Computer & Communications Industry Association
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CCIA Submission in Response to the ACCC's Draft Code of Conduct

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1. Introduction

The Computer & Communications Industry Association (CCIA)[1] welcomes the opportunity to submit comments in response to the Draft News Media Bargaining Code that the Australian Competition and Consumer Commission (ACCC) released on July 31, 2020 (the Draft News Media Code of Conduct or Draft Regulation).[2]

CCIA has publicly encouraged policy options that would provide appropriate support for producers of public interest news content.[3] The Association understands and supports the efforts to preserve news diversity and local news producers as these represent an essential part of any democracy. However, CCIA believes that the Draft News Media Code of Conduct represents a draft regulation to protect national champions to the detriment of the Australian digital economy and its consumers.

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[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[2] Referred to herein as the "Draft News Media Bargaining Code", *available at* https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code.

[3] Statement of Matt Schruers, Vice President for Law and Policy, Computer & Communications Industry Association, "Online Platforms and Market Power, Part 1: The Free and Diverse Press", Committee on the Judiciary, U.S. House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law, June 11, 2019, https://www.ccianet.org/wp-content/uploads/2019/06/MSchruers-6-11-19-Written-Testimony.pdf.

As currently published, the Draft News Media Code of Conduct raises multiple concerns. First, it leaves the application of a regulation that imposes wealth transfers from different stakeholders to the discretion of the Executive without establishing objective, evidence-based principles or standards to select the affected companies. Instead, it grants poorly bounded rights to news media producers that will certainly make compliance with the Draft Regulation challenging. Second, it undermines the credibility of the work advanced by the ACCC that subjects its draft Code of Conduct to new companies designated unilaterally and without public process or consultation by the Treasurer. Finally, the discretionary power fails to grant sufficient safeguards to foreign companies to conduct business in Australia, fails to prevent market distortions and does not provide legal certainty, disincentivizing the private sector from investing in innovation to the benefit of Australian consumers.

Therefore, it is imperative that the ACCC reconsider its proposed text of the Draft Regulation and explore alternatives that would encourage voluntary cooperation between stakeholders rather than engaging in industrial policy that would negatively impact the Australian digital economy.

2. The Executive's discretionary powers

The most concerning aspect of the Draft News Media Code of Conduct as it currently stands is the broad discretionary powers it grants to the Executive. Because the Draft Regulation fails to provide clear standards that the Executive must take into account, the ACCC fails to guarantee that the proposed framework will be protected from political whim. In fact, just the opposite was observed in the Draft News Media Bargaining Code. The proposed text exposes the apparent political nature of this new regulation.

The current Draft News Media Bargaining Code grants full discretion to the Executive to designate which companies will be bound by the proposed regulation without establishing any principles to follow in such a designation. In other words, the Executive will determine which companies are obliged to pay to news media companies without having the need to justify its determination.

This broad discretionary power granted to the Executive is particularly concerning because the Draft Regulation imposes wealth transfer obligations from the designated companies to national news media producers. The Draft Regulation validates government expropriation of revenue from selected foreign companies. While CCIA does not support this type of industrial policy intervention that fails to correctly assess market dynamics, at the least, the Draft Regulation should include strict standards that ensure transparency, proportionality, and certainty in the enforcement of this legal framework.

Failure by the ACCC to reconsider the broad powers granted to the Executive to designate which companies will have to subsidize the Australian news media industry without setting clear standards for such a designation will open a dangerous path for political intervention in the development of the digital economy in Australia. By the same token, this discretionary use of power will have the potential to disincentivize future foreign investments in the Australian digital economy for risk of being regulated in a discriminatory manner. Eventually, Australia will lag behind in terms of digitization to the detriment of its citizens.

Therefore, CCIA encourages the ACCC to revisit the Draft Regulation to include clear standards to determine where there is imbalance in the bargaining power that the Executive must follow when designating the companies to which to apply the Draft Regulation.

3. Broad Definitions That Increase Legal Uncertainty

The Draft News Media Code of Conduct tries to classify and clarify which stakeholders will be impacted by the Draft Regulation. However, in doing so, the Draft Regulation has included very broad definitions that make enforcement of the regulation almost impossible to achieve.

a) Broad Definition of Covered News Content

The Draft News Media Code of Conduct proposes that in order to benefit from the wealth transfer regulation Australian news media businesses will need to sign up to be a registered news company.

