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POLICY PERSPECTIVE

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Forcing Internet Platforms to Pay Publishers for News Content: What about CUSMA?

For months, Heritage Minister Steven Guilbeault has been grappling with how to deal with Google (and Facebook) over the controversial issue of requiring major internet intermediaries to compensate Canadian news publishers for news content appearing on the platforms' services. Canada has been carefully watching developments in France and Australia, where both governments have been engaged in difficult negotiations on this issue with Google and, in Australia, also Facebook. There has been progress in France, and now it appears the same may be true in Australia. This has positive implications for Canada.

Last September, News Media Canada, the organization representing the majority of Canadian news publishers, published a detailed report ("Levelling the Digital Playing Field") advocating that Canada adopt the Australian approach. According to Guilbeault, Canada is looking to both countries for examples but intends to craft its own solution since it has other factors to consider, such as a different regulatory framework, Canadian copyright law and CUSMA, the updated NAFTA trade agreement between Canada, the U.S. and Mexico that came into effect on July 1, 2020.

L'Autorité de la Concurrence, France's competition regulator, issued an order on April 9 requiring Google to negotiate with French press publishers and news providers regarding licensing fees for news content appearing in Google search listings in France. The authority gave Google three months to negotiate "in good faith" and come up with an agreement that would result in payment to publishers. The French order was based on a new "neighbouring right" given to publishers in the EU through a revision to the Copyright Directive. France was the first EU country to give effect to that new right. Google announced that it would not negotiate payment but would instead simply remove all news content. That didn't sit well with the French authorities, who accused Google of abusing its dominant position. Google appealed the authority's ruling in court, and lost. Finally, after months of negotiations, backed up by the authority's threat of action, it was announced in late January that Google and the organization representing many of the major French publishers had come to a revenue-sharing deal, although not everyone is happy.

In Australia, the Australian Competition and Consumer Commission (ACCC) – that country's competition regulator –developed a News Media Bargaining Code "to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook." The code, which was passed into law on February 25 with some minor amendments, is designed to ensure that the two internet giants reach commercial agreements with Australian news publishers within a set period of time, failing which binding arbitration will take place. Google fought the Australian legislation tooth and nail, threatened to end its search function in Australia and even withdraw entirely from the country, while mounting a campaign to get Australians to bombard their government with complaints about the code. None of this worked. The Australian legislation is now in effect, and Google has decided to negotiate content deals with Australian media companies.

Until very recently, Google had been resisting with all the means at its disposal. What changed the equation for Google was the emergence of Microsoft as an unexpected ally for the Australian government. Microsoft has come down unequivocally on the government's side, scrambling the cards and making a future intervention by the U.S. government against the Australian legislation much less likely. In a personal blog released on February 11, Brad Smith, president of Microsoft, made the case for maintaining a free and financially healthy fourth estate as a critical element of democracy. He recognized that the Australian legislation would help redress the imbalance between technology and journalism by requiring negotiations, backed up by a binding arbitration mechanism, between the two internet giants ("tech gatekeepers") and independent news organizations. Although the Australian legislation was drafted to apply only to Google and Facebook, specifically named because of their market dominance, Smith said that Microsoft would willingly submit to the proposed Australian disciplines. This would be both the right thing to do and good business for Microsoft. Smith indicated that if Google followed through on its threat to withdraw its online search engine from the Australian market, where it has a 95 per cent market share, Microsoft would be happy to fill the gap with its own search engine, Bing.

