



***Only the French version is authentic and it prevails  
in the event of its differing from the translated version***

**Decision 21-D-17 of 12 July 2021  
on compliance with the injunctions issued against Google in  
Decision 20-MC-01 of 9 April 2020\*.**

The *Autorité de la concurrence* (Standing Committee),

Having regard to the complaint, registered on 31 August 2020 under number 20/0083 F, in which the Alliance de la Presse d'Information Générale, the Syndicat de la Presse Quotidienne Nationale, the Syndicat de la Presse Quotidienne Régionale, the Syndicat de la Presse Quotidienne Départementale and the Syndicat de la Presse Hebdomadaire Régionale, referred to the *Autorité de la concurrence* a failure to comply with the interim measures handed down against the companies Google LLC, Google Ireland Ltd. and Google France in Decision 20-MC-01 of 9 April 2020;

Having regard to the complaint, registered on 2 September 2020 under number 20/0084 F, in which the Syndicat des Éditeurs de la Presse Magazine referred to the *Autorité de la concurrence* a failure to comply with the interim measures ordered against the companies Google LLC, Google Ireland Ltd. and Google France in decision 20-MC-01 of 9 April 2020;

Having regard to the complaint, registered on 2 September 2020 under number 20/0085 F, in which the Agence France-Presse referred to the *Autorité de la concurrence* a failure to comply with the interim measures ordered against the companies Google LLC, Google Ireland Ltd. and Google France in Decision [20-MC-01](#) of 9 April 2020;

Having regard to Book IV of the French Commercial Code (Code de commerce), and in particular Articles L. 464-2 and L. 464-3;

Having regard to Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse;

\* public version

Having regard to the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020 handed down in the appeal filed by the companies Google LLC, Google Ireland Ltd. and Google France against Decision 20-MC-01 of 9 April 2020;

Having regard to the decision of 30 September 2020, by which the Deputy General Rapporteur joined the investigation of cases 20/0083 F, 20/0084 F and 20/0085 F;

Having regard to the business secrecy decisions 20-DSA-496 of 13 October 2020, 20-DSA-509 of 19 October 2021, 20-DSA-541 of 3 November 2020, 20-DSA-583 of 19 November 2020, 20-DSA-584 of 19 November 2020, 20-DSA-644 of 3 December 2020, 20-DSA-646 of 4 December 2020, 20-DSA-648 of 4 December 2020, 20-DSA-649 of 4 December 2020, 20-DSA-659 of 16 December 2020, 20-DSA-661 of 18 December 2020, 20-DSA-674 of 29 December 2020, 21-DSA-016 of 12 January 2021, 21-DSA-017 of 12 January 2021, 21-DSA-018 of 12 January 2021, 21-DSA-061 of 26 January 2021, 21-DSA-070 of 1 February 2021, 21-DECR-071 of 2 February 2021, 21-DECR-076 of 4 February 2021, 21-DECR-080 of 8 February 2021, 21-DECR-082 of 8 February 2021, 21-DSA-143 of 22 March 2021, 21-DSA-150 of 25 March 2021, 21-DSA-157 of 29 March 2021, 21-DSA-171 of 31 March 2021, 21-DSA-177 of 6 April 2021, 21-DSA-189 of 9 April 2021, 21-DSA-192 of 13 April 2021;

Having regard to the observations submitted by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others, Agence France-Presse and the companies Google LLC, Google Ireland Ltd. and Google France, and by the Representative of the Minister of the Economy;

Having regard to the other evidence in the file;

The Rapporteurs, the Deputy General Rapporteur, the representatives of the Syndicat des éditeurs la presse magazine, the Alliance de la presse d'information générale e.a., Agence France-Presse, Google LLC, Google Ireland Ltd., Google France and the Representative of the Minister of the Economy heard at the hearing of the *Autorité de la concurrence* on 5 May 2021;

The representatives of the Groupe Amaury/L'Équipe and the Fédération Française des Agences de Presse heard on the basis of the provisions of the second paragraph of Article L. 463-7 of the French Commercial Code (Code de commerce);

Adopts the following decision:

## Summary<sup>1</sup>

Under the terms of the present decision, the *Autorité de la concurrence* (hereinafter the "*Autorité*") sanctions the companies Google LLC, Google Ireland Limited and Google France (hereinafter "Google") for failing to comply with the interim measures issued in its Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse (hereinafter the "Decision on interim measures"). These interim measures pertain to the modalities of Google's implementation of Law No. 2019-775 of 24 July 2019 to create a related right in favour of press agencies and publishers (hereinafter, the "Law").

The purpose of the Law, which transposes into French law Article 15 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, is to lay down the conditions for balanced negotiations between press publishers, news agencies and online public communication services, in order to redefine the sharing of value between these actors. However, on the grounds of complying with the Law, Google unilaterally decided that it would no longer display excerpts from articles, photographs and videos within its various services, unless publishers gave it permission to do so free of charge. In the Decision on interim measures, the *Autorité* found that the practices in question were likely to constitute an abuse of a dominant position and that they were causing serious and immediate harm to the press sector. In the Decision on interim measures, it issued seven injunctions aimed at rebalancing the balance of power between the various press publishers and the digital platforms, and setting out an imperative negotiating framework adapted to the circumstances of the case. These injunctions imposed the following obligations on Google:

- negotiate in good faith with any press publishers and news agencies so requesting (Injunction 1), within 3 months of the request to open negotiations made by a press publisher or news agency (Injunction 4);
- communicate to press publishers and news agencies the information provided for in Article L. 218-4 of the Intellectual Property Code (IPC) (Injunction 2);
- continue, during the negotiation period, to apply the terms and conditions of display in accordance with the parameters chosen by the press publishers or news agencies (Injunction 3);
- take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services (Injunction 5), ensure neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies (Injunction 6); and, finally,
- send an initial report to the *Autorité* on its compliance with the Injunctions (Injunction 7).

In a judgement dated 8 October 2020, the Cour d'Appel de Paris (Paris Court of Appeal) upheld this decision, clarifying the wording of injunction No. 5 by adding the following terms (translated):

*"This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd. and Google France, provided that they do not directly or indirectly result in any adverse consequences for the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of the present decision".*

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<sup>1</sup> This summary is for information purposes only. Only the following numbered paragraphs of the decision are authentic.

The present decision follows the complaint, lodged on 30 August 2020 and 2 September 2020, of the Syndicat des Éditeurs de la Presse Magazine (hereinafter "SEPM"), the Alliance de la Presse d'Information Générale, the Syndicat de la Presse Quotidienne Nationale, the Syndicat de la Presse Quotidienne Régionale, the Syndicat de la Presse Quotidienne Départementale and the Syndicat de la Presse Hebdomadaire Régionale

(hereinafter, APIG"), which represent the interests of a significant number of press publishers which publish newspaper and magazine titles in France, and Agence France-Presse (hereinafter "AFP") (hereinafter jointly referred to as the "complainants") regarding Google's failure to comply with the interim measures issued in the Decision.

In the present decision, the *Autorité* considers that Google has failed to comply with Injunctions 1, 2, 5 and 6 issued in the Decision on interim measures.

- **On the failure to comply with the order to negotiate in good faith (Injunction 1):**

The *Autorité* considers that Google has failed to negotiate in good faith with the publishers and news agencies that requested opening negotiations under the Decision on interim measures.

In particular, the *Autorité* notes that Google has consistently linked discussions on the remuneration of related rights for current uses of content protected by the Law to the conclusion of a new global partnership called *Publisher Curated News*, or PCN, which mainly pertained to new services, including the so-called *Showcase* service. Through this partnership, Google sought to obtain a licence for all of the publishers' content, of which the related rights for current uses of the protected content were, at best, only an ancillary component, with no specific financial value.

The *Autorité* considers that Google has also significantly reduced the scope of application of the Law, which is nevertheless unambiguous, by excluding the principle of remuneration for press content from press publishers or news agencies that do not have a "political and general information" (IPG in French) qualification, and by refusing to allow news agencies to earn remuneration for their content reused by publishers during almost all the negotiations.

The *Autorité* also notes that Google has applied an excessively restrictive interpretation of the notion of revenue derived from the display of press content under Article L. 218-4 of the IPC: Google has only taken into account, as part of this basis, the advertising revenue (Google Ads) of the Google Search pages on which protected content is displayed, and has excluded taking into account any other form of indirect revenue generated by the presence of protected content on Google Search, or on other services such as Google News or *Discover*. However, the Decision, as well as the judgement of the Cour d'Appel de Paris (Paris Court of Appeal), stated that the display of protected content on Google's various services contributed to the attractiveness of its services and to their improvement, and could, among other things, provide advantages in terms of prompting visits by Internet users and extending visit times, which leads to access by Google to data that can then be used and monetised.

- **On the failure to comply with the obligation to communicate to publishers and news agencies the information provided for in Article L. 218-4 of the IPC (Injunction 2):**

Injunction 2 was intended to ensure the effectiveness of Injunction 1, by providing the publishers and news agencies entering into negotiations with the necessary elements for a transparent evaluation of the remuneration due.

The *Autorité* notes that the information communicated by Google was either partial, in terms of the scope of Google's services and revenues, or late in relation to the deadline for negotiations, or not

specific to the protected content of the entity to which the information was communicated. These disclosures were insufficient to allow the publisher or news agency to make the connection between Google's use of protected content, the revenue it earned from it, and its financial proposal.

The *Autorité* notes that the data provided by Google during most of the negotiation period was limited to the online search engine Google Search, to the exclusion of other Google services and any other indirect revenues that Google earns from the exploitation of such content, which illustrates Google's excessively restrictive approach to the concept of revenues derived from the display of press content.

The *Autorité* further notes that, from the outset and throughout the negotiations, Google had received requests for information which it chose to ignore, even though these were relevant and complied with the requirements of the applicable statutory provisions and the Decision on interim measures.

- **On the failure to comply with the obligation of neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies (Injunction 6):**

For almost the entire negotiation period, Google conditioned access to the *Showcase* global partnership programme on acceptance by publishers and news agencies of overall remuneration, without any specific remuneration for the actual use of content protected by related rights, in violation of Injunction 1 as stated above. However, the *Autorité* notes that access to the *Showcase* programme had significant consequences in terms of visibility for publishers and news agencies. The mechanism put in place by Google was therefore likely to give these publishers and news agencies a strong incentive to accept the conditions imposed by Google or else have their conditions of visibility impaired in relation to other publishers and press agencies that had agreed to take part in the programme.

The *Autorité* specifies that, while Google was free to propose new partnerships, such as *Showcase* or *Subscribe With Google* (SwG), to publishers and news agencies, Google should have allowed the latter to negotiate a separate remuneration for the current uses of protected content.

- **On the failure to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services (Injunction 5):**

The *Autorité* notes that by linking the negotiations on the remuneration of related rights for current uses to the negotiations on the remuneration of new partnerships such as *Showcase*, which could have significant consequences for the visibility of publishers and news agencies on Google's services, Google violated the obligation of neutrality in the negotiations on the presentation of protected content on its services.

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\* \*

In light of the foregoing, the *Autorité* considers that Google has failed to comply, both in regard to their letter and their purpose, with Injunctions 1, 2, 5 and 6 within the time frame set by these Injunctions. Negotiations that took place after the three-month deadline set by the injunctions do not change this finding in any way.

The *Autorité* notes the exceptional seriousness of these shortcomings, in particular in view of the deliberate, elaborate and systematic strategy of non-compliance with Injunction 1 applied by Google. It considers that Google's behaviour has undermined the objective of the Decision, as set out in the Law, of allowing publishers and press agencies to negotiate with Google within a balanced framework with a view to laying down both the modalities for selecting and displaying their content and any associated remuneration. The *Autorité* notes that linking the remuneration of related rights for current uses of protected content to participation in new Google services constitutes a departure from the aims of the Injunctions to the benefit of Google, which is likely to further enhance its dominant position on the market for generalist search services.

The *Autorité* considers it appropriate to impose a penalty of €500 million.

To ensure full compliance with the injunctions issued in the Decision on interim measures, the *Autorité* orders Google:

- as regards the enforcement of Injunction 1, to make an offer of remuneration that meets the requirements of the Law and the Decision for the current use of protected content on Google's services to those complainants who make a formal request to re-open negotiations;
- as regards the enforcement of Injunction 2, to include in this offer the information provided for in Article L. 218-4 of the Intellectual Property Code. This information must include an estimate of the total revenue it generates in France by displaying protected content on its services, indicating the share of revenue generated by the publisher or news agency that has requested the offer of remuneration. This estimate must detail a number of revenue items detailed in the present decision.

To ensure the effective enforcement of these injunctions, a periodic penalty payment of €300,000 per day's delay shall be imposed upon expiry of the two-month period from the formal request for the reopening of negotiations, where appropriate, by each of the complainants. As such, this periodic penalty payment will be assessed separately for each negotiation that may be reopened by each of the complainants after the notification of the present decision.

Google is also obliged to demonstrate compliance with this Decision in the context of the monthly monitoring reports submitted pursuant to Injunction 7 of the Decision on interim measures.

The *Autorité* reiterates that Google remains bound by the Injunctions as validated by the Cour d'Appel de Paris (Paris Court of Appeal) in its judgement of 8 October 2020 until the publication by the *Autorité* of the decision on the merits of the case. Compliance with these injunctions remains subject to the control of the *Autorité* de la concurrence, which may be referred to again by any publisher or news agency in accordance with Article L. 464-3 of the French Commercial Code (Code de commerce), until the date on which the *Autorité* issues its decision on the merits of the case.