The challenge arises when trying to narrow down which type of news media businesses can become Registered News Businesses for the purposes of the Draft Regulation. While CCIA has expressed support for the principle of preserving the production of public interest news, the interventionist approach adopted by the regulations goes beyond the public interest threshold. In particular, the Draft News Media Code of Conduct could potentially be applied to a broad range of content, including sports and entertainment news. This would allow content far outside the umbrella of 'public interest journalism' to be included as subject to compensation under the proposed wealth transfer system contemplated in the Draft Regulation, incentivizing the centralization of broad forms of content creation under the umbrella of existing news media businesses, and distorting and further reducing competition in Australia's already highly-concentrated media market

Against this background, CCIA urges the ACCC to fine-tune the text of the Draft Regulation to clarify that only public interest news producers represent "covered news content" as established in the text of the regulation. Otherwise, the Draft Regulation will essentially be requesting designated companies to subsidize any news producer in Australia. Such a broad application of the Draft Regulation would undermine the digital future of Australia and set a bad regulatory precedent that will certainly disincentivize future investments in the Australian digital economy.

b) Broad Definition of "Digital Platform Services"

The Draft Code of Conduct also includes a broad definition of "Digital Platform Services" that increases uncertainty as to which companies and which services would be bound by the proposed regulation. "Digital Platform Services" is a term that raises concerns from an enforcement perspective. In fact, many of the companies providing services in the digital space sometimes act as "platforms", but sometimes they do not. Therefore, the compulsory nature of the Draft Code for designated "Digital Platform Services" means that the extent of obligations imposed on the affected companies remains unclear, increasing the legal uncertainty and making it very challenging to ensure compliance with the obligations. With the current text of the Draft

Regulation, designated companies will find it difficult to understand which services are impacted by the new obligations and which other services they provide are not.

Because legal certainty is one of the most important standards that the ACCC should factor into this Draft Regulation, CCIA suggests that the Australian authorities include clear standards to determine where there is imbalance in the bargaining power that the Executive must follow when designating the companies to which to apply the Draft Regulation.

This should not only apply to which companies are designated, but also which services of these companies are designated. This provides certainty, because the services will be clearly articulated, but it also ensures that the code only captures the services in which there has been a strong evidentiary basis for finding a need to intervene

4. Lack of Boundaries for News Media Businesses' Rights and Biased Arbitration Process

The Draft News Media Code of Conduct includes multiple obligations that the designated "Digital Platform Services" need to comply with, but fails to acknowledge the market realities that characterize the way businesses operate in the real world. Consequently, the Draft Code of Conduct does not limit the scope of the established obligations and acts as an obstacle for "Digital Platform Services" to develop its businesses regularly. The following are a few examples included in the Draft Regulation that portray the limitless obligations established in the proposal.

a) Notification Obligations

The Draft Regulation imposes an obligation on designated "Digital Platform Services" to notify registered news businesses of any change in the algorithm that may have a significant impact on their rankings. This notice must be of a minimum of 28 days prior to the implementation of such a change in the algorithm.

Whereas the idea behind this notification obligation is to grant news media businesses sufficient time to adjust and counterbalance any negative effect in their rankings that may arise as a consequence of the changes to the algorithm, such a provision fails to account for the business reality of digital services and the relative importance of news producers in the day-to-day business development.

In fact, the obligation to notify news media businesses grants a preferential treatment to news producers vis-a-vis other important stakeholders including other websites that represent important business partners for "Digital Platform Services". In other words, the Draft Regulation obliges digital services providers to treat differently some of its partners against others based on a purely governmental decision. This notification obligation also distorts competition as it prevents designated digital platform services from introducing timely updates to their algorithms while their competitors can do so without having to wait 28 days. Finally, the Draft Regulation fails to account for the possibility of having to comply with court-ordered obligations e.g. to suppress certain content deemed unlawful.

