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Global watch on culture and digital trade

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ENSURING LEVEL PLAYING FIELD IN THE DIGITAL MARKET: A CROSS-NATIONAL ISSUE

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Analytical report, October 2020

In the context of the COVID-19 global pandemic, it becomes increasingly crucial for several stakeholders to establish a level playing field in the digital market. The goal is to rethink the financial contributions from global online platforms and to create the conditions for fair and equitable remuneration to content creators. The October report comes back to the discussions around the new Australian code of conduct for online platforms, focusing on various concerns expressed by online platforms. In addition, it analyzes the political confrontation between global online platforms, public authorities and content creators in other national contexts. Moreover, it highlights both the talks within the European Union (EU) and the Organization for Economic Cooperation and Development (OECD) with respect to the digital services tax and the ongoing bilateral negotiations between the United States and the United Kingdom.

Struggle for level-playing field

Discussions in Argentina and Brazil

The debates regarding the regulation of global online platforms have recently been increasing in Latin America.

Early September, the Commission on Communications and Informatics of the Argentine Chamber of Deputies organized a meeting, focusing on "Regulation, co-regulation and responsibilities of platforms for a free and open Internet", which allowed to generate a debate on the different perspectives of the regulation of digital platforms in Argentina.

In a similar vein, during an event organized by the Laboratory of Communication Policies (LaPCom) of the University of Brasilia (UnB), Cristiano Flores, president of the Associação Brasileira de Emissoras de Rádio e Televisão (ABERT), stressed the need for discussions in order to build new standards for media and digital platforms. "We should deal with the symmetry of treatment between the digital players who act on the Internet and those who act via other media". In Brazil, debates continue at Congress on a fake news bill, initially introduced in early July 2020.

Canada plans to pass a new law

In Canada, during its federal throne speech, the Liberal government expressed its political willingness to pass a new law in order to further regulate digital companies, such as Netflix and Google, address corporate tax avoidance by global online platforms, as well as to deal with cultural discoverability and with financial contribution by digital platforms to cultural expressions. According to the throne speech, "web giants taking Canadians' money, while imposing their own priorities. Things must change, and will change. The Government will act to ensure their revenue is shared more fairly with our creators and media, and will also require them to contribute to the creation, production, and distribution of our stories on screen, in lyrics, in music, and in writing".

In this respect, the Canadian government seeks to impose obligations, including financial ones, to global social media, such as Google and Facebook, as well as to entertainment online platforms, such as Netflix or Disney Plus, in order to establish an equitable balance vis-à-vis national cultural industries, culture professionals and traditional media companies. In this view, Canada could follow the policy initiatives carried out by some Member-States of the European Union (EU), such as France, Germany, Italy, Denmark, Poland and the Flemish Community of Belgium, which have developed obligations for non-domestic providers of on-demand audiovisual media services.

Concerns about the News Media and Digital Platforms Mandatory Bargaining Code

In mid-September, Rob Sims, the author of the proposed Australian law on online platforms and remuneration of content creators, said the draft legislation will be amended in order to include some concerns expressed by digital companies, such as Google and Facebook. Rob Sims, chair of the Australian Competition and Consumer Commission, mentioned that among the concerns is a fear that under the Code, "news businesses will be able to somehow control the algorithms of online platforms", adding also that "there's nothing in the Code that forces Google or Facebook to share the data from users".

The News Media and Digital Platforms Mandatory Bargaining Code, drafted by the Australian Competition and Consumer Commission (ACCC), would require Google and Facebook to negotiate with news outlets and pay for news content featured on their platforms. In this respect, if Google and Facebook want to continue to operate appropriately in the Australian digital market, they will be forced to comply with the Code, even though the latter does not define what online platforms need to pay. The Code also plans to give key powers of arbitrage to the Australian Communications and Media Authority, which could address the bargaining imbalance between the US tech giants and news businesses.

In this view, if negotiations fail, the matter could be arbitrated by the Authority, which would choose which of the two parties' final offers is the most reasonable within 45 business days. The Code will initially only apply to Google and Facebook. The Authority can fine the tech giants approximately 81 000 USD for minor breaches of the Code. If the matter goes to court, the highest fine could reach around 6 million USD. However, it is worth noting that Google made 4.3 billion USD in advertising revenue in Australia last year and Facebook made 0.7 billion USD.

Reactions by Google and Facebook

If the Australian government moves ahead with this regulatory change, Google and Facebook do appear determined to not pay for news content on their main services, such as Google Search and Facebook news feed. Facebook is threatening to remove all news from Australian Facebook pages and to block Australian users from sharing news on its social media platform.

It should be mentioned that more than one-third of Australians get their news from Facebook. According to the 2020 Digital News Report, more than half of Australians get news on social media, but fewer (39%) use Facebook for news than the global average (42%).

Facebook's managing director for Australia and New Zealand, Will Easton, stressed that the draft law "misunderstands the dynamics of the Internet and will do damage to the very news organisations the government is trying to protect". Besides, in an open letter published in mid-August, Google's Australia managing director, Mel Silva, stated that the draft Code is "unworkable" and it ignores "the significant value Google provides to news publishers".

