Regulating for Results in the Digital Economy – Strategies and Priorities for Leadership and Engagement

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Welcome & Introduction

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Introduction & Overview

- Richard Thomas, Global Strategy Advisor, Centre for Information Policy Leadership

- Christopher Hodges, Head of the CMS Research Program on Civil Justice Systems at the Centre for Socio-Legal Studies, University of Oxford
Regulation, Enforcement and Corporate Behaviour

Christopher Hodges  MA PhD FSALS

Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford

Head of the Swiss Re/CMS Research Programme on Dispute Resolution Systems, Centre for Socio-Legal Studies
Some Questions

- How do you enforce? How do you achieve firms’ compliance?

- What is your enforcement policy? [The EU internal market does not have one (because of subsidiarity)! Most EU states don’t either.]

- What changes when you impose a large sanction on a company or individual?
- How do you know that your (enforcement or other) actions affect and improve compliance?

- If you were a business and you asked an authority for advice on how to put things right, but the authority hit you, what would you do next time you found a problem? Hide it?

- How do you affect behaviour?
Major Evolutions in Global Regulation

- Regulatory Theory and Models:
  - Risk-based
  - Outcomes-based
  - Rules-based → Principles-based
  - Regulated self-assurance

- How to get people to observe rules:
  - Economic theory (rational actors, firms as single organisms, deterrence) → behavioural psychology (behavioural insights/nudge)
  - Enforcement focusing on: root causes, affecting behaviour, step-by-step improvements, making redress
  - Leveraging how companies operate: ‘most people try to do the right thing most of the time’
Ethical Business Regulation: Understanding the Evidence

Christopher Hodges
Professor of Justice Systems, and Fellow of Wolfson College,
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How do you enforce?
Models of regulation and compliance
Compliance and engagement spectrum

Criminal  Chancer  Careless  Confused  Compliant  Champion

Hit them hard

Encourage improvement

Enforce  Educate  Enable  Engage

Recognise and reward

Promote best practice
Methods of Enforcement

The spectrum of motivations: Selecting the right approach

Looking backwards (proportionate sanction: stick)

Looking forwards (affecting behaviour, culture: carrot)

Affecting future behaviour:
1. Deterrent sanctions have little effect on future behaviour
2. Behavioural psychology supports using:
   a) Constructive engagement, motivated voluntary compliance
   b) Values-based culture (fairness)
   c) Trust in relationships, enabling engagement & discussion

Sorting problems through discussion in trusted relationships is quicker and more effective than years of litigation
Implications for DPAs

DPAs cannot do everything:

- GDPR >>> 21 separate duties + 27 powers
- Meagre Resources

Need to set Strategic Priorities

- “Selective to be Effective”
- “Results-based Approach”

Without clear strategies:

- Overwhelmed and ineffective DPAs
- Inadequately protected individuals
- Confused and frustrated regulatees
- Reputational damage for Privacy / Data Protection
Top Priority for **Leadership** with “**Constructive Engagement**”

Guiding and supporting good practice and engaging with accountable regulatees

**Police Officer** role should **not** be first port of call. Reserve for deliberate, wilful or seriously negligent conduct

**Complaint-Handler**: Demand-led / Resource-intensive. Needs triage & selection criteria to avoid swamping, to justify investigation and to use as source of intelligence

**Authoriser** – Not strategic; Criteria for “Class-based” approvals?
Constructive Engagement

- Transparency and practical Guidance aimed at “Right First Time”
- Maximum consultation, participation, frank exchanges
- Reliance on “Regulated Self-Assurance”
- Incentives for good faith compliance
- Exploiting “Herd Instincts”
- Creating space for responsible innovation - e.g. “Regulatory Sandboxes”
Constructive Engagement

Effective DPAs: Working together to achieve effective data protection for individuals and society

Constructive Engagement

Accountable Regulatees

Individuals/Society

Media  Market Forces  Political Forces  Civil Society  Certification Agents  DPOs  Redress Schemes  Ethical Business Practices
Moving Forward

- Not telling DPAs how to do their job
- Suggested Principles and Protocol for discussion
- 10 Questions in time for ICDPPC 2018