In view of the above, the Draft Regulation should include a list of exceptions where the 28-day justification can be waived such as for example the case of an court-order obligation mentioned above. Other situations that could fall under the exceptions clause could be those related to trust & safety related algorithm changes. In the same manner that the Draft Regulation foresees urgent public interest situations where the pre notification obligation is waived, other exceptional cases need to be clarified in the text of the proposed regulation.

b) No Limitation for Potential Complaints from News Media Business

The Draft Regulation includes discriminatory prohibitions against registered news businesses with respect to, e.g., ranking, displaying or indexing. In addition, the Draft Regulation does not include any limits for news businesses to complain about such discrimination or any other aspects regarding ranking or displaying, etc.

In short, the Draft Code of Conduct is unbalanced with respect to the rights granted to news business producers that are poorly limited in scope, and imposes very broad obligations that will impede the normal conduct of businesses on the designated "Digital Platform Services".

c) Biased Arbitration Process and No Limitations to the Amounts to be Paid to News Media Businesses

The Draft News Media Code of Conduct imposes a negotiated-arbitration model in the event that affected parties fail to reach an agreement with respect to the money digital services platforms will have to pay to news media businesses. However, the arbitration process is entirely skewed in favor of payments to publishers. Not only is the arbitration panel appointed by the Communications Ministry, the arbitration process is biased because it is only required to take into account the direct and indirect benefits of news content to the digital platform and the cost of producing news content. It ignores the two-way exchange of value from the web traffic derived from clicks, and the investment that digital platforms are making to their services. While the arbitrator must take into account whether a remuneration amount would place an "undue burden" on the designated platform, that concept is undefined and uncertain.

The Draft Code of Conduct also fails to establish a proportionate cap or limit on the amount that the News Media Businesses could request from "Digital Platform Services" either before the arbitration or when making the final binding offer during the arbitration process. If arbitrators are not required to reflect the commercial realities involved for both parties involved, and given that the news media business' final offer is uncapped, there is high risk that the two offers being considered may be vastly different and opens the door for disproportionate abuse, and compounds the legal uncertainty of the proposed framework.

5. Entrenchment of Incumbent Media Companies

CCIA understands and supports the efforts to preserve news diversity and local news producers as these represent an essential part of any democracy. However, the Draft News Media Code of Conduct risks having the potential effect of entrenching the market positions of the leading

Australian large news media companies by imposing wealth transfer obligations from the designated digital services.

As discussed, the Draft Regulation permits almost any Australian news media business to register and benefit from the designated digital services compulsory subsidization. These registered news media businesses will be able to collectively bargain against the designated digital services. In other words, news publishers will be able to cartelize to negotiate their contractual terms with online platforms, i.e. by fixing prices.

Before the issuance of the Draft Regulation, in limited circumstances, Australian antitrust norms would allow market participants upon the ACCC's approval to band together and collectively agree on terms in negotiating against a competitor, the Draft Regulation will transform these exceptions into day-to-day practices, altering the market dynamics to the detriment of consumers. It is worth recalling that the OECD calls for transparency for cartel exclusions and authorizations, and urges states to consider eliminating or reducing them.[4]

As a direct consequence of allowing the news media sector to cartelize against designated digital services, the two largest media companies in Australia will benefit and further entrench their already significant market shares in Australia. This, in turn, will diminish competition in the Australian markets and disincentivize innovation and the development of the digital economy in Australia.

These are the reasons why CCIA urges the Australian regulators to ensure that the Draft Regulation does not consolidate cartels in the form of bargaining groups against the designated digital services. CCIA invites authorities to take into account real-world business dynamics and ensure that incumbents do not influence the real competitive dynamics behind the markets, as such a position would go against consumers' benefits. The ACCC should continue to promote competition and protect incentives to compete and adopt digital distribution models.

[4] OECD Competition Law and Policy Reports, Hardcore Cartels (2000), at 59, *available at* https://www.oecd.org/competition/cartels/2752129.pdf. *See also e.g.*, fn. 25 Am. Antitrust Inst., Working Grp. On Immunities & Exemptions, Comments of the Antitrust Institute 2 (2005), *available at* http://www.antitrustinstitute.org/files/433.pdf.

