

**Consultation: Fair revenue sharing between digital platforms
and news media**

Submission of the Public Interest Advocacy Centre



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September 15, 2021

Introduction

The Public Interest Advocacy Centre (PIAC)¹ is writing to comment on the consultation regarding fair revenue sharing between digital platforms and news media.² We note that this is the second stage of the consultation process, with the initial stage having involved only stakeholders such as publishers and broadcasters, digital platforms and academics.³ We are disappointed with the closed-door approach taken at the earlier stage. Issues regarding compensation for news media do not just concern media organizations and digital platforms. They affect consumers and citizens. They raise crucial public interest issues of access to fair, investigative journalism, freedom of the press, along with freedom of expression and other policy considerations. Access to news is crucial for keeping the public informed and enabling them to formulate and express their own views, based on an exposure to fair and honest news reporting, which is vital for our democracy.

We gather that the sense of urgency regarding the remuneration regime for news media organizations is caused by the declining state of news media industry with notably a large number of job losses in Canada (and around 80% of the online advertising revenue going to a small number of platforms),⁴ and partly because of what other countries, such as Australia and France are doing.⁵ PIAC understands there are several challenges being faced by the news media industry in this evolving digital society, but is skeptical of some approaches being considered to address this issue in Canada, which appears to mainly lean towards the Australian remuneration model with backing from all the major political parties.⁶ Additionally, some news media groups have also indicated their preference for the Australian approach.⁷

The models being used in different countries are at an early stage, with the Australian model just going into effect earlier this year. Thus, these models' effectiveness and fairness in addressing issues concerning compensation for news media organizations from digital platforms and its implications on key policy issues cannot be accurately assessed, with any deductions of successes or failure at this stage likely to be premature.

¹The Public Interest Advocacy Centre ("PIAC") is a non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. See: PIAC's webpage: <<https://www.piac.ca/about/>>.

² Canadian Heritage, "Stakeholder engagement on fair revenue sharing between digital platforms and news media," (August 3, 2021) online: <<https://www.canada.ca/en/canadian-heritage/campaigns/fair-revenue-sharing/stakeholder-engagement.html>>.

³ Anja Karadeglija, "Government moves to consult public on how to make Big Tech pay for news," *National Post* (10 August 2021), online: <<https://nationalpost.com/news/politics/government-moves-to-consult-public-on-how-to-make-big-tech-pay-for-news>>.

⁴ Canadian Heritage, "Stakeholder engagement on fair revenue sharing between digital platforms and news media," (August 3, 2021)

⁵ *Ibid.*

⁶ National Post, "Opinion: The Australian model to stop Big Tech from siphoning ad dollars from journalism works," *National Post* (7 September 2021), online: <<https://nationalpost.com/opinion/opinion-the-australian-model-to-stop-big-tech-from-siphoning-ad-dollars-from-journalism-works>>.

⁷ Anja Karadeglija, "Government moves to consult public on how to make Big Tech pay for news," *National Post* (10 August 2021).

Mandatory Code and Arbitration Regime (Similar to the Australian Model)

The first regime discussed in the consultation paper is similar to the Australian model for compensating news media by digital platforms, which is the News Media and Digital Platforms Mandatory Bargaining Code (the “Australian Code”).⁸ The Australian Code seeks to address the bargaining power imbalances between digital platforms and Australian news businesses.⁹ It enables eligible news businesses to bargain individually or collectively with digital platforms over payment for the inclusion of news on the platforms and services,¹⁰ while providing mediation and final offer arbitration to resolve any bargaining issues.¹¹ The ACMA notes that it has three roles under the Australian Code: assess the eligibility of news businesses who want to participate in the code; appoint mediators to assist bargaining parties; and register and appoint arbitrators if bargaining parties cannot agree on the make-up of an arbitration panel.¹² Digital platforms reacted to the Australian Code poorly, with Facebook even rescinding access to news through its website in Australia,¹³ which access later was restored.¹⁴ Google has since made over 50 deals with publishers in Australia, many by including certain media services in its Google News Showcase.¹⁵

