regulation to tackle HCGPA risks, and be directed to key players in the development of GPAI models/systems, covering, for example, issues such as transparency, data quality, risk management, accountability, corporate governance, and addressing harms from misuse or unfair bias.

5. The UK Regulators' View

While the proposed UK AI framework places much of the onus on regulators to implement the framework in their sectors/domains by applying existing laws and issuing supplementary regulatory guidance, it is not entirely clear which of the UK's many regulators[64] are intended to be included, or the scope of coverage of potential AI risks and benefits that their respective remits afford.[65] However, some regulators will undoubtedly have a significantly larger role to play than others. The 14 regulators initially requested by the UK Government to provide an update on their strategic approach to AI by May 2024 were the Bank of England, Competition and Markets Authority (CMA), Equality and Human Rights Commission (EHRC), Financial Conduct Authority (FCA), Health and Safety Executive (HSE), Information Commissioner's Office (ICO), Legal Services Board (LSB), Medicines and Healthcare products Regulatory Agency (MHRA), Office for Nuclear Regulation (ONR), Office for Standards in Education, Children's Services and Skills (Ofsted), Office of Communications (Ofcom), Office of Gas and Electricity Markets (Ofgem), Office of Qualifications and Examinations Regulation (Ofqual).[66] Other regulators will be expected to publish plans in the future.

5.1. The 'digital-focused' regulators

It is instructive to consider the initial response of 4 key regulators to the Government's request for details of their approach to AI-related risks in their areas, their current skillset and expertise to address them, and how they plan to regulate AI in the immediate future. These are the CMA,[67] FCA,[68] ICO,[69] and Ofcom.[70] They are the founder members of the Digital Regulation Cooperation Forum (DRCF) and are the primary regulators in the digital arena. All four would view themselves as technology neutral/agnostic, principle-based and outcomes-focused/risk-based regulators, with regulatory briefs that already heavily intersect with AI regulatory issues. They have thus already been engaging in consultation with their key stakeholders on AI use in contexts that fall

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63 Keeling, E. & Finlayson-Brown, J. (2024) 'What is in store for UK AI: The long-awaited government response is here', A&O Shearing [webpage] Feb 15, 2024.

64 The Institute for Government has identified 116 UK regulators, see IoG (2024) *Parliament and regulators*, April 2024 at 5. Policy Exchange identified 92 UK regulators, see Policy Exchange (2022) *Re-engineering Regulation* at 70-72. The National Audit Office suggests, with a slightly concerning lack of specificity, there are "around 90" regulatory bodies in the UK, see NAO (2022). *Departmental Overview 2020-21: Regulation*, March 2022.

65 As noted by Lord Cookham in the House of Lords debate on the AI (Regulation) Bill, Second Reading, Hansard Vol. 837, Col. 393-428 (22 Mar. 2024) at Col.398.