Meanwhile over the past few days, Facebook's actions in Australia have pushed Google off the front pages. Facebook's clumsy actions to remove all Australian news from its platform as a way of avoiding application of the code backfired significantly, partly because of the perception of bully tactics by a major international corporation but also because of how the measure was applied, blocking not just major news sites but also health information related to COVID-19 vaccinations, emergency services providers, women's shelters, food banks, charities and so on. In the space of a few short hours, Facebook managed to enrage the full spectrum of Australian (and global) public opinion. In the aftermath of this self-inflicted wound, Facebook agreed to restore news and the Australian government made some minor changes to the code before the law enacting it came into effect. As a result, if Facebook and Google reach agreement with news providers within the allotted time frame, the code will not apply to them. It is a distinction without a difference, but the platforms can claim they avoided direct government intervention in setting the terms of their contractual arrangements. The outcome of the stand-off in Australia and the engagement of one of Google's major corporate rivals in this issue has significant implications for Canada, and for Steven Guilbeault's policy development options. When Guilbeault first started talking about supporting the news industry, opponents of News Media Canada's proposals argued that CUSMA would constrain any Canadian policy measures since action against the major platforms would violate the trade agreement's terms. In response, in their "Levelling the Digital Playing Field" report to government the publishers addressed this point by including an opinion from noted trade expert Barry Appleton, rebutting the CUSMA argument.

Appleton pointed to Article 32.6 of the CUSMA, known as the "cultural exception" as a primary solution. The definition of a "cultural industry" in the agreement includes the publication of newspapers. Article 32.6 exempts a Canadian cultural industry from any of the USMCA obligations but there is a catch: the other two parties (the U.S. and Mexico) are allowed to retaliate with equivalent commercial effect against any measure Canada takes to protect a cultural industry that would otherwise violate the agreement's terms:

> "Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2 or 3 (i.e., the exception)."

This is a deterrent to ensure that Canada rarely, if ever, uses the cultural exception to override its obligations. It has never done so in the more than 30 years of the cultural exception's existence (both the original Canada-U.S. FTA and NAFTA had a similar clause) and if it did, it could be made to pay dearly. Retaliation could be applied against any sector to equivalent value, so if Canada's other two CUSMA partners were really upset with a Canadian cultural measure that "violated" the agreement, they would exert pressure by hitting other, politically influential sectors unrelated to the cultural industry being protected. The retaliatory impact is the criticism levelled at the cultural exception argument adopted by News Media Canada. The cultural exception is indeed a pretty thin reed to rely on – it is more of a political fig-leaf than anything else – although it is certainly a defence that can be put forward.

But is the cultural exception the only defence that Canada would have if it were to bring in a regime that required major internet platforms to strike compensation deals with news content providers, and would the U.S. challenge such a measure? There are two factors to consider. The first is that it should be possible to deal with major global corporations like Google and Facebook through policies of general application (i.e., directed at any company meeting certain criteria – such as market dominance – regardless of national origin) in a manner that would be consistent with CUSMA. For example, the Competition Chapter of CUSMA, which happens to be exempt from CUSMA's dispute settlement mechanism by virtue of Article 21.7, requires that each party "shall ensure that the enforcement policies of its national competition authorities include … treating persons of another Party no less favorably than persons of the Party in like circumstances". In other words, if a compensation scheme requiring internet platforms (holding a specified degree of market dominance) to pay news publishers for use of content were dealt with as a competition issue, it could be devised in such a way as to apply to Canadian, U.S. or Mexican entities without running afoul of CUSMA. Moreover, the decision could not be taken to dispute settlement by the U.S. government.

The second factor is whether the U.S. government would actually invoke CUSMA on Google's (or Facebook's) behalf. Quite apart from devising measures of general application that would be CUSMA-proof to defend Canadian action, now that Microsoft has positioned itself in favour of a policy where internet platforms compensate news organizations, and is willing to comply with the policy itself, it is much less likely that the U.S. would invoke CUSMA to argue that American companies are being discriminated against. The United States Trade Representative's (USTR) hands are now effectively tied, if not legally than practically in terms of the internal politics affecting the U.S. government's position.