In PIAC’s view, the Australian model is problematic for several reasons. To begin with, this regime requires negotiations to take place in confidence between the news media organizations and digital platforms, which completely lacks public transparency and raises concerns relating to abuse of process, such as concerning what is being negotiated, what could be bargained away and/or requiring positive coverage of platforms. This is problematic also for smaller news media organizations who do not have the same resources and bargaining power to negotiate as larger organizations, and who could find themselves with deals that are not fair, or no with deal at all (or lengthy negotiations that hold them up relative to competitors). The kind of pressure smaller news media groups can exert in negotiations is naturally less than what the larger news organizations can exert, with the latter already having much more leverage than the smaller news outlets in this industry. This lack of public transparency means that smaller news groups would be left on their own to assess what’s fair and seek assistance from the arbitration process as need be.

⁸ Australian Communications and Media Authority, “News media bargaining code,” online: <<https://www.acma.gov.au/news-media-bargaining-code#mediation-and-arbitration>>. Also see: Australian Competition & Consumer Commission, webpage, “News media bargaining code,” online: <<https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>>. For the law, see: *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, online: <<https://www.legislation.gov.au/Details/C2021A00021>>.

⁹ Australian Communications and Media Authority, “News media bargaining code.”

¹⁰ *Ibid.*

¹¹ See: s.52Z1A and Subdivision C of the *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*

¹² Australian Communications and Media Authority, “News media bargaining code.”

¹³ Kerry Flynn, CNN Business, “Facebook bans news in Australia as fight with government escalates,” *CNN Business* (19 February 2021), online: <<https://www.cnn.com/2021/02/17/media/facebook-australia-news-ban/index.html>>.

¹⁴ Daniel Van Boom, “Facebook will reverse news block in Australia,” *CNET* (22 February 2021), online: <<https://www.cnet.com/news/facebook-will-reverse-news-block-in-australia/>>.

¹⁵ Peter Leonard, The Battles Between Google, Facebook, and News Media Proprietors Over Fair Value Exchange for News Content, *Competition Policy International (CPI Antitrust Chronicle Special Edition March 2021)* at p.11.

Similar concerns were noted in the initial consultation, with this model viewed as favouring more established players on either side and being less accessible to smaller independent media, with more support asked for smaller news outlets.¹⁶ This disparity in the size and market power of different media organizations is a major concern that cannot be merely put aside or dealt with at a later stage. If such a mandatory code regime were to be implemented in Canada, more support for smaller news outlets would be crucial. The details of this support and its administration need to be spelled out in the law, not merely left to be attended later or through a regulatory instrument. There should also be some kind of oversight to ensure that smaller news organizations are not subject to any predatory practices.

Most importantly, it is inappropriate for access to a public good, news, one needed for democracy, to be secretly negotiated between commercial parties.

There are other issues with this model as well, such as its seemingly onerous application regime. A news organization has to qualify through an application process to be able to benefit from this regime. The application includes a revenue test to register as a news business corporation.¹⁷ This requires that the annual revenue of the applicant corporation (or related body) as set out in the corporation's annual accounts, exceeds \$150,000 in the most recent year for which there are such accounts, or in 3 of the 5 most recent years for which there are such accounts, amidst other details.¹⁸ Other requirements include that the business should predominately operate in Australia for dominantly serving Australian audiences¹⁹ and meets certain professional standards.²⁰ First, this type of model will financially reinforce major news outlets and stifle new, independent news businesses. In general, we view the requirement to apply, and specifically its revenue threshold, troubling because this means not all news media organizations would be covered by default, which might result in smaller news outlets being left out. Such qualifying criteria could create undue barriers for smaller news outlets, which will be contrary to diversity and inclusion, and be unfair as it will mainly serve the interests and editorial policies of larger news groups. Any model Canada adopts should not discriminate between different news media organizations, and if any criteria is to be applied, it should be fair and must take into account the interests of smaller news outlets and the diverse editorial viewpoints they may represent.