66 DSIT, Regulators' strategic approaches to AI, supra n.12.

67 CMA (2024). *AI strategic update* (29 Apr. 2024).

68 FCA (2024). *AI Update* (22 Apr. 2024).

69 ICO (2024). *Regulating AI: The ICO's strategic approach* (30 Apr. 2024).

70 Ofcom (2024). *Ofcom's strategic approach to AI 2024/25* (26 Mar. 2024).

within their particular regulatory remit, providing AI-related advisory materials and compliance tools,[71] and engaging in related internal capacity building and external collaboration with other regulators. In resource terms, they appear prepared in both capacity and expertise, e.g. the CMA identified its specialist DaTa unit, Technology and Business Services (TBS) team and 9 Digital Expert independent advisors as key staff resources; Ofcom noted its 100 technology experts, including 60 AI experts. This permits these regulators to undertake cutting edge research into AI developments and to engage in detailed horizon scanning. It is perhaps not surprising, given this background, that the 'digital-focused' regulators' were supportive of the Government's approach, and that their AI update documents were lengthy and provided detailed plans for future AI strategy. The documents focused on promoting their past AI-related achievements, emphasizing their capacity to take on the role envisaged for them, and outlining key strategy elements, such as comprehensive AI risk frameworks. compliance and oversight mechanisms, multi-stakeholder engagement, best practice guidelines and tools etc. All highlighted the importance of collaboration, both domestically and internationally, and underscored the need for continuous capacity building to keep pace with AI developments. On the former point, the UK has been keen to be seen to be a leader in international policy discussions, although the degree of influence that any one government can wield in such discussions appears to drop off sharply once one moves past the US and China. It appears though that additional funding to support regulators will be in short supply.[72] While the Government has put what it clearly regards as very significant resource into the development of UK AI capacity, this is overwhelmingly directed to R&D and building industry capacity, and even the entirety of that funding is dwarfed by private sector spending. This may mean that even some of the larger, better resourced regulators may have to rely more heavily than might be desirable on industry co-operation for information and expertise.

5.2. Other regulators

In contrast to the digital-focused regulators, the published strategic plans for smaller, or less digitally-focused regulators, such as the EHRC[73] the MRHA,[74] and the HSE[75] are significantly shorter and rather less detailed. A key takeaway from these plans is that significant additional resource will be required to increase their inhouse expertise and capabilities if they are to fulfil the requirements of the proposed AI regulatory framework effectively.

The MHRA notes that it had approximately three full-time equivalent (FTE) employees working on 'AI as a Medical Device' work, rising to 7.5 FTE in 2024/25, plus a Software and AI Expert Advisory Group consisting of external experts. Given the probability of a significant rise in the number of organisations seeking to increase or newly deploy AI-based tools for health and care applications, one may question the extent to which small regulatory teams will be able to support effective oversight. The MRHA's strategy document is less expansive in its scope than those of the 'digital-focused' regulators, and affords nearly as much space to how it will use AI in its work as it does to have it will seek to regulate AI use within its remit. Regulatory research and horizon scanning are mentioned almost in passing, and while there is some evidence of existing and planned international co-operation on AI use within its remit, there is almost nothing on regulatory co-operation with other UK regulators.

The EHRC's strategy document is short and noticeably less upbeat than those of the 'digital-focused' regulators. After noting the importance of equality and human rights expertise to the application of the 'fairness' principle,

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71 e.g. ICO (2022). *Guidance on AI and data protection* (15 Mar. 2023); ICO (2022). *AI and data protection risk toolkit* (undated).

72 **"**The announced £10 million to support regulators in responding to the growing prevalence of AI is clearly insufficient to meet the challenge…" House of Commons Science, Innovation and Technology Committee (2024) *The governance of artificial intelligence: Final report*, HC38, 28 May 2024 at para 56.

73 EHRC (2024). *Update on our approach to regulating AI* (30 Apr. 2024).

74 MHRA (2024). *Impact of AI on the regulation of medical products* (30 Apr. 2024).

75 HSE (2024). HSE's regulatory approach to Artificial Intelligence (undated) [webpage] https://www.hse.gov.uk/news/hse-ai.htm

it highlights the breadth of the EHRC's remit and its potential to cut across all sectors. Concerns about the EHRC's ability to handle this effectively are clearly flagged. Given a budget static since 2016, a small team of staff with specific AI responsibilities, and a lack of technical expertise, the document explicitly notes that extra resource is critical for the EHRC to implement the 5 principles, but that this has not been forthcoming, restricting its work to a small set of strategic issues. The EHRC is unconvinced that plans to share resources between regulators will overcome its expertise gaps, or permit it to hold large multinational technology firms to account.

The differences in scope between the 12 key regulators in terms of their suggested future strategies, and their degree of optimism that their regulatory objectives under the AI regulatory framework are attainable, are quite noticeable. This reflects the concerns about the likely coherence of that framework expressed during the consultation period, the risks of fragmented oversight and enforcement, and the potential for imbalance in the application of the principles, with issues of direct concern to the digital-focused regulators being likely be given greater weight in regulatory practice.

