Flexing the Muscles of Information Power

On the Australian News Media Mandatory Bargaining Code

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26.02.2021 doi: 10.17176/20210226-153903-0

Since July 2020, the global news media industry has been looking at Australia's draft code, that would force Google and Facebook to negotiate with news publishers, pay for news, share data and advertising revenues. After a public consultation, feedback from the industry, and intensive lobbying from all sides, the Australian Competition and Consumer Commission ("ACCC") News Media and Digital Platforms Mandatory Bargaining Code ('Code') took shape. The Code has been approved by both Chambers on 25 February.

As an answer to this political move, Facebook first decided to ban Australian publishers and users from sharing or viewing Australian as well as international news content. Second, just a couple of days later, the social media changed its view, once the Australian government decided to step back and negotiate with Facebook. This decision was also guided by global concerns about the consequences for the freedom of expression, not least because Facebook's ban has not only led to the blocking of international and Australian news content, but also information on weather and even from public institutions.

There are different ways to look at this sequence of events. From our perspective, the Australian code is a case study to understand how platforms have consolidated their role of gatekeepers over information globally. Facebook's (temporary) choice to ban news in Australia is not just a business decision, reflecting the platform's economic freedoms. It is more of a 'power move' to push the Australian government, that has worked on the Code for months, to step back and negotiate with Facebook. This interaction is not just an example of how Facebook can influence public policies, but also shows how powers are relocated among different actors in the information society, within the push towards a new phase of digital constitutionalism.

Between Freedoms and Powers

Facebook has barred Australian publishers and users alike from sharing or viewing Australian as well as international news content. As Facebook already announced in August 2020, this "is the only way to protect against an outcome that defies logic and will hurt, not help, the long-term vibrancy of Australia's news and media sector". Social media are primary drivers for publishers and news media to attract wider audiences, sell subscriptions and attract more advertising revenues. Facebook calls its decision heavy-hearted, citing the 5.1 billion free referrals to Australian publishers worth an estimated 407 million AUD. In contrast, Facebook claims its gains from hosting news content are minimal, at only 4% of the content in users' news feeds.

Facebook has shown its intention to continue its global commitment for ensuring news quality. The social media has confirmed that it would be present in the Australian market not only by providing its services but also by fighting disinformation. Nonetheless, while Facebook proposes itself as a powerful enabler of free speech and access to news on a global scale, the stand-off in Australia reveals the other side of the coin: online platforms' power to set the rules of the content-sharing game, including news. The ban has not only led to the blocking of international and Australian news content, but also information on weather and even from public institutions. Evidently, the concept of 'news' autonomously adopted by Facebook is broad and driven by business interests.

The decision to block access to news media content in Australia does not promote freedom of expression. Rather, it follows Facebook's business logic. On the one hand, Facebook relies on free speech

as the constitutional basis to shield its activities from regulation while marketing the platform as a place fostering freedom of expression. On the other hand, as a private actor, the social media protects its business interests even if this could undermine the same rights Facebook claims to protect. By limiting news media outlets' access to the platform, Facebook is also affecting the resources on which media outlets can rely to provide professional information. It undermines the passive right to be informed. News media advertising revenues were already declining by up to 40% year-on-year, and the Covid-19 pandemic has exacerbated this downturn.

Against this backdrop, the Australian experiment has been perceived as a bold and innovative solution to the global problem of redistributing generated income between content producers and online platforms.

The New Australian Code

First and foremost, the Australian legislator's intention was always to establish a regulatory framework that would facilitate fair commercial negotiations between platforms and news media: deals struck outside of the Code remain the favored outcome by far. Presupposing that Google and Facebook would remunerate news media for hosted content, the law's premise is that publishers, especially small ones, need the help of the regulator to avoid being obligated to accept whatever terms the dominant platforms impose them.

The Code has the specific purpose of "address[ing] bargaining power imbalances" between Google and Facebook on the one hand, and news media outlets on the other: under the Code, the two platforms' have an obligation to remunerate news media fairly. In order to be eligible, news media must meet certain criteria – (i) their revenues from the past year (or for three of the past five years) must have exceeded 150,000 AUD, (ii) they must predominantly produce "core news" as defined in the Code, (iii) be subject to professional journalism standards and (iv) operate in Australia to serve Australian audiences. On the basis of these criteria, the Australian Communications and Media Authority (ACMA) evaluates the eligibility of news corporations to register under the Code and signal their intention to enter into a bargaining negotiation with Google or Facebook either on their own, or collectively.