It also seems that the Australian regime would not apply to digital platforms unless they are a "designated digital platform corporation" as determined by the Minister, pursuant to s.52E of Australia's *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*. This section states that in making the determination, the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of

¹⁶ Canadian Heritage, "Stakeholder engagement on fair revenue sharing between digital platforms and news media," (August 3, 2021)

¹⁷ See: s.52F, s.52G and s.52M (Revenue test) of the *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*

¹⁸ s.52M of the *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*

¹⁹ See: s.52O of the *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*

²⁰ See: s.52P of the *News Media and Digital Platforms Mandatory Bargaining Code Act 2021*

the corporation, and whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of the Australian news businesses, including remuneration agreements. This in effect indicates that the Australian Code will only apply to those digital platforms who are required to participate in the Code, as decided by the Minister. If a similar provision is applied in Canada, then what we are left with is a private negotiation scheme with its protections and final arbitration offer only available if and when the digital platform is a designated as a qualifying digital platform as decided by the Minister. This provision significantly narrows the application of this regime and creates uncertainty as to its application.

There are policy considerations that are ignored as well, particularly, freedom of the press and freedom of speech. Linking news media with these digital platforms on a financial basis carries a risk of the latter having an undue influence over the news' honest and investigative journalism, specifically when it involves digital platforms themselves and even otherwise. This could create fears of digital platforms either stopping payments or creating unnecessary issues for the news media organizations, because of what is published by news media. This could either lead to news organizations refraining from publishing certain stories and/or softening the tone to cater to the demands and/or the reputation of the digital platforms, which would be appalling for honest and investigative journalism. This in turn would affect public's access to honest news stories, and could also make them distrustful of the reporting done by news media. Considering this, designing of any regime needs to factor in the realities of the market. Also, threats from digital platforms like Facebook to rescind access to news services could happen in Canada, even though it is not now an active issue in Australia.

Mandatory Financial Contributions Regime

The other regime discussed in the consultation paper is the mandatory financial contributions regime, which could work in a similar manner as Canadian content (CanCon) requirements. This regime would require digital platforms to make financial contributions to the news and information sector, as a percentage of their overall Canadian revenues, to be paid to an independent fund.²¹

We submit that this regime would be more favourable than the Australian approach for supporting transparency, equity, sustainability and freedom of press and speech in relation to news media compensation because it would allow for equitable access to funds, which would be administered through an independent fund, rather than through private negotiations and deals between the news media and digital platforms. In order for such a regime to work, we contend that an independent, third party or commissioner(s) should be appointed and given broad administration, oversight and enforcement powers, and in turn, this independent commission be made subject to some form of public oversight. The problems regarding lack of transparency are less likely to arise with this regime as the third party administrator would have knowledge and oversight over the specific amounts of remuneration being provided to all the pertinent news media organizations.

²¹ Canadian Heritage, "Stakeholder engagement on fair revenue sharing between digital platforms and news media," (August 3, 2021)

We realize that there are challenges associated with this regime, particularly that it would be slower than the mandatory code and arbitration regime, and involving a third party for its administration, could add specific processes and additional steps. However, it would be more fair, transparent and better suited to protect the interests of smaller media outlets. At the same time, granting authority to an independent party to oversee and administer this program would mitigate the influence digital platforms could have over the content of news media organizations by holding the digital platforms accountable to this independent body.

If such a commission were created, PIAC recommends that public participation in the rates adjudication be encouraged so that public comment can be considered and other viewpoints can be expressed to the Commission.

As for the timeline, this could potentially be accelerated by expediting the funding process and requiring the designated, independent administrator to distribute the funds within a short, defined timeframe, as feasible. If the government takes a pro-active approach, then this regime could provide remuneration in a timely manner and also result in better protection of the public interest and policy considerations. Accordingly, we submit that this regime with an oversight body would be more appropriate, if one has to be implemented at this time.

Concluding Remarks

The two proposed models for compensating news media organizations have their own challenges and benefits. Similar regimes in other countries remain at an early stage, thus, they can only provide limited guidance. Considering our discussion above, it would be best to wait and see how these models pan out in other countries, review any issues and complications that arise and see what lessons could be applied before implementing a regime in Canada. That said, if a model has to be implemented, it should be one that promotes transparency, equity, sustainability, particularly for smaller news media organizations and other key policy considerations such as freedom of speech and expression, which in our view could be better achieved by a mandatory financial contributions regime than the Australian model.

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