6. Comparison with the AIA

Engaging in a comparison of the EU AI Act legislation and the UK's non-statutory AI regulatory framework is something of an 'apples and oranges' affair. The lack of legislation on the UK's part, and the broad-brush details available at the time of writing on how its framework might operate, exacerbated by the July 2024 General Election, which effectively shuttered policy discussion from the prorogation of the UK Parliament in late May until well after the election of the new government, makes it difficult to effectively juxtapose the UK AI framework with the extensive EU legislation. However, some initial issues can be outlined.

6.1. Choice of regulatory regime

Designing an effective and efficient regulatory regime for a supranational jurisdiction consisting of 27 Member States with widely varying political, social, and economic environments is a very different matter than designing such a regime for a single jurisdiction. This is complicated further when the executive body of the supranational jurisdiction is working within a bounded competency to impose horizontal rules across its Member States governing development, deployment, and use of AI systems, while the executive body of the single jurisdiction has, in principle, unlimited competency to use legislative, regulatory, or administrative powers to achieve its goal. The EU Commission's decision to use Art.114 TEU as the legal base for its strategy, providing broad competency in the establishment and functioning of the internal market, and its decision to then structure the resulting action around the existing EU product liability legislative template are, as has been noted elsewhere,[76] choices structured by procedural necessity in the former case, and the ability to draw upon an established body of EU regulatory practice, rather than attempting to develop a new regulatory regime from the ground up, in the latter. While these choices enabled the Commission to legitimize its AI regulatory agenda, and move more quickly to create legislation, it has been argued that they may yet lead to significant problems in providing protection of fundamental rights, developing effective oversight, and providing meaningful avenues for wider stakeholder engagement and redress.[77]

The UK government, by contrast, had a wider range of options open to it, and the rationale for its decision to eschew the legislative route was therefore not grounded in necessity. This leaves a range of potential rationales for the non-legislative approach chosen. From a pragmatic and practical perspective, there is an entirely reasonable case to be made for the principle-based approach utilizing existing regulators, emphasizing the flexibility and agility of such an arrangement to cope with rapid social, economic and technological change,

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[76] Almada, M. and Radu, A. (2024) 'The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy', *German Law Journal* 1 at 3-4; Almada, M. and Radu, A. (2023), 'The EU AI Act: a medley of product safety and fundamental rights?' EUI, RSC Working Paper, 2023/59.

[77] See e.g. Veale, M. & Zuiderveen Borgesius, F. (2021) "Demystifying the Draft EU Artificial Intelligence Act — Analysing the good, the bad, and the unclear elements of the proposed approach" *Computer Law Review International* 22(4), 97-112.

and leveraging existing domain knowledge and regulatory expertise. The extent to which this perspective should be regarded as the driving force behind the UK policy decision might perhaps be assessed in relation to whether the UK government has then provided adequate resourcing for regulators and provision of effective supporting infrastructure to implement such a policy framework.

Viewed from a more political standpoint, a range of other possible rationales suggest themselves. A weakened and intellectually impoverished Conservative administration, approaching the end of its time in power, might well wish to avoid the work of constructing a complex piece of legislation addressing a rapidly evolving subject-matter, and then steering it through the legislative process, when there was a real possibility of being able to leave that task as a problem for its successor to solve. Alternatively, adopting a strategy allowing the government to place the onus of understanding and addressing AI risks and issues upon the extensive array of UK regulators, at whose feet blame for any failures of the principles-based approach might then be placed, does not seem entirely outlandish. In financial terms, a government keen to be seen as financially prudent might regard the use of existing regulators and central government resources as an opportunity to implement a less costly approach than creating and resourcing another sizable regulator. Finally, the potential to spin the decision as a 'Brexit benefit', allowing the government to claim it was freeing innovative UK business from a red-tape festooned Brussels, would doubtless factor into deliberations.

