Response for CRTC Consultation 2023-140

Due to the extremely short length in which there is an opportunity to respond, it is not possible to formulate a response to every question set out. However, I will answer questions to the best of my ability with some of these questions. The questions not cited are to be treated as a "no comment" response.

Q6. Is the approach of exempting certain online undertakings from the application of conditions of service appropriate? Why or why not? If yes, are the above-mentioned classes of online undertakings appropriate to exempt from the conditions of service being contemplated by this proceeding? Should other classes be considered?

The thresholds provided by the CRTC does not appear appropriate given the objective of not regulating user generated content.

According to the Canadian governments draft policy direction and several stated goals, user generated content is supposed to be left unregulated. Representatives from the CRTC itself has said on a number of occasions that the Commission has no intention of regulating user generated content even though it has the power to do so. These are comments critics have taken as a "just trust us" approach because the government or the Commission can legally change course should it do so at a later time.

The classes presented do offer a good start, however. There has been concern that video games could be captured in regulation, so the explicit class of platforms that provide video game services is a good start at assuring the public that regulations wouldn't go rogue and regulate anything and everything. The class in question appears to exclude services like Steam or the Epic Games Store.

A core problem, however, is that user generated content can be negatively impacted even without applying regulation to them. This can happen when other kinds of content is introduced to the platform where the Commission may require that the outcome is that such content is promoted over such user generated content. In such cases, the visibility for users to click on the user generated content is diminished while artificially boosting the visibility of content the Commission has a mandate in requiring platforms to have an outcome that is generally favourable. One can think of this situation as regulation by omission.

A clear cut solution, in this scenario, is to add a class or classes of platforms that deal primarily with user generated content. An example of a proposed class might be the following:

"online undertakings whose primary service involves the dissemination of content produced by users."

Such a class would cleanly exclude platforms whose users and creators might otherwise be negatively impacted. This would make clear that platforms like TikTok and Twitch are excluded.

One notable area in all of this are platforms that offer a mixed experience. One part of the platform may behave like Netflix where it deals with "premium" content while another part of the platform offers content produced by "non-traditional producers" (ala user generated content). An example of this would be YouTube where users can rent movies on one part of the platform while freely watching user generated content on another part of the platform. In the case of "mixed" content, an additional class could be created. Perhaps a class that reads along the lines of the following:

"In cases where premium content is provided by a platform on a part of their service, the portions of online undertakings that deal primarily with user generated content."

Such a class would, again, make clear that portions of platforms, or platforms themselves, won't affect user generated content.

By creating these exceptions, it would ensure that the Commission and the Canadian government remain consistent on the stated stance of "platforms in, users out".

Q8. Is a threshold of at least $10 million in total gross annual Canadian broadcasting revenues an appropriate threshold to apply to online undertakings in regard to the application of conditions of service on such undertakings? If no, what threshold (in terms of type and the amount) would be appropriate to apply, and why?

With respect to what was proposed, $10 million does appear to be a fair threshold. However, it may be advisable to make clear that the revenue in question is tied to revenues generated within Canada. The reason for this specific clarity is that should a new platform generate only a few thousand dollars within Canada and the remainder revenue is tied with revenues made in other countries like the US, it may discourage online undertakings from continuing to operate within Canada and move their headquarters to a different country like the US. This risks a loss in tax revenue when the online undertaking would see a competitive advantage in pulling up stakes from Canada.

Q9. If the proposed exemptions are adopted by the Commission, how should the Commission address situations where an undertaking's total gross annual Canadian broadcasting revenues moves above or below the threshold from year to year? And, in such cases, at which moment should the proposed exemptions begin or cease to apply?

One logical method of handling an online undertaking crossing such a threshold would be to associate it with tax filings with the Canada Revenue Agency. So, if a platform exceeds the revenue threshold as of April 30th when filing, then regulations could be applied on or around the same time. It might also be possible to offer a 1 month window to apply the necessary paperwork.

In the cases where a platform ceases exceeding the threshold, then one could, again, tie it with the tax deadline. After which, requirements would cease.

Q10. Should a condition of service in regard to information gathering be imposed as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, what changes would be appropriate?

In light of multiple paragraphs, requiring that online undertakings – particularly platforms like YouTube or TikTok – to provide accurate numbers in terms of audiences to gauge and monitor revenue may present an issue in terms of accuracy. Although services like YouTube may offer analytical information in terms of audience size for individual accounts, it is difficult to assess the accuracy of such numbers.

This is because, on a platform scale, there is the ongoing problems of botnets falsely generating views and audience retention on more nefarious accounts. Indeed, platforms take steps to mitigate and reduce fraudulent numbers, but there is never going to be a foolproof method of gauging something like

audience size. There will always be someone somewhere out there attempting to game the system. As such, it may be recommended that if information gathering on the part of the Commission is part of regulation, then it should hinge on language such as “reasonable” or possibly “within reason”. So, a platform may be able to tell the Commission that (insert large number here) is the current size of the audience using their platform to the best of their knowledge.

