

On and Off UK-EU Divergence

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Last week marked a further drifting apart of the EU and the UK, albeit in a way that should gladden the heart of those who advocate transparency and accountability. In a move that was at least in part aimed against British regulations that have made London the 'libel capital of the world', the EU introduced legislation to limit Slapps, strategic lawsuits against public participation. Such cases are often brought by wealthy individuals or companies against journalists, media organisations and NGO's that publish stories and reports that are unfavourable to them. The lawsuits have a chilling effect on public debate and the ability of journalists to do their work. The proposed EU legislation specifically allows courts to ignore judgments from non-EU countries, i.e. the UK, where many of such cases are brought.

It could be seen as ironic that this is a clear case of divergence where the EU has taken the initiative. But that would be to miss the point: the EU is pumping out rules and regulations at a furious pace, and the UK will be hard-pressed to keep up, or formulate viable alternatives. This can be seen most clearly in the UK's inability even to manage regulation at its own borders. The government has now accepted that it will not be before the end of 2023, at the earliest, that it will impose checks on imports from the EU, effectively accepting EU standards and regulations for anything entering the country from the bloc. To many who thought that Britain was going to set its own standards, this might come as something of a surprise. Leave campaigners used the supposed desirability of the UK's divergence from EU rules as one of the biggest selling points of Brexit. This led to some trepidation in the EU that it would have a freewheeling 'Singapore on the Thames' on its doorstep. In practice, divergence has been a mixed bag so far, although it's early days yet.

Regulatory and legislative divergence is not always easy to keep track of and to interpret. Both the UK and the EU have recently introduced legislation, for example, to protect the public from online harm. In the UK this is the Online Safety Bill, in the EU it is the Digital Services Act. While some provisions in the UK bill are seen as stricter, the two pieces of proposed legislation do not diverge materially on some of the main issues, except maybe, where British regulators seek to introduce, once more, age limit checks on the viewing of online pornography. That, however, is a reflection of a longer standing wish for divergence between UK and other European countries. Some commentators make much of the UK seeking to introduce the principle of 'legal but harmful' in the duty of care of online providers towards the public, arguing that all legal speech is protected. This can certainly be a concern, but it remains to be seen how it will differ from the EU's more targeted action against illegal content, given that some forms of hate speech, for example, are more likely to be illegal in the EU than abroad. But more important than such issues of interpretation, the EU proposal appears to be much more wide-ranging than the UK's, digging more deeply into the tech companies' algorithms and business practices. Given the heft of the bloc, its rules could become trend-setting, not just for the UK but even for the US.

That the UK will struggle to keep up in this field, can also be seen from the delay in another piece of online regulation, concerning digital markets and competition. While it was argued during the Brexit debates that the UK would be able to make its tech and digital sectors more competitive outside the EU, the government has been slow to come up with any new digital competition rules, while the EU reached agreement on its landmark Digital Markets Act in March. Also, on data protection, the UK initially announced that it would strike out on its own to reach data agreements with third countries, yet it was the EU that recently signed an important data transfer agreement with the US, seen as a prize by the UK. The UK is still operating under the EU data protection rules, GDRP, but interprets

these independently, leading to substantial divergence in, for example, fines for data breaches. In practice the UK regulator levies lower and fewer fines. Plans for a new UK data protection regime, to be distinct from the EU's GDPR, are set to advance but it remains to be seen if they will be a radical departure, let alone fulfil a government pledge to get rid of annoying cookie popups. If the rules diverge too much, it could complicate matters for UK companies that would still have to comply with the GDPR in the EU.

As with many other things, divergence, in the digital realm or elsewhere, appears to be mostly a campaign slogan, to be trotted out when convenient and to be brushed aside when less so. Take divergence on foreign policy and defence issues. As the Ukraine crisis unfolded, the UK government gratefully pulled closer to the EU and glossed over tensions over such things as the Northern Ireland protocol. Gone too was its supposed strategic pivot to Asia over its commitment to European security that it had set out in a review just last year, a clear case of divergence if there ever was one. It suited the government and the Prime Minister to pull closer to Europe in the Ukraine crisis, allowing Boris Johnson to present himself as a war leader. Now, with local elections nearing and domestic troubles resurfacing, strategic differences with the EU are returning to the forefront, particularly the Northern Ireland protocol. The real divergence between the EU and the UK is over who matters most to whom: In none of the recent national European elections have the UK or Brexit played any role whatsoever. The reverse will probably not hold true for a very long time.