

Global watch on culture and digital trade

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GLOBAL STRUGGLE FOR DIGITAL TAX AND LEVEL PLAYING FIELD

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Analytical report, September 2020

Today, the COVID-19 global pandemic reveals the key place of the digital sphere and the overwhelming position of some worldwide online platforms in the global economy. In this respect, for several governments, it becomes increasingly necessary to establish a level playing field for the actors involved in the digital market in order to rethink the contribution by global online platforms to national tax systems, as well as to across the industries and organisations of professionals in the cultural and creative sectors.

The September report focuses on six interrelated issues: (i) the discussions around the new Australian code of conduct for online platforms; (ii) the discussions in Europe related to the dominant position of Google and Facebook; (iii) the political confrontation between the US administration and several national governments regarding the adoption of digital services taxes; (iv) the Digital Economy Agreement between Australia and Singapore, as well as (vi) the trade negotiations between Japan and the United Kingdom. Finally, Jérôme Pacouret, researcher at the University of Quebec in Montreal, provides an analysis regarding Brexit and the perspectives from British cultural actors, focusing on copyright and the Creative Europe program.




New Australian code of conduct for online platforms

End of July 2020, the Australian government unveiled its draft code of conduct in order to force global online platforms such as Google and Facebook to pay publishers for their contents. The News Media and Digital Platforms Mandatory Bargaining Code – drafted by the Australian Competition and Consumer Commission (ACCC) – aims to give news outlets “a level playing field to ensure a fair go”, allowing news businesses and global digital platforms to take part collectively or individually in a three-month negotiation process aiming to agree on fair payments for content which appears in the news feeds and search results. If negotiations fail, the matter could be arbitrated by the Australian Communications and Media Authority, which would choose which of the two parties’ final offers is the most reasonable within 45 business days. The draft code will initially only apply to Google and Facebook.

According to ACCC Chair Rod Sims, “there is a fundamental bargaining power imbalance between news media businesses and the major digital platforms, partly because news businesses have no option but to deal with the platforms, and have had little ability to negotiate over payment for their content or other issues”. The ACCC can fine the tech giants approximately 81 000 USD for minor breaches of the code. If the matter goes to court, the highest fine could reach around 6 million USD. The draft bill also states that tech companies should inform media organizations in advance if there any changes made to algorithms that significantly affect news rankings on their platforms.

It’s worth noting that in 2019, the ACCC aimed to develop voluntary codes of conduct. However, in April 2020, the ACCC released a report stressing that progress on a voluntary code had been limited and payment for online press content would be unlikely. In this respect, in the context of the COVID-19 global pandemic, the ACCC was tasked with creating a mandatory code of conduct, which deals with “the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from news”, while also establishing “appropriate enforcement, penalty and binding dispute resolution mechanisms”. The government plans to introduce the draft code into the Australian Parliament this year.



In mid-August 2020, in an open letter, Google's Australia managing director Mel Silva stated "you've always relied on Google Search and YouTube to show you what's most relevant and helpful to you. We could no longer guarantee that under this law [...] the law is set up to give big media companies special treatment and to encourage them to make enormous and unreasonable demands that would put our free services at risk". Mel Silva added that the new media law would force Google to provide users with "a dramatically worse Google Search and YouTube". In this respect, Rod Sims stated Google's letter contained "misinformation" about the draft legislation, insofar as "Google will not be required to charge Australians for the use of its free services, unless it chooses to do so". In a similar vein, Facebook announced it will ban publishers and people in Australia from sharing local and international news on Facebook and Instagram if the Australian code becomes law.

Google's "abuse" of its powerful position

In April 2020, using the European Union (EU) Directive on Copyright as legal basis, the Autorité de la Concurrence, France's competition watchdog, ordered Google to negotiate "in good faith" with French publishers and news services over the licencing fees it should pay for press content appearing on its search engine. Isabelle de Silva, the Autorité's chief, stressed "the Autorité found that Google's practices vis-à-vis publishers and news agencies were likely to constitute an abuse of a dominant position".

It's worth noting that the European Union's Directive on Copyright in the Digital Single Market was adopted by the European Parliament in March 2019, giving member states two years to pass legislation. It grants press publishers a so-called neighbouring right allowing them to request a fee from digital platforms such as Google or Facebook when they display their content online. In October 2019, France was the first European country to implement the EU Directive. In response, Google decided to not pay press publishers for sharing their content on the search engine. Besides, the Californian giant announced it would no longer publish small excerpts of press articles below web links, also called snippets, on search results for its French users.



Facebook paying back taxes


In August 2020, Facebook agreed to pay the French government 106 million USD in back taxes and penalties to settle a dispute over revenues earned in the country. The agreement came after French tax authorities carried out an extensive audit of the social media conglomerate's operations in the country, from 2009 to 2018. In addition, Facebook stressed it has changed its sales structure since 2018 so that "income from advertisers supported by our teams in France is registered in this country".

Digital services tax

In mid-July 2020, the Trump administration announced additional duties of 25% on French cosmetics, handbags and other imports valued at 1.3 billion USD in response to France's digital services tax. The US administration will hold off on implementing the duties for up to 180 days, following France's agreement to defer collection of its 3% tax on digital services. The US administration stressed that the way the French tax will be implemented unfairly targets big US digital companies such as Facebook, Google and Amazon. Besides, Matt Schruers, president of the Computer and Communications Industry Association stated "today's action sends a strong message that discriminatory taxes aimed at US companies are not a path to modernizing the global tax system".

In addition, despite pressure from the US, end August 2020 the UK government refused to report the digital services tax implementation and stated that it will replace it once there is an international agreement on how to tax digital tech companies. In a similar vein, since April 2020, India has imposed a tax of 2% on all online sales of goods and services by foreign e-commerce operators. In this respect, revenues from the sale of advertisements targeting Indian consumers, data collected from Indian consumers and from sale of goods and services using such data are now being taxed.