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**DECISION ..... 127**

# I. The findings

## A. REMINDER OF THE PROCEDURE

### 1. DECISION 20-MC-01 OF 9 APRIL 2020

1. In letters registered on 15 and 19 November 2019 under numbers 19/0074 F, 19/0078 F and 19/0080 F, the Syndicat des Éditeurs de la Presse Magazine (hereinafter "SEPM"), the Alliance de la Presse d'Information Générale, the Syndicat de la presse quotidienne nationale, the Syndicat de la presse quotidienne régionale, the Syndicat de la presse quotidienne départementale and the Syndicat de la presse hebdomadaire régionale (hereinafter jointly referred to as the "APIG"), and Agence France-Presse (hereinafter "AFP") (hereinafter jointly referred to as the "complainants") lodged a complaint with the *Autorité de la concurrence* (hereinafter the "*Autorité*") regarding practices applied by Google.
2. In addition to their complaints on the merits of the case, the complainants requested, by letters registered on 15 and 19 November 2019 under numbers 19/0075 M, 19/0079 M and 19/0081 M, that interim measures be issued pursuant to Article L. 464-1 of the French Commercial Code (Code de commerce).
3. By decision of 26 November 2019, the Deputy General Rapporteur of the *Autorité* joined the investigation of cases 19/0074 F - 19/0075 M, 19/0078 F - 19/0079 M and 19/0080 F - 19/0081 M. The reference numbers for the handling of these cases following this decision to join the cases are 19/0074 F - 19/0075 M.
4. On 9 April 2020, the *Autorité* adopted Decision 20-MC-01 (hereinafter "the Decision") on requests for interim measures by the SEPM, the APIG and the AFP, and issued interim measures in the form of seven injunctions (the "Injunctions" and, individually, "the Injunction") against the companies Google LLC, Google Ireland Ltd. and Google France (hereinafter "Google").
5. On 10 April 2020, in accordance with Article 8 of Ordinance No. 2020-306 of 25 March 2020 and the press release of the *Autorité de la concurrence* on the Adaptation of the time limits and procedures of the *Autorité de la concurrence* in times of health emergency, dated 27 March 2020<sup>2</sup>, the President of the *Autorité* informed Google that (translated) "*the deadlines for implementing commitments, injunctions or interim measures [were] therefore suspended or postponed until the expiration of a period of one month from the end of the state of health emergency*"<sup>3</sup>.
6. By letter dated 11 May 2020, the *Autorité* informed Google that the deadlines for implementing the Injunctions issued by the Decision would start to run again as of 18 May 2020. Article 8 of Ordinance No. 2020-306, as amended by Ordinance No. 2020-427 of 15 April 2020, stipulates that the *Autorité* may prescribe the application of interim measures (translated) "*when the interests for which it is responsible so warrant [...], within the time limit it shall determine*". To support its decision, the *Autorité* took into account, in particular, the gradual lifting of the public

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<sup>2</sup><https://www.autoritedelaconcurrence.fr/en/press-release/adaptation-time-limits-and-procedures-autorite-de-la-concurrence-times-health>

<sup>3</sup> Classification marks 43-44, 20/0085 F.

lockdown measures as of 11 May 2020 and the particular urgency requiring the immediate implementation of negotiation in good faith between Google and the publishers and news agencies concerning the conditions for using press content on Google's services<sup>4</sup>.

7. On 2 July 2020, Google appealed the Decision before the Cour d'Appel de Paris (Paris Court of Appeal).
8. On 8 October 2020, the Cour d'Appel de Paris (Paris Court of Appeal) rejected all the grounds for annulment of the Decision and proceeded to amend Article 5 of the Decision, adding the following (translated)<sup>5</sup>:

*"This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd. and Google France, provided that they do not directly or indirectly result in any adverse consequences for the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of the present decision".*

9. As no further appeal was lodged, the decision of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020 became final.

## **2. THE PROCEDURE FOR NON-COMPLIANCE WITH INJUNCTIONS**

### **a) The complaint of the APIG**

10. By letter registered on 31 August 2020 under number 20/0083 F, the APIG lodged a complaint with the *Autorité* regarding Google's failure to comply with the interim measures issued in the Decision.
11. In its complaint, the APIG submits that Google failed to comply with the Injunctions set forth in Articles 1, 2 and 4 of the Decision by (i) refusing to provide the information required by the third paragraph of Article L. 218-4 of the Intellectual Property Code (hereinafter "IPC") and (ii) refusing to negotiate in good faith. According to the APIG, the lack of good faith is evidenced in particular by Google's refusal to discuss the remuneration of related rights, on the grounds that the traffic redirected by Google to the sites of press publishers would generate a higher value for the latter than that received by Google from displaying protected content on these services. The APIG further submits that Google unilaterally shifted the scope of the negotiations to a possible new Google service, relying on the verbatim reposting of press articles, in order to achieve zero remuneration for the use of content protected by Law No. 2019-775 of 24 July 2019 to create a related right in favour of news agencies and press publishers (hereinafter, the "Law" or "Law on related rights").
12. The APIG included in its complaint requests relating to the conduct of the negotiations and the communication of information provided for by Article L. 218-4 of the IPC and by Article 2 of the Decision. In this respect, it asked the *Autorité* to grant a three-month extension of the deadline for negotiations with Google, together with measures to prevent future shortcomings. The requested measures consist, firstly, in appointing a third party expert who will attend all the negotiation meetings and receive a copy of all the correspondence exchanged between representatives of the APIG and representatives of Google and, secondly, in imposing periodic penalty payments for each day's delay as regards, in particular, the communication of the information requested by the APIG

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<sup>4</sup> Classification marks 177-178, 20/0083 F; classification marks 48-49, 20/0085 F.

<sup>5</sup> Classification marks 5,924 to 5,962, 20/0083 F.

from Google under Article L. 218-4 of the IPC and Article 2 of the Decision, as well as the conclusion of an agreement on the remuneration of related rights.

13. The APIG also sought the imposition of a deterrent financial penalty on Google for non-compliance with the interim measures.

#### **b) The complaint of the SEPM**

14. By letter registered on 2 September 2020 under number 20/0084 F, the SEPM lodged a complaint with the *Autorité* regarding Google's failure to comply with the interim measures issued in the Decision.
15. In its complaint, the SEPM argues that Google failed to comply with the Injunctions set out in Articles 1, 2 and 4 of the Decision by (i) refusing to negotiate in good faith and (ii) refusing to communicate the information necessary for the calculation of the remuneration. The lack of good faith, in the opinion of the SEPM, is reflected in the fact that Google continually contested the right to remuneration of magazine publishers under their related rights, on the grounds that the latter are already being remunerated in the form of traffic redirections made by Google in their favour. Moreover, Google appears to have continually sought to minimise the contribution of press publishers to its revenues and to have refused purely and simply to negotiate with press publishers that do not have a "Political and General Information" (hereinafter "IPG") certification.
16. The SEPM included in its complaint requests relating to the conduct of the negotiations and the communication of information provided for by Article L. 218-4 of the IPC and by Article 2 of the Decision. In particular, the SEPM requested that the *Autorité* reiterate the Injunction provided for in Article 1 of the Decision and appoint a mediator to supervise the negotiations. The SEPM also requested that the *Autorité* order Google to comply with the Injunction provided for in Article 2 of the Decision, within 15 days of the request for information, under a periodic penalty payment of 5% of its average daily turnover per day's delay.
17. The SEPM also requested that the injunctions provided for in Articles 3, 5 and 6 of the Decision be upheld and that a financial penalty be handed down on Google for non-compliance with the interim measures.

#### **c) The complaint of the AFP**

18. By letter registered on 2 September 2020 under number 20/0085 F, the AFP lodged a complaint with the *Autorité* regarding Google's failure to comply with the interim measures issued in the Decision.
19. In its complaint, the AFP first of all submits that, since the adoption of the interim measures, Google has not complied with the Injunction referred to in Article 2 of the Decision by refusing to provide the information provided for in Article L. 218-4 of the IPC. Google also appears not to have complied with the Injunction relating to conducting negotiations in good faith, which is the subject of Article 1 of the Decision, by disputing both the application of the related right to excerpts of press content displayed on Google's services and the ownership and benefit of the related right in news agencies' favour. Google's bad faith also stems from its attempts to shift the discussions with the AFP into the domain of a possible partnership that is unrelated to related rights.
20. The AFP included in its complaint requests pertaining to, firstly, negotiations on the remuneration of related rights by Google and, secondly, the imposition of a financial penalty on Google. With regard to the negotiations, the AFP asked the *Autorité* to reiterate the Injunctions issued to Google,

in particular the Injunctions provided for in Articles 1 and 2 of the Decision, to proceed with the appointment of one or more independent third-party experts to oversee the negotiations, and to impose a periodic penalty payment for each day's delay in providing information. The AFP also requested that a financial penalty be imposed on Google that reflects the seriousness, duration and deliberate nature of the identified shortcomings.

#### **d) The joining of the complaints**

21. On 30 September 2020, the Deputy General Rapporteur of the *Autorité* decided to join the investigation of cases 20/0083 F, 20/0084 F and 20/0085 F. The reference number for the handling of these cases following this decision to join them is 20/0083 F<sup>6</sup>.

#### **e) The report of non-compliance with the injunctions**

22. On 19 February 2021, the investigation services issued a report (hereinafter "Report") to the parties and to the Representative of the Minister of the Economy, pursuant to Article R. 464-9 of the French Commercial Code (Code de commerce). This Report considers that Google had failed to comply with Injunctions 1, 2, 5 and 6 issued in Decision 20-MC-01. The complainants and Google responded by letter on 19 March 2021, and the Representative of the Minister of the Economy responded by letter dated 1 April 2021.

## **B. THE SECTOR AND THE COMPANIES INVOLVED**

### **1. THE SECTOR**

23. The Decision underlines the profound upheaval confronting the press sector, with, in particular, the decline in advertising revenues between 2007 and 2017, while, at the same time, the advertising revenues of digital actors are growing significantly (paragraphs 14 to 18 of the Decision). This phenomenon of "value capture" by digital actors to the detriment of press publishers was also noted during the parliamentary work that led to the adoption of the Law on Related Rights (paragraphs 20 and 21 of the Decision).
24. The health crisis has led to a rise in the use of digital media and services and has significantly affected many industries, including the press sector. Although news sites saw an increase in their online audience between July 2019 and June 2020, the press sector saw a sharp drop in its revenue, particularly advertising, and saw its activities seriously disrupted (declines in single-issue sales at newsstands, disrupted deliveries of newspapers and magazines sold by subscription, cancellation of conference activities relating to news).
25. In fact, according to figures published by the Alliance pour les chiffres de la presse et des médias (ACPM)<sup>7</sup>, digital traffic on the websites of press publishers grew for all press families between July 2019 and June 2020: +7.8% for the national daily press, +24.5% for the regional daily press and

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<sup>6</sup> Classification mark 440, 20/0083 F.

<sup>7</sup> <https://www.acpm.fr/Actualites/Les-publications/Communiqués-de-la-Diffusion/Diffusion-et-frequentation-de-la-Presse-OJD-2019-2020>.

+22.8% for the magazine press. This growth in traffic was due in particular to the closure of many physical outlets during the lockdown, and to online subscriptions<sup>8</sup>.

26. Nevertheless, these digital audiences have not compensated for the loss of advertising revenues and the fall in sales of paper copies, which are the main resources of the press. According to a study by the Ministry of Culture on the impact of the Covid-19 crisis on the cultural sectors<sup>9</sup>, the fall in activity is estimated at nearly 16% of turnover in 2020 for all press publishers, i.e. a loss of €1.9 billion compared to 2019.
27. This situation has prompted a reorganisation of press publishers. Among other things, the regional daily *La Marseillaise*<sup>10</sup> has been placed in compulsory liquidation, the weekly magazine *Grazia* has been discontinued in favour of entirely digital content, the daily *Le Parisien* has been restructured and the payroll of the newspaper *L'Équipe*<sup>11</sup> has been reduced.
28. In order to mitigate the consequences of the crisis, on 27 August 2020 the government announced a support plan for the press industry comprising, on the one hand, of emergency measures to guarantee the continuity of press distribution, amounting to €106 million, and, on the other hand, an envelope of €377 million to finance recovery measures over the period 2020-2022<sup>12</sup>.

## **2. THE COMPANIES INVOLVED**

### **a) The APIG and its constituent trade associations**

29. The APIG is a union of trade associations set up in September 2018 by the four professional trade associations of the National daily press ("SPQN"), Regional daily press ("SPQR") and Departmental daily press ("SPQD") and the trade association of the Regional weekly press ("SPHR").
30. In accordance with its articles of association, the object of the APIG is to defend the material and moral interests of its members. In particular, it organises dialogue and joint work between members by coordinating studies and projects, arriving at shared positions in order to present a united front regarding joint initiatives and policies promoted to public and private partners.
31. The APIG and its constituent trade associations are discussed in detail in paragraphs 26 to 31 of the Decision.

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<sup>8</sup> <https://www.mindnews.fr/article/18513/les-abonnements-numeriques-en-tres-forte-progression-dans-le-contexte-de-crise-sanitaire/>.

<sup>9</sup> <https://www.culture.gouv.fr/en/Sites-thematiques/Etudes-et-statistiques/Publications/Collections-de-synthese/Culture-chiffres-2007-2021/L-impact-de-la-crise-du-Covid-19-sur-les-secteurs-culturels>.

<sup>10</sup> <https://www.capital.fr/entreprises-marches/la-marseillaise-place-en-liquidation-judiciaire-1375655>.

<sup>11</sup> <https://www.strategies.fr/actualites/medias/4046338W/la-presse-a-l-epreuve-du-deconfinement.html>.

<sup>12</sup> <https://www.culture.gouv.fr/Presse/Communiques-de-presse/Annonce-du-plan-de-soutien-a-la-filiere-presse>.

#### **b) The SEPM**

32. The SEPM is a professional trade association set up in December 2012, formed by the Syndicat de la Presse Magazine (SPM) and the Syndicat Professionnel de la Presse Magazine et d'Opinion (SPPMO), and is based in Paris.
33. The SEPM was discussed in detail in paragraphs 23 to 25 of the Decision.

#### **c) The AFP**

34. The AFP is a global mainstream news agency, responsible for collecting, verifying, cross-checking and disseminating information in France and abroad in a neutral, reliable format that can be used directly by all types of media (radio, television, print media, websites), as well as by major companies and government agencies.
35. It is an organisation *sui generis*, whose articles of association and remit are set out in Law No. 57-32 of 10 January 1957 establishing the Agence France-Presse<sup>13</sup>.
36. The AFP was discussed in detail in paragraphs 32 to 33 of the Decision.

#### **d) Google**

37. Google is a company set up in 1998, when its founders invented the eponymous search engine, which is the most widely used in the world, including in France. Today, Google's activities are focused on providing online search services, offering platforms and operating systems, and online advertising.
38. Following an internal reorganisation, completed on 2 October 2015, the company Alphabet Inc. replaced Google LLC (formerly Google Inc.) as the parent company of the Google Group, and Google LLC became a wholly owned subsidiary of Alphabet Inc.<sup>14</sup>
39. Google was discussed in detail in paragraphs 34 to 61 of the Decision.

### **3. THE VALUE GENERATED BY DISPLAYING PROTECTED PRESS CONTENT ON GOOGLE'S ONLINE SERVICES**

40. The Decision identifies, in paragraphs 209 and 210, economic benefits enjoyed by Google by reusing protected content on its services:

*"209. Firstly, Google admits that there are ads that appear as a result of news-related queries. While these ads account for a small share of Google's revenues, according to it, they are nonetheless a source of revenue (classification marks 5002 and 5003).*

*210. Secondly, there is a clear economic interest for Google and indirect revenues that are derived from the reuse and display of protected content. This type of display is indeed attractive for users insofar as it improves the quality and viewing experience of the search page. Statements made by Microsoft at the hearing testify to this advantage derived from the display of content belonging to*

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<sup>13</sup> <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000315388/2020-11-02/>.

