ENPA
EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION

EMMA
EUROPEAN MAGAZINE MEDIA ASSOCIATION

The Australian News Media Bargaining Code:

Strengths & Shortcomings

In April last year, the Australian Government asked the Australian Competition and Consumer Commission (ACCC) to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook.

The code adopted on 25 February allows news media businesses to bargain individually or collectively with Google and Facebook over payment for the inclusion of news on their services.

EMMA and ENPA have been calling[1] for an Australian-style arbitration mechanism in Europe to ensure tech gatekeepers remunerate press publishers fairly for use of content.

This paper aims at underlining the main weaknesses and strengths of the Australian code and draws conclusions on how the principle underlying the Australian arbitration mechanism could be applied in Europe, namely the obligation of market-dominant platforms to participate in a binding procedure to set a fair price for the licensing of the publisher's right.

Main shortcomings of the News Media Bargaining Code

1. The code applies only to part of the press ecosystem

The code applies to “core news content” only.

Core news content is defiend under 52A as follows:

> ***Core news content*** *means content that reports, investigates or explains:*
>
> *(a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making;*
> *or*
>
> *(b) (b) current issues or events of public significance for Australians at a local, regional or national level.*

Such a limited scope de facto excludes part the press ecosystem.

Should a similar mechanism be considered at national and/or EU-level, it must be ensured that it would apply to all newspapers and magazines, whether dealing with “core news” or other content.

[1] https://enpa.eu/news/europes-press-publishers-microsoft-call-australian-style-arbitration-mechanism-europe-ensure or http://www.magazinemedia.eu/pr/europe-s-press-publishers-microsoft-call-for-australian-style-arbitration-mechanism-in-europe-to-ens

How to fix this shortcoming:
Should a definition be used, one pragmatic approach would be to use the definition of "press publication" as set out in article 2.4 of the DSM Directive 2019/790[2].

2. **The code is subject to political will**

A last minute change and major consession was included following Facebook's blackout where it restricted publishers and people in Australia from sharing or viewing Australian and international news content.

The following section was added :

> *In making the determination, the Minister must consider (…) whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).*

Campbell Brown, Facebook's vice-president of global news partnerships, stated that the changes allowed the company "*to support the publishers we choose to*". She also indicated that the company was prepared to reinstate a ban in the future.

This change paves the way for Google and Facebook to avoid the code altogether if they can satisfy the government they have struck enough deals outside it.

In other words, an obligation for the mechanism to apply and for a fair price to be attributed to publishers will therefore depend on political will, leaving a lot of uncertainty on the efficiency of the code as Facebook maintains it's potential threat to ban news content.

How to fix this shortcoming:

The DMA or other binding regulation should entail a specific obligation for the gatekeepers to grant all legal publications and offerings non-discriminatory access and fair terms and conditions to their services. This must include an obligation for market dominant platforms to enter into negotiations with all rightsholders of the publishers' right and offer fair payment for their content.

Strengths of the News Media Bargaining Code

[2] Article 2*(4)* of the DSM Directive:
'press publication' means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:
(a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
(b) has the purpose of providing the general public with information related to news or other topics; and
(c) is published in any media under the initiative, editorial responsibility and control of a service provider.
Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;

The code creates a framework for "registered news business corporations" and Facebook and Google to negotiate in good faith for financial remuneration for the use of, and reproduction of, news content. Should there be no agreement after five months (3 months bargaining time and 2 months mediation), a mandatory arbitration clause applies.

Such a mechanism enables an arbitral panel to establish a fair price based on an assessment of the benefits derived by each side in having the news content included on these gatekeepers' platforms, the costs of producing this content, and any undue burden an amount would place on the platforms themselves.

The fact that this instrument is to be applied after a limited amount of time should be considered as it leaves no space for long-lasting (legal) disputes but forces digital mega-platforms to sit at the negotiation table and pay a fair price to publishers.

An arbitration mechanism is needed to complement the publishers' right

The publishers' right is about granting press publishers a remuneration or a payment based on a legal right while the Australian mechanism provides a potential forfeit amount for a limited period (two years). This implies that the publishers' right is long lasting as it is not limited to a single contribution but should be a long-lasting or renewed payment.

However, although press publishers have been granted a neighbouring right in the EU, negotiations with such gatekeepers will not produce fair outcomes unless additional regulatory measures are brought forward to address gatekeepers with dominant market power, through appropriate regulatory frameworks such as the Digital Markets Act, Digital Services Act or other national laws.

Press publishers therefore call for an arbitration mechanism that would oblige gatekeeper platforms to fix a fair price for the publishers' right in addition to a non-discrimination obligation for all publications in order for the press not be to pressured into signing free licences or be delisted as occurred in France, the first Member State to implement the publishers' right[3].

[3] http://www.magazinemedia.eu/pr/news-release-emma-and-enpa-condemn-google-s-announcement-on-french-publishers-right-implementation