Intelligence MEMOS

From: Konrad von Finckenstein

To: Pablo Rodriguez, Minister of Canadian Heritage

Date: February 15, 2022

Re: **Two Improvements Needed for Bill C-11**

You recently introduced Bill C-11, the *Online Streaming Act*. The title reflects the laudable goal of integrating the over-the-top broadcasters (commonly called streamers) such as Netflix, into the Canadian broadcasting system. They clearly form part of the Canadian broadcasting world but they carry none of the burdens or obligations of traditional licenced broadcasters.

While the bill is much improved over its predecessor C-10, it still has two major defects.

First, the scope of the bill and the powers given to the CRTC are too wide. No one wants to stifle the tremendous innovative power of the Internet, which drives our present day digital economy.

This innovation usually come from small new entrants incapable of meeting onerous regulatory burdens. Yet C-11 has the potential of doing that as basically any online undertaking that produces sound or video (with some limited exceptions) can be required to register with the CRTC and be subject to the conditions that the CRTC decides to impose. And the CRTC has been given the same new powers to impose conditions on online undertakings and licenced broadcasters.

Admittedly, the CRTC has been given powers to exempt online undertakings in whole or in part where it "is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)" [of the Act].

However, making decisions about who has to register, who will be exempted, and whether in whole or in part, will be involve lengthy and difficult regulatory hearings.

In addition, history tells us that decisions will be heavily contested and every avenue of appeal will likely be employed, even if only for delay. Finally, in an abundance of caution, the CRTC is likely to over-include online undertakings given that revoking exemptions is generally controversial.

All this can be avoided if the goal is indeed only to bring streamers into the regulatory system. CRTC powers need only be focused on streamers and to ensure they contribute their share to the broadcasting system.

This can be done by inserting a provision along these lines:

10 (2) The Commission may exercise its powers requiring registration of online undertakings under s.10(1) and its powers to impose conditions under s.9.1 only in respect of online undertakings that

a. in the Commission's demonstrable opinion compete with licenced broadcasters,

b. charge a subscription fee or offer their programs for free but with embedded advertising, and

c. have in excess of 400,000 subscribers.

A second issue is that the bill could be challenged under the Canada-US-Mexico trade agreement. While that agreement has a cultural exemption, retaliation for the damage done by using the exemption is possible and may apply here.

Canada presently has two domestic streamers, Illico and Crave. They are regulated under the Hybrid Video On Demand Order 2015-355. The CRTC should be directed to repeal this Hybrid VOD order once the regime for Bill C-11 enters into force so there is no differential treatment for domestic or foreign streamers. This should avoid the possibility of retaliation.

But more importantly, streamers will be expected to contribute to funds that encourage and subsidize Canadian film production. While CUSMA has a specific exemption for subsidies in its Chapter 15, it is not clear that it applies here. After all, we a talking of money contributed to a specific fund as compliance with a condition of a regulatory agency and then distributed by the fund according to its rules.

It is at best an open question whether this would be considered a subsidy. However, any funds currently used to subsidize Canadian production whether coming from Telefilm Canada, CAVCO or CMF require that the recipient be Canadian owned and controlled and be the owner of all IP rights in the production.

Requiring foreign streamers to contribute to a fund they cannot access would clearly be a violation of national treatment. Consequently, an amendment along these lines is needed to avoid a possible trade dispute with the US.

> 10 (3) Notwithstanding the particular terms of any fund, registered online broadcasting undertakings qualify for all the benefits available from any fund to which they contribute pursuant to a condition imposed by the Commission, regardless of whether they are Canadian or foreign owned or controlled.

If changes along the lines above are made, most objections to Bill C-10 are met and it meets its true goal of integrating foreign streamers. It will also limit the stifling of Internet-driven innovation that the bill might otherwise produce.

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