<sup>14</sup> See *Autorité de la concurrence* Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising, paragraph 8.

*publishers and news agencies (classification mark 2398). It is therefore in the interest of a search engine to develop this type of display in order to attract or retain users of its services. The attractiveness of this content can play a role both in triggering a search (which may be motivated by news content and then branch off towards another type of search) and in the time spent on the search engine and the personal data derived from the search. Microsoft also explains that this display is likely to keep users in the search engine environment and, potentially, redirect them to a sponsored link that generates revenue for the search engine. These statements were not challenged by Google during the investigation".*

41. The Cour d'Appel de Paris (Paris Court of Appeal) upheld<sup>15</sup> these observations and insisted that revenues indirectly generated by Google exist, due to the enhanced attractiveness of its services (emphasis added):

*(translated) "Moreover, as the Autorité rightly noted in paragraphs 209 et seq. of its decision, Google, contrary to what it asserts in its submissions, derives a clear economic benefit from displaying these press publications, on account of:*

*- on the one hand, the direct advertising revenues that it earns thanks to the advertisements that are displayed with the search results, even if there are not many when the search is on a topical theme, and those that it earns as an online advertising intermediary, in respect of the targeted ads that it generates on the publisher's site to which the user of the search engine is redirected; and for which it earns a commission;*

*- on the other hand, and above all, the attractiveness conferred to its search engine by displaying content, an attractiveness that can play a role both in initiating a search and in the time spent by the user on the search engine and the personal data derived from it.*

*While this attractiveness also indirectly benefits the press publishers, it represents a major interest for Google, given that the collection of its users' personal data is one of the two pillars of its business model".*

42. In 2008, Marissa Mayer, then vice-president of Google, emphasised the importance of the "Google News"<sup>16</sup> service, which, although not monetised directly through advertising, generates benefits in terms of more users on the Google platform.

## **C. DECISION 20-MC-01 AND THE INTERIM MEASURES**

### **1. THE POTENTIALLY ANTICOMPETITIVE NATURE OF THE REPORTED PRACTICES**

43. The Decision falls within the specific context of the entry into force of Law No. 2019-775 of 24 July 2019 to create a related right in favour of press agencies and publishers (hereinafter "the Law").
44. The Law introduced a set of new provisions, in particular in the Intellectual Property Code ("IPC"), and also the new Article L. 218-2, which stipulates that (translated) "*the authorisation of the press publisher or news agency is required prior to any reproduction or communication to the public, in*

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<sup>15</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraphs 105 and 106.

<sup>16</sup> Classification mark 148, 20/0084 F.

*whole or in part, of its press publications in digital form by an online public communication service".*

45. It also incorporated a new article L. 218-4 for the IPC, which states that (translated):

*"The remuneration due in respect of related rights for the reproduction and communication to the public of press publications in digital form shall be based on the revenue from exploitation of any kind, whether direct or indirect, or, failing that, evaluated on a flat-rate basis, in particular in the cases provided for in Article L. 131-4.*

*Setting the amount of this remuneration shall take into account elements such as the human, material and financial investments made by press publishers and news agencies, the contribution of press publications to political and general information, and the extent to which press publications are used by online public communication services.*

*The online public communication services are required to provide press publishers and news agencies with all the information relating to the use of press publications by their users, as well as all the other information necessary for a transparent evaluation of the remuneration referred to in the first paragraph of this article, and the breakdown thereof".*

46. According to paragraph 197 of the Decision, Google's conduct, concurrently with the entry into force of the Law, "*consisted in unilaterally announcing that it would no longer reuse the protected content of publishers and news agencies as of the date of entry into force of the Law*", while clarifying that "*it would not pay for the reuse of protected content, ruling out any contractual negotiations on the matter*". As such, the *Autorité* stated that "*This practice has therefore had the effect of forcing press publishers, which have no satisfactory alternative to ensure reuse of their content by Google, to forsake in advance the expected benefit from the Law on Related Rights, i.e. to allow for a rebalancing of their relations via an effective negotiation process*".
47. In its Decision, the *Autorité* also considered that the evidence presented in the debate justified the view that the conditions imposed by Google were likely to be unfair, given the existence of clear economic advantages enjoyed by the latter as a result of reusing protected content (paragraphs 208 et seq. of the Decision). This analysis was upheld by the Cour d'Appel de Paris (Paris Court of Appeal) in its judgement of 8 October 2020, in which it noted, as mentioned above, that Google derives a clear economic benefit from displaying press publications, on account of both the direct advertising revenue it earns and the enhanced attractiveness of its search engine thanks to this content.
48. In light of these elements, the *Autorité* considered in the Decision "*that the conditions imposed by Google allowed it to avoid any form of negotiation and remuneration for the reuse of protected content of any kind, even though the related rights created by Law 2019-775 provided news publishers and news agencies with the possibility of negotiation in order to monetise their content based on the criteria established in the Law on Related Rights*" and that "*Google's implementation of the Law on Related Rights is likely to be qualified as the imposition of unfair trading conditions within the meaning of Article 102 a) of the TFEU and Article L. 420-2 of the French Commercial Code (Code de commerce)*" (paragraphs 234 and 237 of the Decision).
49. The *Autorité* also considered that Google's practices were likely to constitute an abuse of its dominant position on the French general search market with a view to applying discriminatory conditions to commercial partners (paragraphs 238 et seq. of the Decision) and to circumvent the Law on Related Rights (paragraphs 242 et seq. of the Decision).
50. Finally, the *Autorité* considered that Google's practices were likely to have had various anticompetitive effects (paragraphs 265 et seq. of the Decision), in particular with regard to

publishers and news agencies, and thus to have harmed the quality of information and the contribution of publishers and news agencies to public debate. The *Autorité* also considered that these practices were likely to generate anticompetitive effects on the online search market, by placing Google's competitors at a disadvantage vis-à-vis the latter.

51. In its above-mentioned judgement of 8 October 2020, the Cour d'Appel de Paris (Paris Court of Appeal) upheld this analysis in all respects, stating that (translated) "*Google's behaviour on a market that it dominates, consisting of depriving press publishers and news agencies of any possibility of negotiating remuneration for the reproduction of excerpts from press publications on the Google search engine at the very moment when the law recognises this right, is likely to be qualified as exploitative abuse by the imposition of unfair transaction conditions*"<sup>17</sup>.
52. The Cour d'Appel de Paris (Paris Court of Appeal) also considered that (translated) "*the Autorité has, through all the reasons stated above, rightly pointed out that, at this stage of the investigation, the fact of ruling out any negotiation for publishers regarding remuneration and limiting their service offering to unfair conditions, was likely to distort the normal course of competition, both with regard to the publishers, since by its behaviour, Google is preventing the development of the market for the granting of paying licences, and with regard to its competitors, since Google has no reason to fear them on account of its ultra-dominant position on the market and would place anyone wishing to enter into negotiations with the holders of related rights at a distinct disadvantage, by burdening their revenue with costs that the market leader does not have to pay*"<sup>18</sup>.

## 2. THE INTERIM MEASURES ISSUED

53. In the Decision, the *Autorité* considered that the above practices created serious and immediate harm to the press sector (paragraphs 272 et seq. of the Decision). The *Autorité* also considered that the causal link between Google's practices and the harm to the press sector had been established (paragraph 238 of the Decision).
54. The Cour d'Appel de Paris (Paris Court of Appeal) upheld this analysis, stating that (translated): "*the Autorité rightly held that the identified infringement is serious, since it is likely to affect the sustainability of a sector as a whole and of the complainants in particular*"<sup>19</sup> and that "*the contested decision has thus perfectly characterised the urgency and the immediate nature of the infringement that it identified*"<sup>20</sup>.
55. In view of these elements, the *Autorité* deemed it necessary, pending the decision on the merits of the case, to impose on Google various interim measures ("the Injunctions") aimed at ensuring the fairness of the terms of the settlement between Google and the publishers and news agencies with respect to related rights.

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<sup>17</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 108.

<sup>18</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 131.

<sup>19</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 161.

<sup>20</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 176.

**a) Obligation to negotiate in good faith in accordance with the conditions established by Article L. 218-4 of the IPC ("Injunction 1")**

56. Article 1 of the Decision provides for an obligation for Google to negotiate in good faith, as follows: *"(Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to negotiate in good faith with any news publishers and news agencies or collective management organisations so requesting the remuneration owed by Google to the latter for any reuse of protected content on its services in accordance with the terms established in Article L. 218-4 of the IPC and based on transparent, objective and non-discriminatory criteria. This negotiation will have to cover the period of content reuse since 24 October 2019"*.

57. The Decision also includes several clarifications regarding the negotiation process covered by this Injunction. In particular, the following clarifications are made in point 304:

*"In order to ensure the effectiveness of such a measure, the Autorité deems it necessary to make the following clarifications:*

- i. the implementation of this injunction must cover all Google services that reuse content protected by Law 2019-775, in particular its online search site Google Search. Once defined, the scope of the interim measures must make it possible to avoid any risk of circumvention of the measures by Google.*
- ii. this Injunction imposes an obligation on Google to enter into negotiations in good faith when it is requested to do so by a press publisher, a news agency or a collective management body.*
- iii. this Injunction requires that the negotiations actually result in a remuneration proposal by Google. This financial proposal will be assessed in respect of its compliance with Law 2019-775 and its transparent, objective and non-discriminatory nature. Where appropriate, such a proposal may give rise to zero remuneration being proposed.*
- iv. taking into account, in particular, the urgency of the situation in which the press sector finds itself, which prompted the legislator to transpose the Directive within a very short time frame, the negotiations relating to this Injunction shall cover, retroactively, the period starting from entry into force of Law 2019-775, i.e. 24 October 2019"*.

58. With regard to Injunction 1, the Cour d'Appel de Paris (Paris Court of Appeal) considered in particular that (translated):

*"Third, and contrary to Google's assertion, the injunction does not impose a payment obligation or constitute a structural measure. Indeed, requiring Google to make an objective, transparent, non-discriminatory offer of remuneration in accordance with Article L. 218-4 of the Intellectual Property Code does not imply an obligation to buy, since Google is simply required to make an offer - justifying the criteria applied to define the level of remuneration proposed - which may lead to a proposal of zero remuneration if, for example, the inclusion of the content does not generate any exploitation revenue and the content in question did not require any particular investment. This reservation, which is contained in paragraph 304(iii) of the contested decision, ensures the proportionality of the injunction.*

*It should also be reiterated that, at the current stage of the proceedings, the lack of remuneration for reusing protected content, as it results from the alternative offered to publishers by Google, is likely to constitute an abuse of its dominant position, not in that any free access should be ruled out*

*as a matter of principle, but in the light of the circumstances in which it was obtained, which are likely to amount to a threat of being removed from page rankings [...].*<sup>21</sup>

**b) Obligation to provide news publishers and news agencies with the information required for transparent assessment of the remuneration due ("Injunction 2")**

59. Article 2 of the Decision provides for an obligation to communicate information, as follows: "*Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case are ordered to communicate to publishers and news agencies the information provided for in Article L. 218-4 of the IPC*".
60. Article L. 218-4 of the IPC stipulates, with regard to the communication of information, the following (translated): "*The online public communication services are required to provide press publishers and news agencies with all the information relating to the use of press publications by their users, as well as all the other information necessary for a transparent evaluation of the remuneration referred to in the first paragraph of this article, and the breakdown thereof*".

**c) Obligation to continue to display textual extracts and enriched extracts from news publishers and news agencies during the negotiation period ("Injunction 3")**

61. Article 3 of the Decision provides that textual excerpts and photographs of press articles from publishers and news agencies must continue to be displayed during the negotiation period, as follows: "*(Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to continue, during the negotiation period, to apply the terms and conditions of display in place since the entry into force of Law 2019-775 in accordance with the parameters chosen by the publishers. (Google LLC, Google Ireland Ltd and Google France) are ordered to allow news publishers and news agencies that have not granted Google permission to reuse their protected content since 24 October 2019 to enter into negotiations within the framework of the Injunctions if they so wish; not to object to the display of their protected content within its services under the terms and conditions chosen by those news publishers and news agencies during the negotiation period*".

**d) Obligation to conduct the negotiations covered by the Injunctions within 3 months of the request to open negotiations ("Injunction 4")**

62. Article 4 of the Decision provides for an obligation to conduct negotiations within three months, which reads as follows: "*(Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to conduct the negotiations referred to in the Injunctions within 3 months of the request to open negotiations made by a press publisher, a news agency or a collective management body*".
63. The Decision adds in paragraph 308 that "*In line with the urgency of the situation in the press sector, Google shall conduct the negotiations covered by the Injunctions within 3 months of the request to open negotiations. This opening will be materialised by the date of receipt of a request by registered letter with acknowledgement of receipt, if necessary in electronic format, sent by a*

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<sup>21</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraphs 222 and 223.

news publisher, a press agency or a collective management organisation referred to in Article L. 218-3 of the IPC, to at least one of the Google entities covered by these Injunctions".

**e) Obligation of neutrality in the way in which news publishers' and news agencies' protected content is indexed, classified and presented on Google's services during negotiations on related rights ("Injunction 5")**

64. Article 5 of the Decision provides for an obligation of neutrality in the way protected content is indexed, classified and presented during the negotiations, which reads as follows: "*(Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services.*"
65. In accordance with paragraph 309 of the Decision, "*The aim is to prevent publishers from being adversely affected in respect of the usual conditions for displaying, indexing and classifying their content on Google, as a result of or in connection with the ongoing negotiations.*"
66. The Cour d'Appel de Paris (Paris Court of Appeal) considered that, with regard to Injunction 5 (translated), "*Its wording, which is very general, does not allow the measure to be limited to what is strictly necessary to address the emergency, since it could lead to a freeze on all innovations necessary for the performance of the search engine during the negotiations undertaken with the various partners concerned*"<sup>22</sup>. Consequently, and as indicated above in paragraph 8, it supplemented this Injunction with the following sentence (translated): "*This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd and Google France, provided that they do not directly or indirectly result in any adverse consequences for the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of the present decision.*"

**f) Obligation of neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies ("Injunction 6"):**

67. Article 6 of the Decision provides for an obligation of neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies. The obligation of neutrality is worded as follows: "*(Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to take the necessary steps to ensure that the negotiations provided for in the Injunctions do not affect any other economic relationships between Google and news publishers and news agencies.*"
68. With regard to this Injunction, the Decision states, in paragraph 311, that "*The aim is thus to prevent Google from rendering negotiations on related rights ineffective by offsetting the remuneration paid to publishers for their related rights against other activities. The aim is also to prevent Google from using its dominant position on the market for general search services to*

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<sup>22</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 242.