Divide to better reign

End of June 2020, Google announced the launch of a licencing program in order to pay local and national press publishers and help them monetize their content. Following this announcement, Google has concluded economic agreements with around 200 media outlets from Germany, Brazil, UK, Argentina and Canada: Der Spiegel, Die Zeit, El Litoral, Stern …

The goal of the Californian digital giant is to include quality content in a new space of Google News service, called Google News Showcase and deployed since October 1. In this respect, Google, which plans to devote 1 billion USD to this new service over three years, agrees to pay for online content. As a consequence, Google aims to spread its remuneration model based on license agreements established with publishers and to undermine the initiatives from public authorities in several countries with a view to establishing a "neighboring right", which would allow remuneration for online content.

Fierce and long battle

It is not the first time a national government has sought to force Google and Facebook to pay media companies or content creators for news content featured on their platforms. In 2014, a Spanish law required publishers to charge Google for the headlines and snippets of their stories that appeared on Google News. In response, the tech giant removed the Google News service from Spain and took Spanish publishers off its news service globally.

In addition, in October 2019, France was the first European country to implement the EU's Directive on Copyright in the Digital Single Market. In response, Google decided to not pay press publishers for sharing their content on the search engine. Besides, the Californian giant announced it would no longer publish small excerpts of press articles below web links, also called snippets, on search results for its French users.

To conclude, over the last years, the dispute is related to the fact that a reciprocal exchange between tech giants and content creators does not lead to a mutual benefit. In other words, in the sharing digital economy, creators offer abundant content and platforms offer global dissemination channels. However, the benefits from this reciprocal exchange are not fairly shared and online platforms generate revenues from content that they did not create or pay for. In this respect, content creators demand a more equitable and fair remuneration from this extremely prosperous sharing digital economy. As stressed by Terry Flew, professor at the Queensland University of Technology, "each party derives benefit from the other […] Australia proposed that there must be a just price for the financial benefit gained by the platforms".

In addition, for national regulators, the new mandatory Australian Code could create a legal precedent, generating new legislations on remuneration of content creators and resulting in larger payments in other countries. However, the Australian Code remains an individual and national response to a global issue, which affects the economic viability of content creators across the globe. Clearly, a collective, plurilateral and simultaneous action, put in place by several national governments, could get a stronger impact on practices of tech companies and on their business model.

Digital tax: talks within the EU and the OECD

In mid-September, France proposed that the EU should implement a digital services tax in the first quarter of 2021, if the multilateral negotiations within the Organization for Economic Cooperation and Development (OECD) do not succeed to create a broad consensus on a global framework for digital services tax. In this respect, the French Finance Minister, Bruno Le Maire, stressed that "the United States (US) don't want a digital tax deal at the OECD. So, they are making obstacles that prevent us from reaching an agreement even though the technical work is done". For its part, the OECD intends to publish technical blueprints in mid-October on how to tax big digital companies across borders and on global minimum corporate tax.

Note that in late June the US decided to no longer participate in the OECD's digital tax negotiations, including around 140 countries. The key reason is that a number of countries aim to adopt taxes on digital companies above a certain revenue threshold, which will notably affect US digital companies, such as Google, Facebook, Netflix, Amazon.

UK-US free trade negotiations

End of September, the US and the United Kingdom (UK) concluded the fourth round of negotiations on a bilateral trade deal, with a fifth round scheduled for mid-October. The fifth round will be the last ahead of the US elections in November. British Trade Secretary, Liz Truss, said "significant progress has been achieved since launching negotiations in May 2020, and most chapter areas are now in the advanced stages of talk". As Inside US Trade mentioned, the US and UK seek "to put an agreement in Congress before April to ensure it is covered by Trade Promotion Authority (previously known as "Fast-Track Authority"), which expires next summer". The fourth round focused, among others, on cross-border trade in services and industrial subsidies. Additional meetings outside of the official round dealt with telecommunications, intellectual property and market access.

Early September, an advisory group from the UK's Creative Industries Council (CIC) proposed to UK negotiators to seek provisions on intellectual property that are more stringent than what US administration has agreed to in previous trade agreements, such the Trans-Pacific Partnership and the US-Mexico-Canada Agreement. The CIC is co-chaired by two British cabinet members and the chief executive of BBC Studios. It includes 25 other creative industry representatives and one other member of Parliament. A Google representative, Ronan Harris, Vice-President of Google UK & Ireland, also sits on the Council.

Finally, given previous positions of the US administration and UK conservative government, the UK-US trade negotiations raise strong concerns regarding cultural exception. It is likely that the goal of the US and UK would be to include cultural and audiovisual services within the agenda of negotiations and to treat online cultural and audiovisual services in a single chapter devoted to e-commerce, eliminating all forms of public intervention with regard to this type of services. In this respect, the impact would be to limit the right of the UK government to adopt and implement policies to support the production, distribution, and consumption of digital local content.

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