As already explained, early June 2020, the Office of the US Trade Representative (USTR) announced that the Office will initiate Section 301 investigations into digital services taxes considered or implemented by ten economies, such as Austria, Brazil, the Czech Republic, the EU, India, Indonesia, Italy, Spain, Turkey and the UK.



The US administration claimed that these taxes discriminate against US digital companies, such as Amazon, Netflix, Facebook and Google and that it is likely to retaliate against these economies, heightening trade tensions.

To conclude, this type of digital taxes aims to redesign national tax systems for capturing the revenue generated domestically by the foreign digital platforms. It also seeks to establish the level playing field principle between national tech companies and foreign online platforms in the domestic digital markets. Finally, the digital taxes are a way for national governments to obtain revenue to cover enormous losses resulting from the coronavirus pandemic.

Australia-Singapore Digital Economy Agreement

Early August 2020, Singapore and Australia digitally signed the Australia-Singapore Digital Economy Agreement (DEA), following the official conclusion of negotiations at the end of March. The new agreement seeks to upgrade the digital trade arrangements between Australia and Singapore under the Comprehensive and Progressive Trans-Pacific Partnership and the Singapore-Australia Free Trade Agreement. The 39-page DEA covers a broad range of issues, such as e-commerce, telecommunications, cross-border transfer of information, data innovation, etc.

In Article 6 focusing on the 'Non-Discriminatory Treatment of Digital Products', the signatories explicitly stress "this Article shall not apply to broadcasting". It's worth mentioning that in mid-June, ministers from New Zealand, Chile and Singapore signed the Digital Economy Partnership agreement (DEPA). In the DEPA (module 15), the signatories stressed that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary [...] to support creative arts of national value". However, a similar mention to creative arts is not included in the DEA between Singapore and Australia.



UK-Japan trade negotiations

The United Kingdom and Japan will soon sign a free trade agreement, perhaps by the end of September, repeating many standards included in the Economic Partnership Agreement between Japan and the European Union. It will be the UK's first trade agreement with a major economy since Brexit and it could be a model for trade negotiations with other countries.


According to the document describing the UK government's approach to trade negotiations, the UK government should "protect the right to regulate public services, including [...] public service broadcasters". In addition, the document stresses "a balanced and effective intellectual property regime is an essential element of a vibrant and creative economy, providing confidence and protection for innovators and creators, while also reflecting wider public interests".

The document also includes some views and recommendations raised in the public consultation, which are not officially incorporated in the UK approach. Among them, it's worth mentioning the following ones: "the agreement should require Japan to introduce an Artists' Resale Right"; "Japan should adopt a public performance right"; "a provision should be included on Collective Rights Management, that places greater responsibility from Japan to ensure transparency, non-discrimination and accountability".

The Brexit of British cultural actors

By Dr. Jérôme Pacouret, Centre d'études sur l'intégration et la mondialisation, Université du Québec à Montréal.


Brexit is a process for reconfiguring the interdependencies between norms, policies and cultural activities of the UK, European Union (EU) Member States and other states. In this context, groups, associations and public institutions from all cultural sectors mobilized to obtain the Brexit that best suited their interests. The following analysis will focus on copyright standards and the Creative Europe program.



In terms of copyright, a few UK interest groups considered Brexit as an opportunity, for example the Publishers Association seeing it as an opportunity to force search engines to dereference pirate sites. But authors' societies and employers' unions from several sectors notably mobilized to ensure that European directives were fully transposed into British law and that the UK continue to influence the development of European and international standards. In parallel with the Brexit negotiations, representatives from British authors, cultural and media industries struggled for the adoption and transposition of the 2019 EU Copyright Directive, which was opposed by lobbies from large digital companies and associations for the defence of Internet users' rights. For its part, the UK government announced its refusal to transpose this directive, which Boris Johnson deemed "terrible for the Internet".

The British government and the EU have documented the consequences of Brexit in terms of copyright, which are, to date, quite modest. Besides, the UK has already transposed most European standards on copyright and it is a Party to the Berne Convention alongside European countries. British citizens will nonetheless be deprived of the right to "portability" which had been recognized in the framework of the 'Digital Single Market' project carried out by the European Commission since 2015. The right to "portability" means the possibility of accessing digital services purchased in the UK when staying in a EU Member State. In addition, even if the new European single market rules are not transposed, they will undoubtedly serve as a benchmark for future British reforms, as they do in Canada. We could assume that the potential differentiation between British law and European law will have less to do with Brexit itself than with local power struggles between cultural and digital industries, whose intellectual property claims are largely similar at the global level.

In addition, associations and groups of authors and creators, cultural institutions and industries from several sectors have mobilized in order to remain beneficiaries of the Creative Europe program, which is the main source of European funding for cultural and audiovisual actors. In this respect, institutions such as the British Film Institute and the British Council argued that British projects had received around 60 million euros from the EU between 2014 and 2017, with three quarters of these funds going to the audiovisual sector.



In 2020, the British government excluded this possibility from its negotiation objectives for a new agreement with the EU, while promising support measures for the cinema sector and the creative industries. In this view, the British Film Institute called for the maintenance of co-production agreements under the auspices of the Council of Europe and for the fact that British audiovisual productions should be considered as European within the framework of the EU broadcasting quotas.

The two issues raised here reveal the adherence of British cultural groups to European standards and policies structuring their activities, as well as the weak bargaining power in the context of Brexit negotiations. Interestingly, Brexit research may also analyze the participation of non-UK interest groups in the process, such as global online platforms and US film companies defending the free movement of labor.

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This edition is supported by the Austrian Coalition for Cultural Diversity.

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