*impose the use of some of its services during negotiations with news publishers and news agencies".*

69. With regard to Injunction 6, the Cour d'Appel de Paris (Paris Court of Appeal) underlined the fact that (translated) *"This injunction is indeed an interim measure, since it is likely to prevent an aberrant economic situation, as the contested decision rightly points out in paragraphs 310 and 311"*<sup>23</sup>.

**g) Obligation to report to the Autorité at regular intervals on Google's compliance with the Injunctions ("Injunction 7")**

70. With regard to the monitoring of the implementation of the Injunctions, Article 7 of the Decision provides that: *"Google LLC, Google Ireland Ltd and Google France are ordered, within a deadline of 4 weeks as of the opening of negotiations with one or more news publishers, news agencies or collective management bodies, to send an initial report on its compliance with the Injunctions. The subsequent reports shall be communicated to the Autorité on the 5th of each month up until publication of the decision of the Autorité on the merits of the case"*.
71. The Decision further specifies, in paragraph 313, that these reports shall include the following:
- (i) any calculation allowing for the evaluation of the remuneration proposal made by Google to news publishers and news agencies;
  - (ii) any information that can be used to assess the objective, transparent and non-discriminatory nature of this proposal;
  - (iii) any information that can be used to assess the objective, transparent and non-discriminatory nature of the remuneration on which Google and news publishers and news agencies have reached an agreement, accompanied by the relevant contracts;
  - (iv) any information relating to difficulties encountered in negotiations with news publishers and news agencies and the corresponding exchanges;
  - (v) any information that enables the Autorité to assess compliance with the principles of neutrality established in Injunctions 5 and 6.
72. It also states, in paragraph 315, that *"Taking into account the variety and potential complexity of the issues to be examined, the Autorité may decide to engage the services of one or more external technical experts"*.
73. Finally, Article 8 of the Decision provides that these Injunctions shall remain in force until publication of the decision of the Autorité on the merits of the case.

**D. THE IDENTIFIED PRACTICES**

74. In its comments dated 19 March 2021 in response to the Report of the investigation services, Google stated that it had received twelve formal requests to enter into negotiations, including those

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<sup>23</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, No. 20/08071, paragraph 246.

from the AFP, the APIG and the SEPM<sup>24</sup>. Among these requests are those from the FFAP, the Groupe TF1 and the Groupe Amaury/L'Équipe.

75. In its compliance report No. 11, dated 6 April 2021, Google reports no new request to enter into negotiations<sup>25</sup>.
76. It should also be noted that Google conducted individual negotiations with publishers who are members of the APIG and the SEPM, whereupon Google indicated that it concluded bilateral partnerships, in particular with Libération, L'Express, Le Monde and Le Figaro<sup>26</sup>. This information was made public by Google in a press release on 19 November 2020<sup>27</sup>. Subsequently, in an email dated 18 December 2020, Google told the investigation services that it had concluded four new contracts on 24 November and 14 December 2020 with [confidential]<sup>28</sup>. In its compliance report No 8, dated 5 January 2021, Google states that it has also concluded contracts with [confidential] and L'Obs<sup>29</sup>. Finally, in its compliance report No. 10 of 5 March 2021, Google states that it has concluded a contract with [confidential]<sup>30</sup>.
77. The course of the negotiations is presented below (sections 1 to 4). The following section will address the contracts concluded with publishers in the context of bilateral negotiations upon expiry of the negotiation period provided for in the Injunctions (section 5).

## **1. CHRONOLOGY OF THE NEGOTIATIONS BETWEEN GOOGLE AND THE AFP**

### **a) 17 April - 11 June 2020: the opening of negotiations and the first exchanges**

78. The AFP sent Google a request to enter into negotiations on the basis of Injunction 1 on **17 April 2020**.
79. In the letter, the AFP requests Google to provide it with (translated) "*all the information provided for by law to assess the remuneration due to the AFP under related rights*", which should include "*any element enabling a concrete assessment of the remuneration proposal made by Google to the AFP*" and "*any element enabling the AFP to understand and verify the objective, transparent and non-discriminatory nature of Google's remuneration proposal*"<sup>31</sup>.

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<sup>24</sup> Classification marks VC 6,704-6 706 and VNC 7,334-7 336, 20/0083 F.

<sup>25</sup> Classification marks VC 8,496-8 499 and VNC 9,409-9 413, 20/0083 F.

<sup>26</sup> Classification marks VC 483-487 and VNC 4,446-4 450; lines VC 2,247-2 252 and VNC 5,037-5 041, 20/0083 F.

<sup>27</sup> <https://france.googleblog.com/2020/11/-droits-voisins.html>

<sup>28</sup> Classification marks VC 6,045 and VNC 6,051, 20/0083 F.

<sup>29</sup> Classification marks VC 7,833 and VNC 8,761, 20/0083 F.

<sup>30</sup> Classification marks VC 8,290 and VNC 9,200, 20/0083 F.

<sup>31</sup> Classification marks 64-65, 20/0085 F; 585-586, 20/0083 F.

80. **On 4 May 2020**, Google acknowledged receipt of the request, stating that it was working (translated) "*to define transparent, objective and non-discriminatory criteria that could serve as a framework for such negotiations*"<sup>32</sup>.
81. **On 4 June 2020**, a conference call was set up between representatives from Google and the AFP. According to the minutes of this call sent by the AFP to Google, two main topics were discussed: *neighbouring rights* (i.e. related rights) and possible *business partnerships*.<sup>33</sup> According to the AFP, it was themselves that requested the subject of related rights to be added to the agenda, as Google had not automatically included this issue on the agenda sent on 3 June<sup>34</sup>.
82. With regard to related rights, the report drawn up by the AFP states that Google is currently collecting data and drawing up a proposal for remuneration<sup>35</sup>. It also mentioned the question of identifying the AFP's content, which would be more complex than identifying publishers' content, which can be tracked through editor's domains<sup>36</sup>. It also stated that Google was not able to discuss remuneration for related rights on that day, nor was it able to present any results or methodology.<sup>37</sup>
83. With regard to business partnerships, the report mentions several avenues for increasing the revenues of the AFP: licensing of images and the provision of specific content, such as infographics, which could be monetised on Google's services through what Google calls "corners" dedicated to the AFP<sup>38</sup>.
84. Finally, the report notes that Google indicated that it had compiled data on the remuneration of related rights in Europe and France, and specifically concerning the AFP, and would present it to the AFP on 10 June<sup>39</sup>.
85. **On 10 June 2020**, Google sent an email to the AFP. In this email, Google indicates that it is not totally in agreement with the report of the conference call of 4 June 2020 drafted by the AFP (without specifying on which point(s)). Google pointed out that the conference call of 4 June, and in particular the AFP's position on the question of related rights, raises issues that require internal consultation and therefore additional time. Google planned to send a response in writing to the AFP<sup>40</sup>.

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<sup>32</sup> Classification marks 67, 20/0085 F; 588, 20/0083 F.

<sup>33</sup> Classification marks 81-82, 20/0085 F; 594-595, 20/0083 F.

<sup>34</sup> Classification mark 78, 20/0085 F.

<sup>35</sup> "*Google is working on related rights, gathering data and elaborating a proposal of remuneration*".

<sup>36</sup> "*Identification of AFP's content is more specific than editors' contents which are tracked through editors' domains*".

<sup>37</sup> "*Google could not yet discuss remuneration during the meeting, and no results or methodology have been exposed*".

<sup>38</sup> "*Specific contents, such as fact checking, advanced infographics, which could be monetized on Google using a dedicated "corner" for AFP, taking care of avoiding any conflict of interest with AFP's clients...*".

<sup>39</sup> Classification marks 81-82, 20/0085 F; 594-595, 20/0083 F: "*Google said that it has elaborated global figures for remuneration of related rights in Europe, France and also specifically for AFP. Google will be able to present them on Wednesday 10 June*".

<sup>40</sup> Classification marks 84-85, 20/0085 F; 597, 20/0083 F: "*The discussion during our meeting – and in particular your view of the scope of the related rights – has raised a number of questions on our end that we*

86. **On 11 June 2020**, the AFP sent an email to Google. In this email, the AFP informs Google of its dissatisfaction with the course of the negotiations, reiterates its wish to enter into a discussion on the remuneration owed by Google for related rights and to obtain the communication of the information provided for by the Law. The AFP stated that it had not received any information to date, even though Google had promised to provide it with information by 10 June<sup>41</sup>.

**b) 17 June - 30 June 2020: the difficulties expressed by Google and the reaction of the AFP**

87. **On 17 June 2020**, Google responded to the AFP by letter, raising several difficulties it believed that it faced. In the letter, Google first of all rejected the AFP's accusations of "*time wasting*", explaining that these negotiations raise complex and unprecedented legal and technical issues. They would also involve significant groundwork in developing an economic evaluation methodology, collecting data and creating a negotiating framework.

88. With regard to the ownership of related rights, Google said that it disagreed with the AFP's demands (translated) "*to receive additional remuneration from Google for the display of AFP's content for which press publishers have already paid the AFP themselves*" insofar as, according to Google, "*content only benefits from related rights from the moment it is incorporated in a press publication, and at that stage the related rights are held by the publisher of that press publication*". Google added that (translated) "*in any event, Google cannot reasonably be expected to pay twice for the same content*".<sup>42</sup>

89. With regard to the communication of information, Google stated in the letter that the AFP's requests for data concerning the display of the AFP's content embedded in the press publications of other publishers cannot be transmitted to AFP insofar as (translated) "*Google is not currently able to reliably identify, among the content browsed on publishers' websites, how much of that content comes from AFP*", that "*even if it were able to do so, such information would be commercially sensitive, and Google would therefore have to obtain the consent of each publisher before it could share it*" and that "*it is not clear at this stage whether Google would even be allowed to share this information under Articles 101 TFEU and L. 420-1 of the French Commercial Code (Code de commerce)*".<sup>43</sup>

90. At the end of its letter, Google indicates its willingness to continue the discussions started at the conference call of 4 June on possible business partnerships for news and images, and to maintain its proposal (translated) "*that these could serve as a basis for broadening our discussion in addition to offering remuneration that covers our use of your protected content*"<sup>44</sup>.

91. **On 19 June 2020**, the AFP sent a reply letter to Google, in which it contests the various arguments put forward by Google in the letter of 17 June 2020.

92. The AFP first of all maintains that Google (translated) "*has all the means necessary to identify the origin of the protected content that it reuses and distributes*" and that even if Google were to face

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*need to go through internally [...] As a result, we will need a bit more time to work through these issues and plan to send you a response in writing that we propose to discuss in a meeting as soon as possible next week*".

<sup>41</sup> Classification marks 84, 20/0085 F; 688, 20/0083 F.

<sup>42</sup> Classification marks 87-89, 20/0085 F; 690-692, 20/0083 F.

<sup>43</sup> Classification marks 87-89, 20/0085 F; 690-692, 20/0083 F.

<sup>44</sup> Classification marks 89, 20/0085 F; 692, 20/0083 F.

real difficulties in establishing and justifying *"operating revenues of any kind, whether direct or indirect", linked to the display of AFP's content on its services, it would be up to Google to propose a flat-rate remuneration"*.

93. The AFP also argues that Google cannot dispute the fact that content produced by news agencies falls within the definition of protected content under the Law of 24 July 2019, insofar as this Law (translated) *"makes no distinction in the right it grants to publishers and agencies."* The AFP also explained that Google's argument that the content produced by the AFP and integrated into the publications of press publishers had already been paid for and did not need to be paid for again by Google was inadmissible, in particular insofar as (translated) *"the authorisation that it [AFP] gives for its content to be reused by press publishers is limited to their websites and does not in any way include distribution on Google's various services"*<sup>45</sup>.

### **c) 30 June - 24 July 2020: Google's initial proposal and the AFP's counter-proposals**

94. **On 30 June 2020**, Google and the AFP set up a conference call. Google explains in its compliance report No. 2 that it then (translated) *"outlined a possible agreement structure based on an image licensing agreement, which would also cover related rights"*<sup>46</sup>. According to the AFP, no figures, no information, nor any amount of remuneration was proposed by Google. According to the AFP, the discussions focused on *"related subjects such as "business partnerships" on new additional services whose exact content was still unknown and which had nothing to do with related rights"*<sup>47</sup>.
95. **On 8 July 2020**, Google sent the AFP an initial business proposal in the form of a letter of intent ("*Term Sheet*") drafted in English, and made up of two parts<sup>48</sup>:
- firstly, the granting by the AFP of a worldwide paying licence to Google for the use on any medium of: (i) photographs from an archive of 15 million AFP photographs, as well as (ii) the current production of the APF (3,000 new photographs per day);
  - secondly, the production by AFP of a certain number of new news modules, which would then appear in Google's products and services. In this context, the AFP would grant Google a licence to use the text, images and audiovisual content integrated into these modules, as well as free access to certain lead articles. The draft Term Sheet also stipulates that this licence would cover Google's use of AFP's copyrighted content on all Google services (Search, Google News and *Discover*). It also stipulates that remuneration will be paid to the AFP by Google for this licence. This remuneration covers both the production by AFP of news modules and the use by Google of protected content.

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<sup>45</sup> Classification marks 91-93, 20/0085 F; 694-696, 20/0083 F.

<sup>46</sup> Classification marks VC 619 and VNC 4,672, 20/0083 F.

<sup>47</sup> Classification mark 12, 20/0085 F.

<sup>48</sup> Classification marks VC 95-97 and VNC 222-224, 20/0085 F; VC 792-794 and VNC 4,807-4,809, 20/0083 F.

96. In its compliance report No. 3, Google states that, in a conference call held on the same day (translated), "*the AFP considered, among other things, that the value of Google's offering fell short of its expectations*"<sup>49</sup>.
97. **On 9 and 10 July 2020**, the AFP and Google had an exchange via video conference and email. During these exchanges, they noted that there was disagreement between them on the draft Term Sheet<sup>50</sup>.
98. **On 13 July 2020**, the AFP sent a letter to Google, in which it recalled the course of the negotiations up to that point and criticised, among other things<sup>51</sup>:
- the fact that requested figures had not been communicated by Google "*for many months*" according to the AFP (translated), "*and these were necessary to be able to engage in objective negotiations as required by law and the decision of the Autorité*";
  - the fact that no explanation had been given regarding the method of calculation of the remuneration proposed by Google in the Term Sheet communicated to the AFP on 8 July 2020 and the low level of this remuneration. This level was apparently lower than the agreements concluded between the AFP and Google in the past, even though the scope of the latter agreements was more limited;
  - the duration of two years (translated) "*without any specification or proposal as to possible terms of renewal*";
  - the extent of the exploitation requested by Google, which, according to the AFP, "*would eventually lead to the drying up of the market for the distribution of press content*".
99. **On 20 July 2020**, the AFP sent Google an initial counter-proposal on terms and conditions that it believed could lead to an agreement<sup>52</sup>. According to the AFP, the agreement should contain two parts:
- (translated) "*The first part concerns the conditions of the authorisation that may be granted by the AFP to Google for displaying press content generated by the AFP (photographs, images, infographics, texts and videos) among the search results of Google's engines (Search and News) as well as on the Discover service, and the remuneration relating to this authorisation and this reuse*";
  - "*The second part, which again we are perfectly willing to discuss, could lead to the integration of additional licences and/or services offered by Google (News Corner, Fact Checking, etc.) but these licences or services must be handled separately because otherwise we will not be able to determine the objective value of the licences or services that make up the agreement as a whole*".