The differing choice of regulatory mechanisms for the two regimes thus reflects more than just a political divide between the two but provides an interesting example of how the choice of regulatory strategy may be constituted by very different means, including clear constitutional constraints and pragmatic practical considerations on the part of the EU; and a more diffuse and indeterminate range of possible political, financial and pragmatic factors on the part of the UK.

6.2. Implementation

The speed at which the EU was able to reach agreement on the AI Act appears to have taken other jurisdictions, including the UK, somewhat by surprise. However, while the AIA will enter into force in July 2024, full implementation of the legislation will not occur until 2026, with the ban on prohibited AI systems taking effect 6 months after entry into force, the provisions relating to GPAI systems and models after 12 months, and full enforcement after 24 months when obligations on high-risk AI systems will begin. [78]

Significant elements of the EU's regime will be developed over time, with the Commission given the power to issue delegated acts on matters such as: definition of 'AI system', criteria and use cases for "high-risk" AI', thresholds for general purpose AI models with systemic risk, technical documentation requirements for general purpose AI, conformity assessments, and EU declarations of conformity and to issue guidance on high-risk AI incident reporting, by 12 months after entry into force, and practical implementation of high-risk AI requirements, with list of practical examples of high-risk and non-high-risk use cases by 18 months. Other guidance on issues such as prohibited AI practices, requirements for high-risk AI systems, and the relationship of the AI Act and its enforcement with other EU law will be produced "when deemed necessary." On the part of the Member States, appointment of their Competent Authorities under the AIA is required by 12 months after entry into force, with the implementation of rules on penalties, including administrative fines and the establishment of at least one operational AI regulatory sandbox after 24 months.

Assuming the Commission and Member States are able to adhere to the timetable set by the legislation, it will thus be mid-to late 2026 before the EU's regime is largely in place. That said, the AIA does have the clear benefits of setting a defined timetable and providing industry and other stakeholders with an early and detailed understanding of the Commission's aims and objectives, the measures that those regulated will need to prepare for and implement, and the enforcement measures and sanctions that may be brought against those

[78] A 36-month timeline applies to high-risk systems in Annex II e.g. systems intended to be used as a safety component of a product, or where the AI is itself a product, and the product is required to undergo a third-party conformity assessment under existing specific EU laws, for example toys, radio equipment, in vitro diagnostic medical devices, civil aviation security and agricultural vehicles.

not in compliance.[79] While the Commission has been criticized in some quarters for legislating at a point which some believe to be too early in the development of the technology to be effective,[80] utilizing arguments such as the 'pacing problem',[81] or the 'timing problem'[82] to suggest that legislation is a poor means of establishing agile approaches to AI regulation, such criticisms fail to consider the subtleties of the EU legislative process, whereby legislative activity often has a wider purpose than simply attempting to provide a definitive solution to an particular problem. An important function of EU legislation, it is suggested, is 'messaging', i.e. the Commission uses legislation to indicate the importance it attaches to the subject matter, the key elements on which it wants to focus attention, and an indication of whom it considers the key stakeholders. By this means, even if the initial iteration of the legislation is flawed in its targeting of a particular technology, the legislation has the effect of shaping Member State and key stakeholder understandings and behaviour, in anticipation of future adjustments which are more precisely focused.[83]

Because of the way that it is structured, the UK's regulatory regime is in effect already underway, insofar as key regulators have produced AI-related guidance and tool kits[84] and, in the case of the ICO, have already investigated, and brought regulatory compliance actions against, AI system developers.[85] The implementation roadmap for the UK is, however, inevitably going to be more fragmented. The principle-based approach, while potentially more flexible and agile in response to AI technology-mediated social and economic changes provides much less certainty for key stakeholders and smaller, but important regulators, such as the EHRC, which has a key role in the application of the fairness principle, are likely to struggle, given current resourcing, to match the upskilling and intervention capabilities of the big four 'digital regulators' in the short to medium term.