If an agreement is not reached within three months, the parties become subject to compulsory arbitration. The ACMA provides a register of arbitrators, consisting of at least ten individuals, each with experience in either legal, economic or industry matters. When arbitration is required, and the parties cannot agree on a panel of three, the ACMA can appoint a panel of three individuals from the register. This deadlock-breaking mechanism is called "Final Offer Arbitration" and represents the true heart of the draft code. The arbitral panel will have 45 business days to choose between two final remuneration offers made by the parties. If neither offer is entirely acceptable "in the public interest", the arbitrators might amend the most acceptable of the two. In evaluating the offers, the arbitrators will consider the direct and indirect benefits that the news content brings to the platforms, as well as the cost of producing such content.

Once the arbitral panel has determined the remuneration due by the platform, the parties have 30 days to enter into an agreement. The failure to conclude an agreement will give rise to a civil penalty that could amount to the greater of 10 million AUD; three times the total value of the benefits enjoyed as a consequence of the omission to comply to the arbitration; 10% of the platform's annual turnover for the previous 12 months from the supply of goods and services in Australia.

In addition to the Final Offer Arbitration, platforms particularly dislike the 'minimum standards' – information obligations on the part of the platforms vis-à-vis all news business that registered to benefit from the Code. Platforms are required to provide 14 days advance notice of changes to their algorithms, which might impact the presentation or ranking of news content. After consultations with the platforms, it was specified that the notice is limited to "conscious

changes to algorithms that would have a significant impact on ranking".

Even though this system was the result of months of work, just before approval, the Australian government decided to renegotiate the scope of the Code in the aftermath of Facebook's decision to ban the dissemination of news in Australia. The amendments will consider *inter alia* that "a decision to designate a platform under the Australian Code must take into account whether a digital platform has made a significant contribution to the sustainability of the Australian news industry through reaching commercial agreements with news media businesses" and "the final offer arbitration is a last resort where commercial deals cannot be reached by requiring mediation, in good faith, to occur prior to arbitration for no longer than two months".

Treasurer Frydenberg said the amendments would "provide further clarity to digital platforms and news media business about how the code is intended to operate and strengthen the framework". Nonetheless, these are not trivial changes: they open the doors to tech giants to escape the system of remuneration, as long as they have "made a significant contribution to the sustainability of the Australian news industry". It is unclear, as of yet, what a significant contribution entails. This negotiation reveals how states are not the only actors exercising powers on information in the digital age. The governance of information is increasingly shaped by a mix of public authority and private ordering.

Governing Information Powers

Although the Australian initiative is one of the most interesting regulatory attempts to rein in the influence of tech platforms on democracies, it's certainly not the only one.

In the framework of the 2015 Digital Single Market strategy, the European Union famously passed the Copyright Directive in May 2019, that establishes a new publishers' right, strengthening the bargaining power of news media when licensing their content to platforms that intend to keep using their news. While this is certainly a step towards obtaining payments from the tech giants for the journalistic works they use for free, European news media are now calling for the EU to implement an "Australia-style arbitration system".

From Europe to the US, news media are lobbying in favor of the ACCC's solution. The most recent example comes from Canada, where news media representatives, in a letter to Members of Parliament, claim that "Australia has figured out the solution [and it] costs the taxpayer absolutely nothing". Likewise, the establishment of a new technology regulator in the UK seems inspired by the Australian solution. At the same time, the Australian Code might also have inspired the platforms to be more available to negotiate globally.

This trust in the Australian model could, however, fail to take into account the current situation. The Australian Code has not only shown a potential model to regulate online platforms, it also provides a case study to understand the power of online platforms on information dissemination and the news sector. During the pandemic, private platforms have provided (information) services which even the State failed to deliver promptly. In other words, their primary role during the pandemic has resulted in these actors being thought of as public utilities or essential parts of the social infrastructure. The Australian negotiation shows how information is subject to the governance of private actors, which, by sitting at the negotiation table as information gatekeeper, increasingly compete with public authorities. Therefore, Facebook's decision to ban news content has proven a good (political) move, to show the information society's dependence on platforms, and government and news media outlets' need to negotiate with them.

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SUGGESTED CITATION

De Gregorio, Giovanni; Pollicino, Oreste; Perotti, Elena: Flexing the Muscles of Information Power: On the Australian News Media Mandatory Bargaining Code, Verfassungsblog, 26.02.2021, doi: 10.17176/20210226-153903-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210226-153903-0.