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<sup>49</sup> Classification marks VC 720 and VNC 4,742, 20/0083 F.

<sup>50</sup> Classification marks VC 1,048 and VNC 5,033, 20/0083 F; Classification marks 99, 20/0085 F; 796, 20/0083 F.

<sup>51</sup> Classification marks 101-104, 20/0085 F; 798-801, 20/0083 F.

<sup>52</sup> Classification marks VC 106-110 and VNC 226-230, 20/0085 F; classification marks VC 803-807 and VNC 4,811-4,815, 20/0083 F.

100. In its proposal, the AFP suggests a monetisation that would be based (translated) "*on the value that Google derives from AFP content*", on "*AFP's pricing and commercial practices, while taking into account Google's specificities (very large audience, quantity of content used, sometimes partial use of content, etc.)*", and on "*AFP's investments (production costs) in generating protected content*".
101. The AFP specifies in its letter that (translated) "*If the negotiations need to consider these two aspects separately (since Google wishes to include other licences or services), we would not be against the final agreement providing for an overall and fixed remuneration that covers all the licences and services agreed upon*".
102. **On 24 July 2020**, Google set up a video conference with the AFP in which the AFP made a second counter-proposal<sup>53</sup>.

**d) 24 July 2020: the first methodology for monetising related rights communicated by Google**

103. **On 24 July 2020**, Google also sent a letter to the AFP. In this letter, Google provides elements concerning the valuation of news content on its services<sup>54</sup>:
  - firstly, elements concerning Google's annual "attributable revenues" relating to the display of content from the website *afp.com*, which according to Google is (translated) "*the only B2C press publication of the AFP we are aware of at this stage*", including the estimated number of displays on Google Search in France of protected content from *afp.com*, displayed in response to all types of queries and to news queries;
  - secondly, elements concerning Google's annual "attributable revenues" relating to the display of IPG-certified content, including general data on news-related queries as well as data on all IPG-certified content from news publishers.
104. These revenues (whether related to the display of content from *afp.com* or to the display of IPG content) are evaluated differently by Google depending on whether Google takes into account all types of queries or only those related to news.
105. A one-page methodological note is also attached by Google to this letter. It explains the method used to calculate Google's "attributable revenue" from the display of news content. This is based on an estimate of Google Ads revenue from Google Search relating to the display of potentially protected IPG content<sup>55</sup>.

**e) 27 July 2020: Google's second proposal**

106. **On 27 July 2020**, the AFP and Google had an exchange via video conference. According to the AFP (translated), "*Google's reaffirmed position was to offer the same comprehensive, worldwide and unlimited access to images (photographs, videos and infographics) generated by the AFP*" and "*to propose 'new services' to be included in a 'comprehensive license' (Web Stories, audio*

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<sup>53</sup> Classification marks VC 478 and VNC 4,441, 20/0083 F.

<sup>54</sup> Classification marks VC 809 and VNC 4,817, 20/0083 F.

<sup>55</sup> Classification marks VC 811 and VNC 6,070, 20/0083 F.

content, news corner, etc.), unrelated to the related right [...]”<sup>56</sup>. For its part, Google states that it made a new financial offer to the AFP during the exchange, in which it doubled the amount of its initial offer<sup>57</sup>.

**f) 29 July - 7 August 2020: Google's third proposal and subsequent exchanges**

107. **On 29 July 2020**, Google sent the AFP a new proposed Term Sheet in English<sup>58</sup>. Compared to the proposal of 8 July, the main differences are as follows:
- the duration of the contract was extended from 2 to 3 years;
  - the amount proposed to the AFP for licences on photographic stock and current production increased;
  - new services provided by the AFP, entitled "*Digital Innovation Products*", were added, consisting of the generation of (i) audio content in English and (ii) "*Web Stories*", in return for an annual remuneration.
108. The main other provisions of this Term Sheet remained identical to those in the one sent by Google to the AFP on 8 July. In particular, the Term Sheet still provided that the AFP would generate a certain number of news modules appearing in Google's products and services, for the same remuneration, which would include the licence to use the AFP's protected content on all Google services.
109. **On 30 July 2020**, the AFP replied by email agreeing to examine Google's proposal, but told Google that the licence for the images, as set out in the draft Term Sheet, was not acceptable, as the AFP could not grant (translated) "*a comprehensive, worldwide licence, without any limits or restrictions on use, for all the image content generated by the AFP*", which would "*ultimately mean that Google could appropriate the content distributed by all press publishers*".
110. Furthermore, in the letter, the AFP once again requested Google to indicate (translated) "*the amount of the remuneration applicable to a licence covering only Google's current use of AFP content, i.e. a licence limited to the display of image content produced by the AFP (photographs, videos and infographics) in the search results of Google's search engines (Google Search and Google News) as well as on the Google Discover service (including the display of the AFP's content integrated with the content of press publishers)*". The AFP also requested that "*the terms of renewal*" be clarified, to ensure the long-term nature of the agreement<sup>59</sup>.
111. **On 31 July 2020**, Google stated that it had had another meeting with the AFP by videoconference<sup>60</sup> and had received a counter-proposal from the AFP that covered the reuse of images, videos and infographics generated by the AFP around the world on Google's engines and

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<sup>56</sup> Classification marks VC 14 and VNC 205, 20/0085 F.

<sup>57</sup> Classification marks VC 478 and VNC 4,441, 20/0083 F.

<sup>58</sup> Classification marks VC 116-119 and VNC 233-236, 20/0085 F; VC 815-818 and VNC 4,823-4,826, 20/0083 F.

<sup>59</sup> Classification marks 121, 20/0085 F; 820, 20/0083 F.

<sup>60</sup> Classification marks VC 721 and VNC 4,744, 20/0083 F.

services (Search, News, Discover), as well as the new services envisaged (Web Stories, Audios and News Corner)<sup>61</sup>.

112. **On 7 August 2020**, the AFP sent a reminder email to Google stating that it had not received a response to its letter of 30 July 2020, and reiterating that the three-month negotiation period provided for in the Injunctions was about to expire<sup>62</sup>.

**g) 10 August - 11 August 2020: Google's fourth proposal and subsequent discussions**

113. **On 10 August 2020**, Google says it had a conference call with the AFP in which Google reportedly made a new partnership proposal<sup>63</sup>. Google explains in its compliance report No. 4 that (translated) "*While the AFP acknowledged that Google's offer had improved, it felt that it was still too low. Moreover, while the AFP indicated that it was not opposed to a flow of images for new uses or products, it asked Google to focus first on an offer that covered Google's current use of the AFP's related rights*"<sup>64</sup>.
114. **On 11 August 2020**, Google sent an email to the AFP highlighting the differences between the parties on several points, including the scope of the proposed flow of images and the licence, and suggesting that the AFP set up a meeting to discuss these<sup>65</sup>.

**h) 12 August 2020: Google's proposal to request extending the negotiation period**

115. **On 12 August 2020**, Google told the AFP that it planned to ask the *Autorité* to grant an extension of the negotiation period (translated) "*given the summer period and the fact that many people in France are currently on annual leave.*"<sup>66</sup> In response to this email, the AFP told Google that it was not in favour of extending the negotiation period (translated) "*given Google's manifest lack of willingness to discuss the crux of the matter, namely the remuneration of related rights*".<sup>67</sup>

**i) 14 August - 16 August 2020: Google's fifth proposal to the AFP**

116. **On 14 August 2020**, Google sent an email to the AFP in which it provided elements regarding the valuation of a licence that would only cover Google's current use of news content across its services.
117. The valuation described by Google in the email was established by reference to the royalties paid by Google (translated) "*for weather content, sports content, and the Oxford English dictionary and Le Robert French dictionary*" and which "*grant Google the right to display the entirety of the content in question*". According to Google, applying this method (translated) "*results in a*

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<sup>61</sup> Classification marks VC 479 and VNC 4,442, 20/0083 F.

<sup>62</sup> Classification mark 123, 20/0085 F.

<sup>63</sup> Classification marks VC 479 and VNC 4,442, 20/0083 F.

<sup>64</sup> Classification marks VC 870 and VNC 4,884, 20/0083 F.

<sup>65</sup> Classification marks VC 870 and VNC 4,884, 20/0083 F.

<sup>66</sup> Classification marks 159, 20/0085 F; 928, 20/0083 F.

<sup>67</sup> Classification marks 158, 20/0085 F; 931 and 932, 20/0083 F.

*maximum value limit of approximately USD [...] per year for a licence limited to our current categories of use of certified IPG content as a whole, including your B2C website [afp.com](http://afp.com)". In the same email, however, Google emphasises the fact that (translated) "given its narrower scope, such a licence would offer less value to Google. The licence royalties for this proposal would therefore be lower than our previous offers"<sup>68</sup>.*

118. Google stated it also shared in a second email (translated) "*data on the number of views of press content on Google Discover and Google News, although these tools are not monetised in France.*"<sup>69</sup> In concrete terms, this is the number of views of (i) publications on the website [afp.com](http://afp.com) and (ii) all IPG-certified publications on the Google News<sup>70</sup> and *Discover*<sup>71</sup> services.
119. **On 16 August 2020**, the AFP responded to Google's first email of 14 August 2020, with an email disputing much of Google's argument against paying related rights, and criticising Google's conduct in the negotiations. In particular, the AFP criticised Google's objections regarding the ownership of related rights in relation to the AFP, its refusal to produce the information requested by the AFP concerning the value of its content, Google's push to negotiate a business partnership for additional services unrelated to related rights, and Google's refusal to discuss remuneration linked to current usage, namely the display of AFP content on the Google Search, Google News and *Discover* services<sup>72</sup>.

#### **j) The expiry of the negotiation period**

120. **On 18 August 2020**, the three-month period for conducting negotiations stipulated in the Injunctions expired, without agreement between the AFP and Google.
121. Subsequently, various exchanges took place between Google and the AFP on 19 and 22 August 2020, but no agreement was reached. On 19 August 2020, Google made a new proposal to the AFP of [confidential] dollars over 5 years, without specifying the share of remuneration allocated to related rights<sup>73</sup>, and without this leading to an agreement<sup>74</sup>.

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<sup>68</sup> Classification marks VC 936-937 and VNC 6,092, 20/0083 F.

<sup>69</sup> Classification marks VC 871 and VNC 4,885; classification marks VC 940 and VNC 4,933, 20/0083 F.

<sup>70</sup> Google News (accessible via [www.news.google.com](http://www.news.google.com), as well as through mobile apps available on iOS and Android) is a Google service separate from Google Search, and dedicated entirely to news. Google News presents news content on its homepage, selected according to the user's language and region, without the user having to make a prior request. Users can also access different categories - entitled "Top Stories", "For you", "World", "Your local news", "Business", etc. - where content is grouped by topic. Finally, this service also offers the user the option to search for news.

<sup>71</sup> Google Discover is a service linked to Google Search, accessible on mobile phones or tablets, which presents users with content selected based on their past interactions with Google products, or based on topics they usually follow, without them having to make a specific request. The content displayed in the context of the Discover service may include news.

<sup>72</sup> Classification marks VC 943-947 and VNC 4,936-4,940, 20/0083 F.

<sup>73</sup> Classification marks VC 953 and VNC 4,946; classification marks 955- 958, 20/0083 F.

<sup>74</sup> Classification marks VC 478-479 and VNC 4,441-4,442, 20/0083 F.

**k) October 2020 to March 2021: discussions after the negotiation period stipulated in the Injunctions**

122. After the end of the negotiation period stipulated in the Injunctions, new discussions between the AFP and Google resumed in October 2020<sup>75</sup>.
123. According to the elements transmitted by the AFP during the investigation, these discussions continued in November and December 2020<sup>76</sup>. Google further states that exchanges continued into January and February 2021<sup>77</sup>.
124. According to the AFP, Google's position, through the proposals it has made, is still problematic, in particular in that Google continues to refuse to recognise the related rights that news agencies claim, and to impose an overall remuneration for related rights including participation in the *Publisher-Curated News* programme. Google also apparently refused to take into account, without any explanation, the period from 24 October 2019 to the signing of the proposed agreements<sup>78</sup>.
125. According to the information in the file, no agreement has been reached between Google and the AFP on related rights.

**2. CHRONOLOGY OF THE NEGOTIATIONS BETWEEN GOOGLE AND THE APIG**

**a) 6 May - 20 May 2020: the opening of negotiations and the first proposal of the APIG**

126. By letter dated **6 May 2020, received on 7 May**, the APIG sent Google a request to enter into negotiations pursuant to Injunction 1.
127. In this letter, the APIG requests Google to (translated) "*produce and communicate to the APIG, which will centralise on behalf of its members, all the information relating to the uses of the press publications that are members of the APIG on Google's services, as well as all the other information necessary for a transparent evaluation of the remuneration due to the publishers and the value of this content for your group*".
128. With regard to the scope of the revenues to be taken into account, the APIG specifies in this letter that it expects to receive (translated) "*all elements relating to the direct and indirect revenues for use of any kind generated by protected press content on your various services*" for all services belonging to the Google group<sup>79</sup>.
129. **On 14 May 2020**, the APIG provided Google with an initial proposal for valuing Google's use of political and general information news content (IPG), based on publicly available data regarding Google's advertising revenues in France<sup>80</sup>.

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<sup>75</sup> Classification marks VC 2,251 and VNC 5,040-5,041, 20/0083 F.

<sup>76</sup> Classification marks VC 5,596-5,615 and VNC 5,616-5,635, 20/0083 F.

<sup>77</sup> Classification marks VC 8,216 and VNC 9,133; classification marks 8,294 and 9,205, 20/0083 F.

<sup>78</sup> Classification marks VC 5,595-5,615 and VNC 5,616-5,635, 20/0083 F.

<sup>79</sup> Classification marks 172-173; 551-552, 20/0083 F.