6.3. Central Co-ordination

The EU Commission established the European Artificial Intelligence Office (EAIO) in February 2024 as part of the administrative structure of the Directorate-General for Communication Networks, Content & Technology.[86] Its role is to support the governance bodies in Member States in their tasks, enforce the rules for general-purpose AI models, promote an innovative ecosystem of trustworthy AI, ensure a strategic, coherent and effective European approach on AI at the international level, and collaborate with Member States and the wider expert community through dedicated fora and expert groups, liaising with scientific community, industry, think tanks, civil society. It is currently stated that the EAIO, which will also provide the secretariat for the EU AI Board,[87] will employ "over 140 staff, including technology specialists, administrative assistants, lawyers,

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79 Larsson, S., Hildén, J., & Söderlund, K. (2024). Between Regulatory Fixity and Flexibility in the EU AI Act. [Pre-print] Lund University.

80 e.g.

81 i.e. regulation always lags behind rapidly evolving technologies - "technology develops exponentially, laws change incrementally" - thus creating gaps where emerging technologies may operate without adequate oversight or governance.

82 i.e. early regulation hinders technological development because it imposes constraints before the technology's potential is fully understood, or is based on perceived rather than actual risks leading to misallocation of resources and stifling of beneficial innovation.

83 See e.g. the evolution of the EU's eMoney Directives (Directive 2000/46/EC; Directive 2009/110/EC; draft Directive on payment services and electronic money services (2023)).

84 Supra n.71.

85 Davies, R (2021) US facial recognition firm faces £17m UK fine for 'serious breaches' *The Guardian* (29 Nov. 2021).

86 Per Art.64, AIA; Commission Decision of 24 January 2024 establishing the European Artificial Intelligence Office OJ C, C/2024/1459, 14.2.2024; European AI Office, https://digital-strategy.ec.europa.eu/en/policies/ai-office

87 Per Art.65 & 66 AIA. The European AI Board (similar in function to the EDPB under the GDPR) consists of a representative from each Member State, and its role is to advise and assist the Commission and the Member States on the application of the AIA.

policy specialists, and economists".[88] Its role resembles that mooted for the UK's Central Risk Function (above, section 4), based in the DIST, although precise details on the make-up, size and role of CRF, beyond those initially provided in the UK government's White Paper and Response document,[89] remain sparse. What is clear from the material available is the role of the UK CRF is envisaged to only be 'initially' provided by government, with the possibility of an independent body being established outside of government.

Several issues arise regarding these co-ordination entities: firstly, the stated remit of the EAIO appears very ambitious for an administrative unit staffed at the level suggested, and it is hard to believe that it could effectively manage a workload that includes EU-wide support for 27 AI Competent Authorities, and enforcement of the GPAI rules.[90] The Commission has a history of taking on administrative functions which it cannot effectively support, the 'adequacy' process under the GDPR being a case in point. Secondly, the continuing lack of clarity over the nature of the CRF, in combination with complaints about initial failure to provide timely support to the sectoral regulators, casts some doubt over the ability of the DIST to undertake the role effectively. Finally, if the UK government now envisages the possibility of moving the CRF role to an independent body, such that the CRF is essentially an interim 'AI Authority', one might question the rationale for not adopting an independent body from the start.

6.4. Regulatory risks

While the EU and UK regulatory AI regimes differ in approach, there is a risk that both could be compromised through 'regulatory capture'.[91] As regulating AI technologies requires a broad understanding of relevant technical complexities, ethical implications, and potential societal impacts, this may lead to a situation where national or sectoral regulators lack the relevant expertise or information necessary to exercise their functions, and become increasingly reliant on access to industry expertise, creating a risk of dependence on industry-provided data and insights. AI companies will inevitably possess more information about their technologies than do regulators, particularly where regulators lack subject experts or have limited resources. This information asymmetry may permit industry stakeholders to shape regulation in their favour, or to present regulators with information that does not fully capture the risks associated with particular AI deployments.[92] In rapidly developing regulatory arenas, like AI, there may also be a greater than usual scope for 'revolving door dynamics' – the movement of personnel between regulatory bodies and industry. Recruitment to regulators from industry can lead to industry viewpoints being given greater weight, and becoming embedded in regulatory practice. In the other direction, early-stage expertise and insider knowledge garnered by staff at regulators will make them highly desirable to the AI industry, which can offer much more competitive pay and conditions, meaning adoption of less stringent regulatory approaches may be an inadvertent or deliberate outcome of regulators future career considerations.[93] From a UK perspective, it is interesting to note that the

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88 Ibid.