6. Violation of International Trade Obligations

As explained above, the framework proposed by the ACCC to impose subsidization obligations for Australia's news publishing industry on designated digital services raises numerous concerns, including the potential to breach international trade commitments like those included in the Australia-U.S. Free Trade Agreement (AUSFTA) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The AUSFTA is based upon market economy principles which are not necessarily respected in the Draft Regulation. As previously explained in this submission, the designated digital services will be obliged to carry content from Australian publishers without having the freedom to choose with whom to contract or even to set the contractual terms of such service. Specifically, the framework proposed by the ACCC appears inconsistent with AUSFTA's rules on investment, notably the Performance Requirements in Article 11.9 and rules on National Treatment and Most-Favored-Nation Treatment outlined in Articles 11.3 and 11.4.

With respect to Performance Requirements, the proposed framework conflicts with rules that prohibit parties from imposing certain requirements on foreign investors. Parties cannot require foreign investors to carry or use a certain level of local content (Article 11.9.1(b)-(c)). The Draft Regulation conflicts with this rule by requiring designated "digital platform services" to carry domestic news content. Parties also cannot mandate investors to transfer proprietary information or technology (Article 11.9.1(f)). The Draft Regulation conflicts with this rule as designated "digital platform services" must share specific information that could encompass company algorithms and proprietary analytics to Australian news firms.

With respect to National Treatment, the Draft Regulation conflicts with Articles 11.3 and 11.4 by failing to provide equal treatment to designated "digital platform services" and similar digital services that engage in advertising services. Further, the Draft Regulation as currently proposed would only apply to two U.S. companies per the Executive decision. This also suggests that the

Draft Regulation would not only violate AUSFTA commitments on national treatment, but also the WTO General Agreement on Trade in Services (GATS).

The Draft Regulation is also inconsistent with Australia's commitments under TRIPS. CCIA has long argued that snippet taxes and *sui generis* or ancillary rights to domestic industries serve as a trade barrier and are in fact a violation of international copyright commitments — long-standing international law that prohibits nations from restricting quotation of published works. The wealth transfer obligations included in the Draft Regulation could be classified as snippet taxes. In essence, the News Media Code of Conduct imposes an obligation on digital services to pay an undesignated amount to news businesses for including news snippets in their websites.

Consequently, the Draft Regulation risks being incompatible with Berne Convention Article 10(1)'s mandate that "quotations from a work . . . lawfully made available to be public" shall be permissible. As TRIPS incorporates this Berne mandate, compliance is not optional for WTO members; non-compliance is a TRIPS violation. While this potential framework may not be structured in the same way, this proposal may still run afoul of the same international commitments, and Australia can be held liable for non-compliance with its international obligations.

Any code of conduct that the ACCC proposes must be consistent with Australia's international commitments. This is the reason why CCIA strongly recommends the ACCC review the compulsory framework included in the Draft Regulation. As the text of the Draft Regulation currently stands, granting the Executive the right to cherry pick which companies will have to comply with the Draft Regulation, risks violating the ACCC's international commitments.

7. Conclusion

Australia is at the crossroads regarding the adoption of cutting-edge policy tools that would provide for flexible frameworks that facilitate implementing proportional and reasonable solutions to preserve news content producers without undermining innovation and the advancement of the digital economy.

The ACCC's proposed Draft Regulation as it currently stands represents a government interventionist approach to the Australian digital economy. Whereas the effort and regulatory experiment to preserve public interest news producers may be interesting, adopting a broad regulation that includes limitless rights to practically any news media business in Australia does not represent the right path forward.

CCIA encourages the ACCC to limit and clarify some of the rights and obligations included in the Draft News Media Code of Conduct. Furthermore, the ACCC should include standards to guide the Executive's process to designate the affected digital services "platforms" to avoid political interference in the development of the Australian digital economy.

For the reasons outlined in this submission, the ACCC's failure to reconsider the current text of the Draft Regulation risks undermining the development of the Australian digital economy. The lack of legal certainty and discriminatory approach reflected in the current text will disincentivize investment in the provision of digital services in Australia, as companies risk onerous obligations and the possibility of discrimination from the Executive. In the long term, the current Draft Regulation will only harm Australia, its digital economy, and its consumers.