<sup>80</sup> Classification mark 180, 20/0083 F.

130. **On 19 May 2020**, Google acknowledged the request of the APIG to enter into negotiations. In this letter, Google requests the APIG to indicate (translated) "*the scope of the APIG's authority to negotiate on behalf of its members, including whether or not the APIG intends to represent and negotiate the intellectual property rights of its members*".<sup>81</sup>

**b) 29 May - 11 June 2020: Google's first proposal and subsequent exchanges**

131. **On 29 May 2020**, during a video conference, Google presented the APIG with a licence offer that included a financial proposal, in the form of an overall amount for the IPG in France, part of which would accrue to members of the APIG.<sup>82</sup>
132. **On 3 June 2020**, Google appears to have detailed the operational aspects of the proposed partnership in a new video conference, which would be (translated) "*based on dedicated interfaces powered by Google's chosen publishers*" and "*allow their protected content to enjoy better exposure*." The APIG attached to its complaint the slides presenting the partnership proposed by Google in this video conference<sup>83</sup>. According to the APIG, this proposal would be consistent with a partnership proposal that had already been submitted by Google to the APIG in February 2020, prior to the intervention of the Decision<sup>84</sup>.
133. **On 8 June 2020**, the APIG sent an email to Google stating that it rejected the partnership proposal detailed by Google on 3 June 2020. In this email, the APIG states that it considers that Google's proposal does not meet the requests made in the letter requesting the opening of negotiations, nor the Decision, insofar as Google's partnership proposal is aimed at setting up a new service, and not at sharing the revenues generated by Google's existing services. The APIG points out that Google's presentation of 3 June 2020 made no mention of related rights.
134. In this email, the APIG also reiterates its request for Google to communicate all the information necessary to evaluate the remuneration<sup>85</sup>.
135. **On 11 June 2020**, Google sent a letter to the APIG. In this letter, Google sets out its position on the progress of the negotiations at this stage. In particular<sup>86</sup>:
- Google rejects the valuation of related rights made by the APIG, in particular because it ignores the value of the traffic redirected by Google to the sites of press publishers<sup>87</sup>.

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<sup>81</sup> Classification marks 183-184; 554-555, 20/0083 F.

<sup>82</sup> Classification marks VC 11 and VNC 334, 20/0083 F.

<sup>83</sup> Classification marks 186-191, 20/0083 F.

<sup>84</sup> Classification marks VC 11 and VNC 334, 20/0083 F.

<sup>85</sup> Classification marks 193-194; 564-565, 20/0083 F.

<sup>86</sup> Classification marks VC 198-201 and VNC 6,095, 358-360; classification marks VC 567-570 and VNC 6,056, 4,648-4,650, 20/0083 F.

<sup>87</sup> "*Your approach drastically overstates the amount of Google revenue attributable to APIG members' protected content and, moreover, ignores the significant value Google provides to the news industry in driving some [...] clicks per year to IPG sites*".

- Google points out that it does not sell access to news publishers' content and, therefore, does not receive any "direct" revenue when a user views or clicks on free links to news publishers' sites<sup>88</sup>. Google also explains that it only receives revenue when a user clicks on an ad.
  - According to Google, a broad definition of revenues could be based on including ad revenues that result from searches that display at least one result from an IPG news publisher. However, such a method, according to Google, would result in an overestimation of the value of related rights, as it would not take into account a number of other elements. In particular, it would not distinguish whether or not the displays are in response to news queries, it would not take into account the value of Google's technology required to create the ads and search algorithms, and it would not take into account the existence of unprotected hyperlinks excluded from the scope of related rights and very short extracts. As a result, Google estimates that the actual value of protected content should be "*at a half or a quarter of that figure, if not less*".<sup>89</sup>
  - Google goes on to say that it has made a remuneration proposal to the APIG covering protected content and has offered to find ways "*to increase the value and use of the content*"<sup>90</sup>, while rejecting the accusation that it is trying to circumvent the French legal framework<sup>91</sup>.
136. Attached to the letter is a memo which sets out in more detail the methodology used by Google to determine the Google Search advertising revenues relating to the display of potentially protected IPG press content, namely €[20-25] million<sup>92</sup>.

### **c) 18 June - 30 June 2020: Google's second proposal and subsequent exchanges**

137. **On 18 June 2020**, Google sent an email to the APIG summarising the main points of its offer. The financial proposal had improved compared to the previous offer<sup>93</sup>.

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<sup>88</sup> "As you know, Google Search does not sell access to news publisher content and earns no "direct" revenue when users click on free links to news publishers".

<sup>89</sup> "Even these figures overstate the value of IPG content protected by the related right, because they represent 100% of the revenue derived from the search results page without even considering: the value of licensed content that can appear at the top of the results page like sports scores or election results; the value of the ads themselves; the value of Google's ranking algorithms, serving infrastructure, and technology; and the value attributable to the protectable elements of the search result as distinct from the unprotected hyperlinks and very short extracts [...] a more rigorous analysis of all the sources of value that contribute to that advertising figure would put the amount attributable to IPG's protectable content at a half or a quarter of that figure, if not less".

<sup>90</sup> "In compliance with our obligation, we have proposed to APIG an offer of remuneration which covers our use of protected content. We also proposed that we find mutually agreeable ways to increase the value and use of the content".

<sup>91</sup> "This is not a circumvention of the French legal framework – to the contrary, it is a programme we have developed specifically to support the news industry, license the related rights created by Article L. 218-2 IPC, and follow objective and non discriminatory remuneration principles".

<sup>92</sup> Classification marks VC 202 and VNC 6,097; classification marks VC 571 and VNC 6,058, 20/0083 F.

<sup>93</sup> Classification marks 204-205 and VNC 363-364; classification marks VC 623-624 and VNC 4,676-4,677; lines VC 617 and VNC 4,670, 20/0083 F.

138. **On 25 June 2020**, Google informed the APIG of the launch in several countries (Germany, Brazil, Australia) of a Google News initiative consisting of a licence programme to support the press industry. Google's press release stated that the programme would allow users to access paid content for free on a publisher's site that would be remunerated by Google, while allowing publishers to grow their audience and better monetise their content<sup>94</sup>. According to Google (translated), "*[t]his announcement echoes the discussions we have been having and confirms our commitment, at the highest level within us, to increase our efforts to support news publishers.*"<sup>95</sup>
139. **On 30 June 2020**, Google provided the APIG with a breakdown of the proposed remuneration for each of the publishers represented by the APIG<sup>96</sup>. In the email accompanying this breakdown, Google stated that this is a proposal based on its "date model"<sup>97</sup> but did not provide any details about this model or the calculations used to arrive at the proposed breakdown.

#### **d) 1 July 2020: The APIG's second proposal and request for detailed information**

140. In a letter dated **30 June 2020, received on 1 July**, the APIG reacted to the latest exchanges with Google, proposed a new method for valuing related rights, and drew up a list of information that it asked Google to provide. The APIG's reason for this request was the need to have (translated) "*all the information necessary for a transparent and proportionate valuation of the related right*"<sup>98</sup>.
141. With regard to the conduct of negotiations and the remuneration, the main points set out by the APIG in this letter are as follows:
- First of all, with regard to the scope of the negotiations, the APIG stresses the need to focus the discussions (translated) "*on the issue of remuneration due to publishers for their related rights*" and that "*any other use of this content [...] for example in the context of partnerships such as the one you have presented [...] does not fall within the scope of these discussions*".
  - Secondly, with regard to the remuneration due by Google, the APIG maintains that the discussions (translated) "*cannot in any way be based on an analysis of an alleged reciprocal exchange of value between Google's services and the publications of the publishers of the APIG*" and that the discussions "*must [...] exclusively pertain to the value created by press content for Google's services, including all direct and indirect revenues generated by Google's services*".
  - The APIG then submits that the amounts proposed by Google would be (translated) "*almost identical to those discussed during informal contacts between Google representatives and the main French publishers during the visit by Richard Gingras to Paris in January 2020*".
  - Subsequently, the APIG proposes a new method of valuing Google's use of its members' related rights, based on an update of the amount mobilised by Google in the context of the

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<sup>94</sup> Google's press release is available at: <https://www.blog.google/outreach-initiatives/google-news-initiative/licensing-programme-support-news-industry/>.

<sup>95</sup> Classification marks 207-210; 630, 20/0083 F.

<sup>96</sup> Classification marks VC 220-223 and VNC 374-377; classification marks VC 639-641 and VNC 4,686-4,688, 20/0083 F.

<sup>97</sup> .

<sup>98</sup> Classification marks VC 212-214 and VNC 366-368; classification marks VC 632-634 and VNC 4,679-4,681, 20/0083 F.

Digital News Innovation Fund (DIN Fund) between 2013 and 2015. According to the APIG, the amount resulting from applying this method would be convergent with the amount stated in the APIG's first proposal transmitted to Google on 14 May 2020.

142. With regard to the communication of information by Google, the APIG supplies a non-exhaustive list of information that it believes is necessary for a transparent assessment of Google's remuneration for related rights. This information is as follows (translated):
- *"The total direct and indirect revenues in euros generated by the activity of French users of the Google ecosystem, in absolute value and per user";*
  - *"Google's margin on its advertising operations in France";*
  - *"The complete Google crawl data of the IPG sites of the members of the APIG (daily volume, frequency, etc.)";*
  - *"The exhaustive details of the Google services and tools [...] for which the content resulting from the crawl of the IPG sites of the members of the APIG is used, directly or not";*
  - *"The details of the mechanism of the uses made by Google's algorithm of news content";*
  - *"The share of search results containing at least one piece of IPG press content, for users logged into their Google account, for other users, and as a whole";*
  - *"In the search results containing at least one IPG press content, the part directly monetised by Google (presence of a sponsored link)";*
  - *"The share of IPG press content in the content pushed by Google Discover to its users".*

**e) 1 July - 20 July 2020: various exchanges concerning the mandate of the APIG, the valuation of related rights and the request for the communication of information**

143. **On 1 July 2020**, the APIG sent a response letter to the request of Google of 19 May 2020 regarding the scope of the mandate of the APIG. In this letter, the APIG confirms the mandate of the APIG and the working group it has set up to negotiate remuneration for related rights. Attached to this letter is a resolution from the board of directors of the APIG of 3 June 2020, which states that a formal mandate will be collected from each member of the APIG.
144. In its letter, the APIG also reiterates its request for information from 6 May 2020, which it believes Google has not responded to<sup>99</sup>.
145. **On 6 July 2020**, Google states that a video conference was held with the APIG, during which Google reportedly explained in more detail the methodology used to estimate the value of news to Google<sup>100</sup>.
146. **On 14 July 2020**, Google sent a letter responding to the letters of the APIG of 30 June and 1 July 2020. The main points raised in the letter are set out below.

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<sup>99</sup> Classification marks 225-228; classification marks 643-646, 20/0083 F.

<sup>100</sup> Classification marks VC 718 and VNC 4,741, 20/0083 F.

147. With respect to the mandates, Google states that it is still awaiting (translated) "*signed versions of the individual mandates from members of the APIG or, at the very least, a list of those members who have signed them*", while "*remaining committed to continuing [its] discussions with the APIG*"<sup>101</sup>.
148. With regard to the APIG's estimate of Google's revenue from news content on its various services, Google makes the following criticisms:
- Google's proposed valuation methodology (translated) "*is based on that proposed by the APIG itself*," which would be "*merely refined and adjusted with actual data*."
  - The APIG's argument that the value of traffic redirected by Google to publishers' sites should not be taken into account would be untenable because, inter alia, (translated) "*the APIG has consistently stated that this traffic is critical to its members*" and "*the ACCC [Australian Competition Authority] has expressly recognised that the value of traffic redirected by Google should be taken into account in the exchange of value*". Furthermore, with respect to the APIG's argument that IPG content displayed in response to non-news related queries should be included, Google states in its letter of 11 June that it has provided (translated) "*data for all IPG content displayed in Google Search (not just IPG content displayed in response to news-related searches)*".
  - According to Google (translated), "*even if we ignore the value of traffic redirected by Google and include Google's revenues from all search pages displaying IPG content [...], we would still only arrive at amounts far removed from those suggested by the APIG*." Consequently, according to Google (translated), "*it is precisely because a methodology that would rely on the allocation of Google's revenues from the use of news content (a methodology originally suggested by the APIG) would not result in meaningful revenues for members of the APIG that Google has opted for a pragmatic approach, consisting of including in the scope of the license a new "News" product, aimed at promoting and enhancing publishers' content*". Google adds (translated) "*Contrary to what your letter suggests, our proposal [...] is in no way separate from the negotiation of related rights: on the contrary, it aims precisely at offering members of the APIG significant remuneration for the use of their protected content on Google's platforms*".
  - Google also criticises the APIG's approach based on the amounts paid by Google in the context of the "*Digital News Innovation Fund*", insofar as the amounts paid under this fund were, in its view (translated), "*unrelated to the value of news content*" and cannot therefore "*constitute the starting point for determining the contribution of press publications to Google's revenues*". Google also criticises the methodology used by the APIG, which it believes should be corrected on several points.
149. With regard to the requests for communication of information made by the APIG, Google points out that some of them are (translated) "*irrelevant to the ongoing negotiations, or even to the new evaluation methodology*" suggested by the APIG. In addition, Google is said to have (translated) "*already shared with APIG data that allows it to evaluate its proposal*", including data that the APIG continues to request, even though it has already been provided (Google cites as an example, the share of revenue from sponsored ads in search results that contain at least one IPG content). Google added that it would not be required to provide data (translated) "*unrelated to the ongoing discussions or the new methodology proposed by the APIG*".

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<sup>101</sup> Classification marks VC 230-233 and VNC 379-382; classification marks VC 727-730 and VNC 4,749-4,752, 20/0083 F.

150. **On 20 July 2020**, the APIG responded to the various points raised by Google in its letter of 14 July.

151. With regard to the mandates, the APIG attached to its letter the list of members who gave it a mandate to negotiate the valuation of related rights<sup>102</sup>.

152. With regard to the valuation of related rights and the communication of information, the APIG criticises Google's positions, and in particular:

- With regard to the valuation of related rights, the APIG indicates that (translated) "*the methodological elements proposed by Google in its letter of 11 June and then in its e-mail of 18 June [...] only take into account certain advertising revenues linked to certain pages and not all direct and indirect revenues*". It also explains that it was in the absence of data provided by Google that the APIG (translated) "*took the initiative to successively propose different methodologies for evaluating the related right, based on the only publicly available sources at its disposal*".

In its letter, the APIG reiterates its desire to take into account (translated) "*all direct and indirect revenues generated by Google in France to determine the value of the related right*" and "*the indexing of press content by all Google services, and not only search results redirecting to IPG content*".

