

ITI Response to Draft News Media Bargaining Code

August 28, 2020

We thank the Australia Competition and Consumer Commission (ACCC) for the opportunity to comment on the draft News Media Bargaining Code.

About ITI

The Information Technology Industry Council (ITI) is the premier voice for the global information and communications technology (ICT) industry. Our over 70 member companies include the world's leading innovators around the world across the ICT spectrum. We advocate on behalf of our members for policy and regulatory environments that foster innovation and maximize all the benefits that ICT companies provide, including economic growth, job creation, and the tools to solve the world's most pressing social, economic, and environmental challenges. We work closely with our partners in government, international organizations, the business community, and civil society to achieve these objectives.

Overview

Digital platforms play a foundational role in driving innovation and growth in the economy, supporting the efficiency of supply chains and creating market opportunities by improving access for businesses of all sizes. Digital platforms have also catapulted us into a new era of information sharing across a variety of different forms of media, enabling more people to access reliable information than ever before. The tech sector appreciates the need for quality journalism and delivery of that information, recognizing the vital role that technology plays in facilitating access to journalism and improving its reach. Journalism, and the technology ecosystem that supports it, both have a vital role in a functioning democracy.

Given the dynamic nature of this ecosystem, this Code of Conduct should work towards ensuring the mutually beneficial ecosystem of publishers and platforms. To do so, the Code should include clear definitions, criteria, and requirements with appropriate thresholds to enable compliance and avoid arbitrary application of the Code. We are also concerned that some processes outlined in the draft Code could expand to other areas of the digital and non-digital sectors for competition purposes, while having deleterious protectionist effects.

Due to these concerns and others, which we detail below, ITI respectfully requests that the ACCC delay enacting the Code in favor of robust, meaningful review and public consultation. We hope that this process will allow the drafters to fully address concerns, ensure alignment with Australia's trade obligations, and ensure that the final product benefits both the Australian market and all of companies, foreign and domestic, that invest, create jobs, and support economic activity in the Australian market.

Designation of Digital Platforms

The draft Code currently applies to two companies, but clearly has the potential to apply to a broad range of digital platforms at the Treasurer’s discretion. We have significant concerns about expansion of the scope, unfair treatment of multinational companies, and unintended consequences that may inhibit the growth of digital services in Australia. As written, the Code lacks any distinct criteria for designating a digital platform, other than consideration of bargaining imbalance. However, according to the Code, the Treasurer also has no requirement to provide evidence of a bargaining imbalance, and a digital platform has no clear mechanism through which to dispute the designation. While Australian officials have indicated that a legislative instrument would make such a threshold high, the draft as written provides the Treasurer with considerable, potentially arbitrary, license to designate a wide range of digital services companies. Furthermore, companies that become designated under the Code likely offer many additional services that may be captured, however unintentionally, by the Code. We recommend that the Treasurer’s designation be specific to the targeted service for clarity and ease of compliance.

We recommend that the ACCC amend the draft to include: clear criteria for designation of platforms or specific digital services; requirement for a Treasurer to provide specific justification of the designation; and finally, a mechanism for a digital platform to dispute a designation. It is particularly important to outline clear criteria for designation, otherwise there will be a clear risk for digital platforms to invest in Australia. This change will help Australia avoid arbitrarily shutting out platforms or disincentivizing their market access.

Discriminatory Effects and Trade Obligations Violations

The draft Code explicitly and exclusively targets two U.S. companies without any indication of the selection criteria for these companies and their various services or whether similar criteria was or shall be applied to companies in or outside of Australia. The draft Code would impose discriminatory and burdensome responsibilities on U.S. companies where Australian, Chinese, Japanese, European, or other third-country technology businesses would not incur the same responsibilities. In solely targeting U.S. companies, the Code conflicts with basic trade principles of national treatment and most-favored nation under the Australia-U.S. Free Trade Agreement (AUSFTA) and the WTO General Agreement on Trade in Services (GATS).