89 DSIT/OAI, *A pro-innovation approach, supra* n.4 at 37-48; DSIT, *A pro-innovation approach: Government response, supra* n.4 at 46-48.

90 One might consider, for example, that in 2021 Google's legal department had over 900 members. See O'Carroll, M. and Kimbro, S. (2021) 'Legal Operations at Google', in D.M. Katz, R. Dolin, and M.J. Bommarito (eds.) *Legal Informatics*. Cambridge: Cambridge University Press, 501 at 501.

91 The process where regulatory agencies, due to close relationships with industry stakeholders, develop policies favouring the interests of the industry they are supposed to regulate, rather than the public good. See for discussion in the AI regulatory context, House of Lords CDC, *Large language models and generative AI* supra n.26 at paras. 43-57; Guihot, M., Matthew, A. F., & Suzor, N. P., (2020) 'Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence', 20 *Vanderbilt Journal of Entertainment and Technology Law* 385 at425; Roberts *et al* supra n.101 at 16.

92 Neudert, L. (2023). "Regulatory capacity capture: The United Kingdom's online safety regime". *Internet Policy Review* 12(4) 1-34 at 7.

93 Makkai, T. and Braithwaite, J. (1992) 'In and Out of the Revolving Door: Making Sense of Regulatory Capture', *Journal of Public Policy*, 12(1), 61–78.

risk of capture for individual sector regulators may be higher than it is for a cross-sector regulators,[94] possibly because there is less of a revolving door effect in cross-sectoral regulation work.

The EU Commission and UK regulators have certainly had capture-related issues in the past,[95] for example, in the AI arena, the EU's AI Ethics Guidelines (2019),[96] were criticised as being too focused towards industry interests and insufficiently attentive to human rights, transparency, and accountability in AI development and deployment.[97] There have also been concerns expressed about the higher risks of regulatory capture occurring in relation to the use of regulatory sandboxes, the use of which are encouraged by both the EU AIA and the UK framework (and development of which is seen as a key UK regulatory strength),[98] as organisations engaged in sandbox activities with regulators have a greater ability to influence the direction and scope of the regulatory environment, often out of sight of other stakeholders.[99]

6.5. Innovation vs Human rights

The EU places significant emphasis on ensuring high standards of safety, ethical use, and protection of fundamental rights in the development and placing on the market of AI systems in the EU. However, the need for a broad legal base for legislation, and the fact that fundamental rights, in and of themselves, would not provide a basis for EU legislation, meant the AIA was based with the broad competence provided by Art.114 TEU and, on the EU's product liability and consumer protection legislative template, leading to suggestions that the role of fundamental rights would inevitably be diminished within the EU, as the agencies tasked with AI regulatory functions would have potentially countervailing regulatory priorities, and lack the necessary background and expertise to effectively pursue a fundamental rights-focused agenda. This might in turn impact the EU's ability to raise the bar for fundamental rights in international AI policy through the 'Brussels' effect.[100] The UK Conservative government's commitment to protection of fundamental rights is somewhat undermined both by its failure to adequately resource key regulators with relevant remits, notably the EHRC, and its attempt, in the Digital Information and Data Protection bill, to significantly alter the role and approach of the primary rights focused 'digital regulator', the ICO, by placing a new duty to have regard to 'growth and innovation' on its work, and reducing its independence by placing key policy tools, such as its Codes of Conduct effectively under government control.[101] In both frameworks, albeit for different reasons, there is thus a significant risk that the innovation element comes to dominate the regulatory agenda at the expense of rights-based developments.