- With regard to the communication of information, the APIG criticises the fact that, in its opinion (translated), "*Google continues [...] to shirk its obligation to transmit all the data that would make it possible to transparently value the related right of the publishers who are members of the APIG*".

In particular, the APIG contends that, contrary to what Google states in its letter of 14 July 2020, Google (translated) "*did not provide the APIG ... with data regarding all IPG content displayed in Google Search*." Furthermore, Google has apparently not substantiated its claim that the data requested by the APIG is "*irrelevant*" to the ongoing discussions.

Consequently, the APIG reiterates in this letter its request for Google to communicate information in the same terms as in its letter of 30 June.

153. The APIG also reiterates its willingness to conclude a collective agreement, and not bilateral agreements, with each of its members.

#### **f) 24 July - 27 July 2020: Google's third proposal (draft framework agreement) and subsequent discussions**

154. **On 24 July 2020**, Google submitted a proposed framework agreement to the APIG (in English) with proposed remuneration per publisher<sup>103</sup>.

155. With regard to the licence that would be granted under the agreement, Google says it would cover (translated) "*the use of content protected under French law (Law No. 2019-775 and IPC) on all*

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<sup>102</sup> Classification marks VC 235-241 and VNC 384-390; classification marks VC 732-738 and VNC 4,754-4760, 20/0083 F.

<sup>103</sup> Classification marks VC 243-258 and VNC 392-407; classification marks VC 740-759 and VNC 4,762-4,781, 20/0083 F.

*Google products (including Search, News and Discover) and participation in a 'new experience in News and Discover'.*"

156. Specifically, with respect to the use of protected content on Google's products, the main provisions of the draft framework agreement are as follows:

- Article 3.1: This article provides that publishers will grant Google a non-exclusive, royalty-free, worldwide, sublicensable licence for the term of the agreement to reproduce, distribute, publicly display, publicly perform or otherwise use the content available on publishers' sites to create "new experiences" in Google's products and services, and the content made available by publishers as part of the Publisher-Curated News feature<sup>104</sup>.
- Article 3.2: this article stipulates that each publisher undertakes, under what Google calls "Publisher-Curated News", to select and complete a defined number of "modules" per day (between 5 and 7 for the publishers with the highest audiences, 2 for the publishers with lower audiences)<sup>105</sup>.
- Article 3.3: This article provides that the licence granted would cover the use of content protected by the Law on Google Search, Google News, *Discover* and other Google products and services. It states that the remuneration provided for under this agreement, together with the value that Google creates through the traffic redirected to the sites of press publishers which are members of the APIG, constitutes appropriate remuneration for related rights<sup>106</sup>.
- Article 5.1: this article provides that the licence granted would be remunerated by a global annual amount, the breakdown of which among the publishers is attached in Annex. According to this article, only publishers with an "IPG" certification would be concerned by this remuneration.
- Article 10.5: This article prohibits the APIG, during the term of the agreement, from participating directly or indirectly in advocacy (e.g., the publication of a press release), legal

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<sup>104</sup> *"Licenced Content Generally - In Individual Agreements, Publishers will grant to Google a non-exclusive, royalty-free, worldwide, sublicensable licence during the License Term to reproduce, distribute, publicly display, publicly perform and otherwise use: a) the Domain Content to create new discovery experiences in Google products and services. b) the PCN Content in connection with Publisher-Curated News".*

<sup>105</sup> *"Publisher-Curated news - Each Publisher will: a) select, curate and complete (by providing PCN Content) for a specified number of modules (the "Modules") for Publisher-Curated News (the "Minimum Requirements"). Publishers who are ranked high by the independent online audience measurements bodies in terms of their monthly audience are listed in list A of Attachment 1 and will commit to curate and complete 5 or 7 Modules per day. Publishers who are ranked low by the independent online audience measurement bodies in terms of their monthly audience are listed in list B of Attachment 1 and will commit to curate and complete 2 Modules per day [...]"*.

<sup>106</sup> *"Licence scope – The Licensed Content scope will cover the use of content protected by Law n° 2019-775 of 24 July 2019 on Google Search, Google News, Discover, and other Google products and services. APIG agrees that the consideration contemplated under this Framework Agreement, together with the value Google creates by driving user traffic to APIG member publishers' online properties through its products and services, constitutes sufficient remuneration for the online use during the term of this Framework Agreement by Google of any press publications of the APIG member publishers or part(s) thereof benefitting from the rights specified in any national law implementing Article 15 of the 2019 Copyright Directive [...]"*.

remedies, or complaints regarding the use by Google or its affiliates of content crawled by its robots, including news snippets<sup>107</sup>.

157. With regard to the overall monetisation of IPG content, this remains identical to that proposed by Google to the APIG in its email of 18 June 2020<sup>108</sup>.
158. In the email communicating this proposed framework agreement, Google states that it would like a decision on the proposed offer to be made by 31 July 2020. Alternatively, Google stated that it intends to (translated) "*communicate its offer more widely and enter into individual negotiations*".
159. **On 27 July 2020**, the APIG sent an email to Google. In this email, the APIG criticises Google's offer of 24 July 2020, in that it (translated) "*essentially repeats, in its amount, as well as in its terms, the parameters already put forward in previous correspondence*".<sup>109</sup>
160. With regard to the remuneration, the APIG notes that Google's offer (translated) "*still implies an overall remuneration for all uses of press publications by Google's services, without identifying a remuneration specifically relating to related rights*" and that "*[this] amount is not calculated according to direct and indirect revenues for use, as laid down by article L. 218-4 of the IPC*".
161. With regard to the communication of information, the APIG stresses the (translated) "*failure to provide the data requested in [its] previous correspondence*".

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<sup>107</sup> "Advocacy - During the term of this Framework Agreement, APIG will not directly or indirectly participate in either advocacy (e.g. by issuing public statements), legal claims or complaints relating to Google's or its affiliates' use of crawled content (including news snippets) [...]".

<sup>108</sup> Classification marks 260-261; classification mark 761, 20/0083 F.

<sup>109</sup> Classification marks 260-261; classification mark 761, 20/0083 F.

**g) 30 July and 12 August 2020: the request to extend the deadline**

162. **On 30 July 2020**, Google states that a call was held between the APIG and Google in which (translated) "*the APIG (i) raised the possibility of requesting an extension of the deadline from the Autorité and (ii) requested a 'clean room' to verify Google's data.*"<sup>110</sup>
163. **On 12 August 2020**, Google sent a letter to the APIG informing it that it was preparing to request an extension of the negotiation deadline from the *Autorité*.<sup>111</sup>

**h) 4 August - 6 August 2020: communication of Google's methodology**

164. At the same time as these exchanges on a possible extension of the deadline, Google sent a methodological note on **4 August 2020** setting out the intermediate stages of the calculation of the value of the content made by Google and attached to its letter of 11 June 2020<sup>112</sup>. As detailed below (see paragraphs 274 et seq.), this evaluation methodology is based on an estimate of total Google Ads revenue from Google *Search*, associated with displays with potentially protected IPG content, and a weighting according to the position in search results of this content.
165. **On 6 August 2020**, the APIG told Google that it believed that the figures used in the methodological note attached to the letter of 4 August 2020 contained (translated) "*none of the data requested by the APIG in its correspondence of 30 June and 20 July.*" The APIG therefore reiterated its request for information from Google<sup>113</sup>.
166. With regard to the calculation of revenues in the Google memo, the APIG stated in this email that (translated) "*only a fraction of the revenues from given Google activities (Google Ads) is mentioned, whereas [...] the law requires that the remuneration of the related right be based on the revenues of all types of use, direct and indirect.*" Furthermore, the APIG points out that "*the fraction of revenue identified is directly related to the position of IPG content in search results, whereas this position is determined by measures that are under Google's sole control.*"

**i) 14 August - 17 August 2020: Google's fourth proposal and subsequent discussions**

167. **On 14 August 2020**, Google provided the APIG with a valuation proposal addressing the current uses of IPG news content in Google *Search*, Google *News* and *Discover*<sup>114</sup>. As Google states in its letter (translated), "*given its narrower scope and the absence of editorial curation and access by our users to paywall-protected content as in our previous proposal, such a licence would offer less value to Google.*" Consequently, Google explains that (translated) "*the licence royalties for this proposal would therefore be lower than our previous offers.*"

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<sup>110</sup> Classification marks VC 719 and VNC 4,742, 20/0083 F.

<sup>111</sup> Classification mark; classification marks 879-880, 20/0083 F.

<sup>112</sup> Classification marks VC 271-275 and VNC 417, 6,101-6,104; classification marks VC 763-766 and VNC 6,078-6,081, 20/0083 F.

<sup>113</sup> Classification marks 277-278; classification marks 876-877, 20/0083 F.

<sup>114</sup> Classification marks VC 282-284 and VNC 426, 6,106-6,107; classification marks VC 882-884 and VNC 4,893, 6,083-6,084, 20/0083 F.

168. As such, Google proposes in its letter to value its current use of news content by reference to the amounts of licences it pays for weather content, sports content and the Oxford English dictionary and Le Robert French dictionary. These licences authorise Google to display the entirety of the content in question in search results and in its other interfaces. In concrete terms, the methodology used by Google is as follows:
- Initially, Google calculated a royalty per display;
  - Google then multiplied this fee per display by the number of views of IPG-certified content under two years old in France on Google Search from June 2019 to May 2020.
169. Applying this method results, according to Google, in (translated) "*an upper limit fee for the content of news publishers of approximately [confidential] per year for the IPG class as a whole*". Google adds in its letter that it continues to believe, however, that its (translated) "*broader offering of a licence for related rights [...] provides the best path to successful negotiation as it [allows it] to offer higher licence fees and develop new designs that will create additional value for publishers*".
170. Furthermore, in this email, Google asks the APIG for its agreement to extending the negotiation period.
171. **On the same day**, Google provided the APIG with data regarding the number of views of IPG content and APIG content on Google News and *Discover*<sup>115</sup>. Google specifies in its email that it has not yet shared this data because (translated) "*Google News and Discover are not currently monetised by Google in France, so there is no revenue on these interfaces*".
172. **On 17 August 2020**, the APIG sent an email to Google acknowledging and responding to Google's emails dated 14 August 2020<sup>116</sup>.
173. With regard to the valuation proposal made by Google for its current use of news content, the APIG criticises in particular (translated) "*the reference to weather or dictionary content to determine the 'upper limit value' of political and general information publications [...] when these have both a specific economic and societal value, recognised by French and European law*".
174. With regard to the communication of information requested by the APIG, the APIG considers that the data provided by Google (translated) "*does not in itself allow value to be calculated*", reiterates its requests, and invites Google to provide it with "*all the data requested in [its] previous communications, starting with Google's revenue data in France*".
175. Furthermore, in this email, the APIG does not respond to Google's request for extending the deadline, arguing, among other things, that the failure of the negotiations was not due to a lack of time, but to Google's bad faith.

**j) 18 August 2020: the expiry of the negotiation period**

176. **On 18 August 2020**, the three-month period for conducting negotiations stipulated in the Injunctions expired, without agreement between the APIG and Google.

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<sup>115</sup> Classification marks VC 286-287 and VNC 430-431; classification marks VC 887-888 and VNC 4,898-4,899, 20/0083 F.

<sup>116</sup> Classification marks VC 890-891 and VNC 6,074 and 4,902, 20/0083 F.

177. Google, in an email sent at 18:53, again asked the APIG to confirm its refusal to extend the negotiation deadline<sup>117</sup>. The APIG reiterated its refusal on 24 August 2020<sup>118</sup>.

**k) October 2020 - February 2021: discussions after the negotiation period stipulated in the Injunctions**

178. After the end of the negotiation period stipulated in the Injunctions, new discussions between the APIG and Google resumed at the start of October 2020<sup>119</sup>.

179. During October, Google submitted a new version of the draft framework agreement<sup>120</sup>. A review of this draft contract did not reveal any substantial changes from the version provided by Google to the APIG on 24 July 2020. This is the case in particular with regard to the lack of distinction between current uses of protected content and participation in the Publisher-Curated News programme, especially in the amount of remuneration offered. In some respects, this draft contract appears even more restrictive, particularly as regards the scope of the elements included. Indeed, the definitions on page 2 of the draft contract, as well as the proposed remuneration per publisher, now clearly stated that only press publishers with IPG certification would be included in the scope of the contract.

180. With regard to this draft contract, the APIG upholds several of its previous criticisms of Google<sup>121</sup>:

- Google still appeared to link remuneration for current uses of protected content to the new *Showcase* service;
- Google appeared to still want to take into account the traffic redirected to the sites of press publishers in order to minimise the remuneration due to the latter, and this in contradiction with the judgement of the Cour d'Appel de Paris (Court of Appeal of Paris);
- although Article 5.2 of the contract specifies that the proposed remuneration would be based on objective, transparent and non-discriminatory criteria, in practice these criteria did not appear to be defined.

181. A new proposal from Google was sent to the APIG in late November 2020<sup>122</sup>. A review of this new draft contract again shows that a link was made between the remuneration due for participation in the Publisher-Curated News programme and other uses of the protected content by Google (Article 5.2). Similarly, although it is stated that the fee is calculated on the basis of transparent, objective and non-discriminatory criteria, the APIG points out that it has not been provided with any information in this regard. In this respect, in the summary email accompanying this draft contract, the APIG states that (translated) "*The APIG expects transparent data on all of Google's direct and*

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<sup>117</sup> Classification mark 292; Classification mark 893, 20/0083 F.

<sup>118</sup> Classification mark 294; Classification mark 895, 20/0083 F.

<sup>119</sup> Classification marks VC 2,246 and VNC 5,036, 20/0083 F.

<sup>120</sup> Classification marks VC 2,053-2,086 and VNC 2,110-2,143, 20/0083 F.

<sup>121</sup> Classification marks 2,001-2,002, 20/0083 F.

<sup>122</sup> Classification marks VC 3,541-3,559 and VNC 3,720-3 738, 20/0083 F.