And it's not as if Google itself, or Facebook, could initiate action. The "investor-state dispute settlement" (ISDS) provision in the previous NAFTA was dropped in CUSMA, ironically at U.S. insistence. The Trump administration felt that investor-state protections encouraged U.S.

companies to invest abroad, and so pushed to have it removed (although there is a transition period for existing claims and some residual measures respecting U.S. and Mexican investments). The ISDS provision in NAFTA allowed a private party (a company) to invoke dispute settlement against a NAFTA government if that government had taken action that resulted in expropriation of the company's property, or measures that were tantamount to expropriation. Changes to domestic policy that resulted in making it more difficult for a foreign NAFTA company to operate or generate expected returns on investment could be argued to violate investor-state protections. Canada lost several investor-state cases under NAFTA and the Canadian taxpayer had to compensate U.S. companies as a result. Even where the investor-state clause was not invoked, it had the potential to exert a chilling effect over policy development and implementation if there was a possibility that a U.S. (or Mexican) company might have grounds to object. No Canadian company ever succeeded in bringing a successful investor-state case against the U.S. although a few such cases were launched.

It now appears that the Australian government has prevailed in its struggle with Google and Facebook as both have now reached or are in the process of reaching content deals with Australian publishers. The U.S. government did intercede earlier in Australia, making a submission to the Australian Senate hearing arguing "an attempt, through legislation, to regulate the competitive positions of specific players in a fast-evolving digital market, to the clear detriment of two U.S. firms, may result in harmful outcomes." However, that submission was made under the previous Trump administration and before Microsoft had waded into the debate. Microsoft's engagement was good news for Australia and will likely result in the Biden administration standing back. This will also likely be the case in Canada when Minister Guilbeault introduces his legislation this spring. When one or two U.S. companies are on the same side of an issue involving a foreign country, it is relatively easy for the U.S. government to take a position to "defend U.S. interests". When there are U.S. companies on both sides of an issue, it is much more difficult to intervene, especially when both are large, powerful entities with significant lobbying clout in Washington.

Canada certainly needs to consider its CUSMA obligations when formulating policies that affect U.S. companies, but it is unlikely that CUSMA will restrain Canadian policy options with regard to the major internet platforms if the legislation is carefully drafted. There should be no need to resort to the economically costly cultural exception (Article 32.6). Moreover, the entry of another major U.S. internet company, Microsoft, into the debate in Australia – opposing Google's position on payment for news content and its claims that the Australian legislation is "unworkable" – will widen Canada's scope for action given the decreased probability that Google will now be able to convince the U.S. government to invoke CUSMA on its behalf. Added to this is Facebook's self-inflicted public relations disaster in Australia which makes it even less likely that the U.S. would attempt to constrain Canada through CUSMA provided that the legislation is not overtly discriminatory against U.S. companies.

About the Author

Hugh Stephens *has 40 years of government and business experience in the Asia-Pacific region. Based in Victoria, BC, Canada, he is currently Vice Chair of the Canadian Committee on Pacific Economic Cooperation (CANCPEC), Distinguished Fellow at the Asia Pacific Foundation of Canada, and Executive Fellow at the School of Public Policy at the University of Calgary. In addition, he teaches in the MBA program at Royal Roads University as an Associate Faculty member.*

Before returning to Canada in December 2009, he was Senior Vice President (Public Policy) for Asia-Pacific for Time Warner for almost a decade, located at the company's regional headquarters in Hong Kong. In recent years, he has written and commented extensively on Canada's engagement with the Asia Pacific region including articles published in The Globe and Mail, National Post, Ottawa Citizen, iPolitics, The Diplomat, Open Canada, and others. He currently maintains an active blog on international intellectual property issues (www.hughstephensblog.net).

Prior to joining Time Warner in 2000, Mr. Stephens spent 30 years in the Canadian Foreign Service with the Department of External Affairs, later the Department of Foreign Affairs and International Trade (DFAIT). His last Ottawa assignment was as Assistant Deputy Minister for Policy and Communications in DFAIT. He also served abroad as Canadian Representative in Taiwan, Counsellor and Charge d'affaires at the Canadian Embassies in Seoul, Korea and Islamabad, Pakistan, among a number other overseas and headquarters assignments, including service at the Canadian Embassies in Beirut, Lebanon, Beijing, China and Mandarin language training in Hong Kong.

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