The Code also does not appear to comport with Australia’s investment commitments by imposing specific performance requirements on U.S. digital companies in Australia through requiring the purchase of Australian content as a condition for market access. These are in addition to basic questions over conflicts of Australia’s commitments on minimum standard of treatment for investors and procedural rules required in Australia’s transparency commitments. The Code also presents a high penalty of ten percent of Australian revenue for designated platforms who fail to comply. Given these concerns, the Code appears to counter Australia’s goal to be a leader in promoting digital trade.¹

Notification of Algorithmic Changes and Disclosure of Proprietary Information

In addition to these revenue transfer requirements, designated platforms must give Australian publishers 28 days’ notice of any changes to their algorithms that may result in a “significant effect”

¹ <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/e-commerce-and-digital-trade>

on the registered news business' (RNB) ranking. This requirement does not take into account how algorithmic changes occur, nor does it clearly define "significant effect" to either the ranking system or ability to derive user traffic. Companies make nearly constant changes to algorithms to improve user experiences and address other issues completely unconnected to RNBs, and it is not often clear in advance whether a change will have an effect on rankings or user traffic.

The Code would also have platforms furnish RNBs with explanations on how to "minimize the negative effects" so as to avoid negative consequences and navigate around the algorithm. Digital platforms often make changes to digital platforms and ranking systems in order to combat spam, fraud, or abuse; in other cases, it may be to improve the overall quality of the search function and content feed, the key product advantage on which digital platforms compete. Changes that rely on machine-learning may also render it difficult for a digital platform to provide the Code's requested preferential explanation for publishers. Moreover, this minimum requirement obligates platforms to disclose proprietary information around an essential function of business. This requirement raises concerns of commercial fairness and creates a disincentive for new platforms that may be subject to the Code from entering the Australian market.

We suggest that the ACCC establish clear, balanced thresholds for notification that take into account technical realities and eschew requirements for companies to disclose any proprietary information, such as the details of algorithmic changes.

Media Diversity and Competition

The qualification for RNB status appears to apply only to a limited set of businesses and overly benefits large, privately-owned publishers based in Australia. While we support the intention of the Code to strengthen public interest journalism, the Code as drafted discriminates against small and overseas publishers from surfacing their content on digital platforms. As part of RNB qualification, large publishers would have access to compensation from designated platforms. However, even with collective bargaining arrangements under the current draft, there is no guarantee that small or overseas publishers will not be pushed out of the market due to these advantages afforded to large publishers. Media competition may be reduced because the Code would limit resources for technology platforms to develop commercial relationships with small or emerging publishers. This is of particular concern due to the highly concentrated nature of Australia's media market.

Non-discrimination and Due Process

As written, the Code establishes that platforms shall not discriminate against news businesses, whether registered or not, for the use of their services. However, the Code as written presents an unintended consequence of incentivizing news media businesses to prioritize content creation for only designated digital platforms as a means of gaining remuneration. This may conversely shift a large amount of traffic only to those designated platforms and hurt smaller platforms that may not have the means to pay for exclusive content.

"Covered news content" is broadly defined in the Code and highly subject to interpretation. For designated platforms to best comply with the Code, we would recommend further clarification to eliminate potential abuse or uncertainty. A narrower definition of "covered news content" to support journalism in the public interest will avoid unintentionally preferencing content not intended by the scope of the Code, such as sports and entertainment news. There should also be a

way for publishers to assist in distinguishing or notifying covered news content to support broad compliance with the Code.

The Code also provides that only RNBs may initiate arbitration under any justification of their choosing. While there is an obligation to negotiate under good faith, the Code would be better served by the inclusion of clear guidelines and criteria for RNBs to initiate arbitration, along with a clear appeals and review process, which the Code also lacks. It is important for the Code to ensure that any arbitration provisions genuinely promote collaboration and avoid favoring either RNBs or technology companies.

Monitoring and Review

The ACCC and the Treasurer should both be responsible for monitoring the Code's implementation and addressing any unintended or discriminatory consequences. In addition to including more specific, balanced provisions on arbitration initiation, the ACCC and the Treasury should also be required to monitor the impact of the proposed Code on news media and technology markets, ensuring that its function does not have a deleterious impact on smaller news media publishers or smaller platforms, the global competitiveness of businesses subject to the Code, or to consumers of media on these platforms. The ACCC and the Treasury should be mindful of how the Code may impact global markets and endeavor to maintain a balance of power in collective bargaining arrangements.

We also strongly recommend that this Code be subject to a statutory review by a non-government commission during the first year of implementation to address any issues and make amendments as appropriate.

ITI and our members thank the ACCC for considering our comments. We would be happy to discuss additional details on any of the aforementioned points.