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94 House of Lords, Industry and Regulators Committee (IRC), 1st Report of Session 2023–24 *Who watches the watchdogs? Improving the performance, independence and accountability of UK regulators*, HL Paper 56, February 2024.

95 Saltelli, A. Dankel, D.J. Di Fiore, M. et al. (2022). Science, the endless frontier of regulatory capture, *Futures*, 135, 102860; Heims, E. and Moxon, S. (2024), Mechanisms of regulatory capture: Testing claims of industry influence in the case of Vioxx. *Regulation & Governance*, 18, 139-157.

96 High-Level Expert Group on AI (2019). *Ethics Guidelines for AI*, European Commission (8 April).

97 See Roberts, H. *et al.* (2021) 'Achieving a 'Good AI Society': Comparing the Aims and Progress of the EU and the US'. Science and Engineering Ethics 27, 68; Charlesworth A. (2022) 'Regulating Algorithmic Assemblages: Looking Beyond Corporatist AI Ethics', Kohl, U. & Eisler, J. (eds.) *Data-Driven Personalisation and the Law*. Cambridge University Press.

98 EU AIA Arts.57-63; DSIT/OAI, *A pro-innovation approach, supra* n.4 at 54.

99 Ranchordas, S. & Vinci, V. (2024). 'Regulatory Sandboxes and Innovation-Friendly Regulation: Between Collaboration and Capture', *Italian Journal of Public Law* 14(1), 107-139.

100 Almada, M. and Radu, A. (2024) 'The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy', *German Law Journal* 1 at 3-4; Almada, M. and Radu, A. (2023), The EU AI Act: a medley of product safety and fundamental rights? EUI, RSC Working Paper, 2023/59.

101 See Roberts, H. *et al* (2023). Artificial intelligence regulation in the United Kingdom: a path to good governance and global leadership? *Internet Policy Review*, 12(2) 1-31.

6.6. Generative AI

The rapid development of publicly accessible Generative AI systems (GenAI) or 'general-purpose AI systems', such as ChatGPT, provide a good example of the problems that AI-based systems may pose for both the EU and UK regulatory regimes. The technical foundation for GenAI systems are 'general-purpose AI models' or 'foundational models', which include large language models (LLMs), such as GPT-4 and DALL-E.[102] GPAI models may be used by their provider to create AI systems (e.g. as OpenAI use GPT-4 and DALL-E in ChatGPT4) or by providers that integrate a third-party or open-source GPAI model into their own AI systems - 'downstream providers' and 'downstream AI systems'.

The impact of GPAI models and the wide-spread dissemination of GPAI systems that can be built from them necessitated late-stage amendments to the EU AI Act, [103] and to the UK's stance on regulation.[104] Under the EU AIA, GPAI systems could be categorized within the four risk categories, based on their use/context (i.e. a basic chatbot would likely be minimal to low risk), the initial draft of the AIA would have had very limited application to GPAI models because its requirements only applied to high-risk AI, and a GPAI model that had no predetermined use or context would not therefore qualify as 'high risk'. The final AIA thus imposes a set of risk-based obligations on providers of GPAI models, differentiating between standard 'GPAI models', 'openly and free licensed GPAI models' and 'GPAI models with systemic risks', including information to enable downstream users of their GPAI model to comprehend its capabilities and limitations, to enable regulatory coverage of the development and use of GPAI across the entire AI supply chain.[105] The GPAI rules, governance and penalties apply 12 months after the AIA's adoption, and the AI Office will oversee GPAI models, enforce common rules, and develop secondary legislation. The hurried adjustment to the Ai Act does call into question the ability of the legislative regime to address future developments, while such significant adjustment was possible while the AI Act was being finalized, scope for future amendment may prove rather more difficult to accommodate.

In the UK there has been a reconsideration on the part of the UK government of its decision not to produce legislation to address AI regulation, with suggestions that legislation might be introduced to place specific requirements on developers of AI 'foundational models' (i.e. GPAI models). However, at the time of writing no concrete proposals have yet emerge as to what such legislation might look like, or to what extent it would align with that of the EU.