Additionally, it may be an idea to offer a method to adjust those statistics on the part of the platform as new information comes to light. Otherwise, such an ask may actually be unreasonable.

Q11. Should the condition of exemption specified above in regard to undue preference/undue disadvantage be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

Undue preference or undue disadvantage provisions should not be a condition imposed to online undertakings. The reason for this is that it would inherently impose an unreasonable burden on online undertakings and the CRTC.

By its very nature, platforms promote some forms of content while demoting other forms of content. This is not necessarily a bad thing. Users of the platforms have gotten used to an experience that is tailored to their interest for years now. So, if a user happens to be interested in, for example, gardening video’s, then the algorithm of that given video might promote gardening video’s. If a user is not interested in violent video games, then the algorithm will demote content revolving around violent video games. The system in place, by its very nature, is not nefarious when it promotes or demotes content in this manner.

The problem arises when different people or different organizations set different expectations. So, if one organization sets on expectation of, say, 1 million views on a video, but doesn’t get there, then that organization may file a complaint citing undue disadvantage. It could be the result of many factors such as users not liking the material, that there may not be the audience for that particular kind of content, or maybe the viewers have said that the content is not relevant to their interests.

At the same time, that organization may also cite a more popular user and say that their view count is higher than their video and claim undue preference. All of the above scenarios can be explained away by a multitude of reasons other than something nefarious going on with undue preference.

The problem arises when you have thousands of people with either a bad interpretation of what undue preference is or a bad expectation is for how their content performs on platforms. It doesn’t take a lot of imagination to foresee the kind of impact that would have on the regulator – not to mention the burden that could be placed on the platform to explain each and every decision a computer decision was made. This is a recipe for regulatory gridlock as complaints will be destined to just keep stacking up.

Many factors could be at play. So, for instance, a video gets presented to 1,000 users. 100 users click on that video. Of those 100 users, only 50 of them viewed it until the end. Of those 50 users, 6 of them gave it a thumbs down while only 1 gave a thumbs up. The algorithm may automatically conclude that the video is of questionable value and demote it as opposed to someone on the other end nefariously down ranking that content. A lot of complaints could easily end up being mundane scenarios like that,

but the amount of work involved to track such a decision down could exceed any regulators ability to keep up. Math will invariably take over in the form of multiplication and the Commission may enter this issue with the best of intentions, but if someone enforcing this sees 100 complaints com in on an hourly basis, it won't be possible to physically keep up.

These comments aren't made in a vacuum, either. There is, in fact, precedence for this. When the European Commission brought into force the General Data Protection Regulation (GDPR), the idea was that a company could be fined if a data breach took place. It was incumbent on a company to disclose such information to their respective Data Protection Agency (DPA). One may think that there would be fewer complaints as a data breach incident would be a rare thing to have happen. However, by February of 2020, two years after the GDPR came into force, the number of files related to security incidences topped 160,000 cases.[1] The biggest problem with the GDPR was that regulators simply did not have the manpower to keep up. This year, in 2023, European digital rights organization, None of Your Business (NOYB) noted that after 5 years, 85% of their cases still remain unresolved.[2]

Without question, this is a textbook case of what happens when government regulations meets the internet. You have a seemingly simple problem that regulators want to resolve, a system is set up to solve that problem, and then simple math takes over to completely jam up the system. This will invariably happen in Canada should the CRTC take on such a question of deciding if some forms of content is being unfairly disadvantaged or not. The nebulous nature of what is and is not undue preference will only exacerbate such a problem, invariably leading to the exact same problem here as what happened in Europe.

If the CRTC has any sense of self preservation when it comes to, at minimum, their public image, this is something it should steer clear from. This isn't even getting into why squabbling over things like this harms the user experience and places an overwhelming burden on the platforms. The employees at the CRTC do not deserve dealing with such a catastrophic mess. A workload that big would likely lead to requiring significant use of mental health resources and considerable problems related to burnout. All of this while tackling an issue that would, at best, yield minimal benefits to the general broadcasting system. It is not worth it by any stretch of the imagination.

Q12. Should the condition of exemption specified above in regard to offering content over the Internet be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

Based on paragraph 31, this does make sense. It's hard to visualize a scenario where access to a specific Twitch stream, for instance, is dependent on paying additional money to a given ISP. In fact, such a scenario risks conflicting with basic principles of network neutrality. Based on what I was able to interpret off of that paragraph, I see no issue with this approach.

Thank you for taking the time to read my submission. I hope you find at least some of the points raised here insightful.

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1 "GDPR Proves Success After Reported Security Incidences Tops 160,000" (Freezenet) https://www.freezenet.ca/gdpr-proves-success-after-reported-security-incidences-tops-160000/

2 "5 Years of the GDPR: National Authorities let down European Legislator. 85% of noyb cases not decided." (NOYB) https://noyb.eu/en/5-years-gdpr-national-authorities-let-down-european-legislator