An interesting difference that has emerged between the EU and UK regimes relates to the use of copyright materials by GPAI models. The AIA places a requirement on providers of GPAI models to draw up a policy to comply with EU copyright law and to create and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, to allow parties with legitimate interests, including copyright holders, to exercise and enforce their rights under EU law. By contrast, the UK Intellectual Property Office (IPO) started work in May 2023 on a voluntary code on the use of copyright-protected content for training AI models, via a technical working group comprised of rights holders and AI developers. In February 2024 the UK Government admitted that no voluntary code had been agreed, but discussion continued between Ministers and stakeholders.[106] Given that the Government had stated that it did "…not rule out the possibility

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102 Art.3(63) AIA 'GPAI model': An AI model, including when trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications.

103 EU AIA, Arts. 51-56. Helberger, N. & Diakopoulos, N. (2023). ChatGPT and the AI Act. *Internet Policy Review*, 12(1) 1-6; Volpicelli, G. (2023). ChatGPT broke the EU plan to regulate AI. *Politico*, 3 March. https://www.politico.eu/article/eu-plan-regulate-chatgpt-openai-artificial-intelligence-act/

104 HoC SITC, *Governance of AI: Final report*, supra n.72 at paras 32-33; Gross, A. & Criddle C. (2024) UK rethinks AI legislation as alarm grows over potential risks Financial Times, Apr. 15.

105 The obligations do not apply to GPAI models used solely for research, development, or prototyping activities, and only apply in part to AI models released under a free and open license.

106 DSIT, *A pro-innovation approach: Government response, supra* n.4 at 19.

of legislative action in this area if industry does not take adequate steps to improve the situation"[107] it remains to be seen whether this is yet another area where a non-legislative approach gives way to a legislative outcome.

6.7. Concluding Comment

Discussions with international academic audiences about the differences between the two AI regulatory frameworks often raise the question - "Can the UK afford to diverge significantly from the EU approach to AI regulation?" This often draws on some knowledge of the way in which the EU General Data Protection Regulation (GDPR)[108] has come to influence much of the international approach to data protection, and the care the UK has had to take post-Brexit to maintain its 'adequacy' ruling that permits free flow of data between the UK and EU. However, while there will inevitably be an element of 'Brussels effect' arising from the AIA, it is arguable that the UK is a sufficiently major international player in AI development, being a key player in both AI development and AI policymaking, and dominating AI investment in Europe,[109] to be able to maintain a regulatory divergence from the EU for long enough to determine whether its regulatory strategy can plausibly meet either or both of its innovation and human rights objectives, and how it stands up to comparison with the EU framework. As AI technologies are inherently global, divergent regulatory frameworks can create complexities for cross-border operations. Presently, businesses operating in both the UK and the EU will need to navigate different regulatory landscapes, leading to increased compliance costs and operational challenges, and there will undoubtedly be pressure from commercial interests for convergence or accommodation. The EU has shown a pragmatic approach to regulatory strategies – the GDPR itself incorporates a number of elements the Commission drew from successful DP practice around the world, from breach notification to privacy impact assessments – and if the UK can demonstrate its Ai regulatory approach is viable, then policy influence may prove to be a two-way street.

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107 Intellectual Property Office, (2023) Code of Practice on Copyright and Artificial Intelligence, Terms of Reference, May 2023 at 1, citing HM Government. (2023) Response to Pro-Innovation Regulation of Technologies Review: Digital Technologies, March 2023.

108 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88.

109 Maslej, N. Fattorini, L. Perrault, R. et al, "The AI Index 2024 Annual Report," AI Index Steering Committee, Institute for Human-Centered AI, Stanford University, Stanford, CA, April 2024 at 247-248.

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Proposal for a Regulation of the European Parliament and of the Council] laying down harmonised rules on artificial intelligence and amending certain Union legislative Acts, COM(2021) 206 final, Brussels, 21.4.2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206

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