*indirect revenues in France, both for the valuation and for the breakdown of revenues among publishers".*

182. Moreover, the remuneration envisaged in this draft contract is capped and does not appear to be linked to the actual use made by Google of protected content over time (Article 5.1).
183. In an internal email dated 7 January 2021, the APIG's legal team outlined the status of negotiations with Google thus far, and indicated that Google had agreed to introduce an explicit reference to related rights (in addition to *Showcase*), while emphasising that Google was refusing to limit the licence to its current services and uses. With regard to the valuation and breakdown of related rights, the legal team specified that Google had not communicated precise documents justifying the qualitative and quantitative criteria, although it had undertaken to do so, and despite three reminders<sup>123</sup>.
184. On 21 January 2021, the APIG and Google announced that they had reached an agreement regarding the use of online press publications<sup>124</sup>. The press release issued at the time stated (translated): "*This agreement sets out the principles under which Google will negotiate individual licensing agreements with members of the APIG whose publications are recognised as Political and General Information, while reflecting the principles set out in the law. These individual licence agreements will cover related rights, and will provide access to News Showcase, a new news publication licensing programme recently launched by Google, which will provide readers with access to enhanced content*".
185. The board of directors of the APIG approved the signing of an agreement with Google comprising a framework agreement and a settlement agreement. In an internal memo dated 20 January 2021, it is specified that the agreement reached with Google includes a three-year framework agreement covering the uses of publishers' content in Google's services, as well as participation in *Showcase*, and a settlement agreement<sup>125</sup>. In a memo presenting the agreement to its board of directors, the APIG also indicated that the agreement reached provides for recognition of related rights by Google and refers to a financial consideration for the latter (translated) "*included in the overall amount of remuneration*". Regarding the allocation of remuneration among the publishers, the memo stated that Google has provided a document but that (translated) "*this document is too imprecise to meet the requirements of the law*".<sup>126</sup>
186. On 12 February 2021, the APIG and Google signed the framework agreement and the settlement agreement<sup>127</sup>. These contracts are attached to Google's compliance report no. 10 dated 5 March 2021<sup>128</sup>.

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<sup>123</sup> Classification marks VC 6,163-6,166 and VNC 6,294-6,297, 20/0083 F.

<sup>124</sup> <https://www.alliancepresse.fr/actualite/lalliance-et-google-france-signent-un-accord-relatif-a-lutilisation-des-publications-de-presse-en-ligne/>.

<sup>125</sup> Classification marks VC 6,160-6,161 and VNC 6,291-6,292, 20/0083 F.

<sup>126</sup> Classification marks VC 6,156-6,158 and VNC 6,287-6,289, 20/0083 F.

<sup>127</sup> Classification marks VC 8,289 and VNC 9,200, 20/0083 F.

<sup>128</sup> Classification marks VC 8,316-8,365 and VNC 9,227-9,277, 20/0083 F.

### 3. CHRONOLOGY OF THE NEGOTIATIONS BETWEEN GOOGLE AND THE SEPM

#### a) 22 May - 29 June 2020: the opening of negotiations and the first exchanges

187. In accordance with Injunction 1, the SEPM sent Google a request to enter into negotiations on **22 May 2020**<sup>129</sup>.
188. In this letter, the SEPM states that it has received a mandate from its members, of whom it also provides a list, to conduct the negotiations on their behalf and for their account.
189. The SEPM also asks Google to provide certain information within 10 days for each of its members' websites, namely (translated):
- *"The number of displays of editorial content on each of Google's services [...] and across all media (mobile, tablet, computer), for each calendar month between 1 January 2019 and receipt of this letter";*
  - *"The number of visits (measured in the amount of "clicks") of these sites by internet users from each of the above-mentioned Google services [...] and across all media (mobile, tablet, computer), for each calendar month between 1 January 2019 and receipt of this letter";*
  - *"revenue of any kind, direct and indirect, earned by Google from displaying editorial content by members of the SEPM for (i) all of 2019 and (ii) each calendar month between 1 January 2019 and receipt of this letter."*
190. **On 2 June 2020**, Google acknowledged the request of the SEPM to enter into negotiations<sup>130</sup>. In this letter, Google requests the list of publications falling within the scope of the Law and the addresses of their Internet domains. Google also requests the SEPM to specify which publications have IPG certification. Finally, Google asks the SEPM about the measures taken to avoid any exchange of commercially sensitive information between members of the SEPM when sharing the data provided for in Article L. 218-4 of the IPC.
191. **On 12 June 2020**, a meeting was held between Google and the SEPM. With regard to this meeting, and without further clarification, Google stated that it discussed *"the issue of data sharing and the general principles on which Google's offer is based"*<sup>131</sup>.
192. **On 17 June 2020**, the SEPM responded to Google's letter of 2 June 2020 by providing a list of domain names of publishers who were members of the SEPM, and clarified which of those members had IPG certification. In this letter, the SEPM also specified the measures taken to protect the confidentiality of the individual data of its members<sup>132</sup>.

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<sup>129</sup> Classification marks 43-44, 20/0084 F; classification marks 573-574, 20/0083 F.

<sup>130</sup> Classification marks 47-48, 20/0084 F; classification marks 577-578, 20/0083 F.

<sup>131</sup> Classification marks VC 6,326 and VNC 333, 20/0083 F.

<sup>132</sup> Classification marks 50-59, 20/0084 F; classification marks 653-662, 20/0083 F.

193. **On 26 June 2020**, a new meeting was held between Google and the SEPM. During this meeting, Google stated that (translated), "*the SEPM called into question the calculation of value presented by Google*".<sup>133</sup>
194. **On 29 June 2020**, the SEPM sent a letter to Google to reiterate its request to communicate information from 22 May 2020. In this letter, the SEPM also asks Google to provide (i) the elements which Google used to value IPG content and shared with the SEPM at the meetings of 12 and 26 June 2020 and (ii) an estimate of the valuation of the use by Google of non-IPG content<sup>134</sup>.

**b) 1 July – 23 July 2020: Google's first offer**

195. **On 1 July 2020**, Google sent a letter to the SEPM in response to its letter of 29 June 2020<sup>135</sup>. In this letter, Google clarifies its position on various aspects of the negotiation and makes an initial proposal for remuneration.
196. With regard to valuing the use of press content within its services and the partnerships it envisages with the press, Google makes the following points:
- Google points out that it does not sell access to news publishers' content and, therefore, does not receive any "direct" revenue when a user views or clicks on free links to news publishers' sites, and that it does not earn revenue when a user clicks on an ad. However, according to Google, news-related queries generate little in the way of ad revenue.
  - According to Google, an extensive definition of revenues earned from protected content could be based on including ad revenues that result from all queries that display at least one result from an IPG news publisher. However, such a method, according to Google, would result in an overestimate of the value of related rights, as it would not take into account various other elements (such as the value of the content licensed by Google and appearing on the results pages, the value of Google's ranking algorithms, infrastructure and technology, etc.). As a result, the real value of protected content would actually be much lower. Furthermore, the value that Google brings to the press sector by redirecting traffic that Google considers "valuable" to press publishers as a source of subscriptions and advertising revenue for them should also be taken into account.
  - In order to find, according to Google, a (translated) "*mutually acceptable agreement that covers related rights*", Google then proposes (translated) "*a pragmatic approach, which would make it possible to broaden the scope of our discussions, in order to allow Google to do more to support the political and general information press in France, in addition to a remuneration offer that covers our use of protected content*".
  - Google then presents the outlines of its new "News programme" in which (translated) "*the content displayed will be selected by the publishers and the edited content will appear in "panels" reflecting the visual identity of the publisher*". Furthermore, Google states (translated), "*if they wish to read the full articles, users will still be redirected to the publishers' sites, and it will be possible to further engage these users to encourage them to subscribe*". Google

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<sup>133</sup> Classification marks VC 6,326 and VNC 6,333, 20/0083 F.

<sup>134</sup> Classification marks VC 61-62 and VNC 210-211, 20/0084 F; classification marks 664-665 and VNC 4,690-4,691, 20/0083 F.

<sup>135</sup> Classification marks VC 680-686 and VNC 4,706, 4,707, 6,060, 4,709, 4,710, 6,062 and 4,712, 20/0083 F.

specifies that (translated) "*this new programme is included in our licence proposal in addition to the remuneration under related rights*".

- With regard to remuneration, Google says it has developed (translated) "*a transparent model based on objective criteria*". According to Google, IPG certification is a "*fundamental*" criterion. The other criteria cited by Google are (translated) "*daily publication volume, monthly internet traffic, editorial salaries, monthly active users on Google News, percentage of readers who have purchased a paid subscription, and monthly online subscription fees*."
- In concluding its letter, Google states that (translated) "*we would like to summarise our approach: since the balance of value is already in favour of publishers, Google has worked to put in place compelling business reasons to offer meaningful remuneration to IPG-certified publishers, in addition to covering a licence for related rights*".

197. With regard to the remuneration proposal, Google attached a note setting out its methodology for calculating the Google Search advertising revenues associated with the display of IPG press content, which it estimates at €[20-25] million<sup>136</sup>. Google also attached to its letter a remuneration proposal for a number of IPG-certified publishers which are members of the SEPM.

#### **c) 6 July - 23 July 2020: the reaction of the SEPM to Google's offer**

198. **On 6 July 2020**, in response to Google's letter of 1 July 2020<sup>137</sup>, the SEPM criticised the fact that, in its opinion, Google (translated) "*still refuses to communicate the information necessary to calculate the remuneration due to SEPM members for their related rights*".
199. Furthermore, with regard to the structure of the partnership proposed by Google, the SEPM considers that Google (translated) "*[claims] to be negotiating in good faith with publishers by proposing a flat-rate amount in exchange for an overall licence for the use of their editorial content*" whereas "*this licence is not intended to remunerate publishers for their related rights but to remunerate them for a new service that [Google] is planning to launch*".
200. **On 17 July 2020**, a meeting was held between the SEPM and Google to discuss the offer made by Google. Google indicated that the discussions focused on whether Google's proposal to license a new news product should be included in a licence for related rights or should be addressed separately<sup>138</sup>.
201. **On 22 July 2020**, the SEPM sent a letter to Google<sup>139</sup>. In this letter, the SEPM reiterated its earlier criticisms of Google.
202. With regard to the communication of information, the SEPM indicates that (translated) "*on four occasions, the SEPM requested that Google communicate the information provided for in Article L. 218-4 of the [Intellectual] Property Code*" and that Google still refuses to communicate this information. The SEPM therefore reiterates its request for communication of the information made in its previous correspondence.

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<sup>136</sup> Classification marks VC 685 and VNC 6,062, 20/0083 F.

<sup>137</sup> Classification mark 85, 20/0084 F; classification mark 768, 20/0083 F.

<sup>138</sup> Classification marks VC 717 and VNC 4,739, 20/0083 F.

<sup>139</sup> Classification marks 87-88, 20/0084 F; classification marks 770-771, 20/0083 F.

203. With regard to the partnership proposed by Google, the SEPM criticises this proposal, in particular because it would reflect a refusal to recognise the principle of remuneration due to press publishers, replacing it with remuneration for a new service. Furthermore, the SEPM criticises the exclusion of non-IPG publishers from the remuneration proposals made by Google.
204. **On the same day**, Google indicated that a telephone call was held between the SEPM and Google to discuss the evaluation methodology used by Google to calculate its offer of remuneration.
205. **On 23 July 2020**, Google sent a letter in response to the letters of the SEPM of 6 and 22 July 2020<sup>140</sup>, in which it explained its position and defended itself on several points and, in particular, on its offer to the SEPM as well as on sharing data.
206. Regarding Google's offer to the SEPM, Google states:
- Contrary to what SEPM claims in its letters, Google's offer is not unrelated to related rights. According to Google, its offer (translated) "*is specifically designed to provide the IPG-certified members of the SEPM with significant remuneration for the use of their content protected by the Law on related rights on Google's platforms*". Google states that (translated) "*the reason Google has proposed a scope of the licence that exceeds Google's current use of news content ... is because a monetary offer that is based solely on the revenue Google derives from current use of such content and the value that such use provides [to SEPM members] would not allow Google to offer meaningful payments.*"
  - According to Google, its offer (translated) "*takes into account the elements referred to in Article L. 218-4 of the IPC*" which provides that "*the amount of the proposed remuneration must take into account elements such as the investments made by the publishers, the contribution of the press publications to political and general information and the importance of the use of the press publications by Google*". Consequently, Google's offer focuses on IPG-certified publishers, as Google considers that they (translated) "*contribute most significantly to 'political and general information'*". According to Google, this criterion would be (translated) "*an objective and transparent criterion [...] based on a certification granted by the CPPAP [...], which itself reports to the Ministry of Culture*".
  - Google also states that it (translated) "*does not deny that the related right covers non-IPG press publications*", but notes that the Law "*does not require Google (or any other party) to purchase any content*". However, "*as regards non-IPG content, Google considers that it has no commercial interest in taking out paying licences for this type of content in view of the many equivalent alternatives widely available on the Internet*".
207. With respect to data sharing, Google states in its letter that it has shared with the SEPM "*all relevant data*" that allows the SEPM to evaluate Google's offer. Nevertheless, in this letter Google provides data on the number of times SEPM content is displayed (i) in response to a news query and (ii) for all queries. However, Google limits this data to Search, on the grounds that (translated) "*Google does not currently monetise either Google News or Discover in France*".

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<sup>140</sup> Classification marks VC 90-93 and VNC 234-237, 20/0084 F; classification marks VC 773-776 and VNC 4,788-4,791, 20/0083 F.

#### d) 29 July - 11 August 2020: the SEPM's counter-proposal and subsequent exchanges

208. **On 29 July 2020**, the SEPM sent a letter to Google in response to its letter of 23 July 2020<sup>141</sup>. In this letter, the SEPM reaffirms its positions on a number of points of disagreement with Google, and in particular:

- Google's refusal to enter into negotiations for the remuneration of press publishers who do not have IPG certification. On this point, the SEPM emphasises that (translated) "*the contribution of publishers to the IPG press is only one criterion among others established by Article L. 218-4 of the IPC to determine the amount of remuneration due to press publishers*".

However, according to the SEPM, the other criteria provided for in the Law would all justify "*significant remuneration for press publishers who do not have IPG certification*". In this regard, the SEPM maintains that non-IPG press publications represent the major part of the editorial content displayed on Google's services, that non-IPG press publishers make significant investments and that Google derives (translated) "*direct revenue (i.e. advertising revenue) and indirect revenue (i.e. revenue linked to data and to improving the ergonomics and attractiveness of its services) from displaying the content of non-IPG press publishers*".

- Google's basic assumptions for estimating revenue from the display of protected content appear to be incorrect. In particular, the SEPM criticises the fact that Google would only take into consideration (translated) "*the advertising revenues that would be generated on Google Search by pages that include the display of at least one editorial content from an IPG press publisher*". According to the SEPM, on the one hand, this method would not reflect the advertising revenue that Google derives from the display of editorial content from publishers that do not have IPG certification. On the other hand, this method results, according to the SEPM (translated), "*in excluding from Google's estimates all of its indirect revenues from the display of press publishers' content, not only on Google Search but also on Google News and Discover*". With regard to the latter services, the SEPM notes that (translated) "*it is simply not credible to claim [...] that Google would not make any profit from the distribution of publishers' press content on Google News or Discover, and that it would therefore operate these platforms at a pure loss, for the sole aim of incurring costs without any remuneration*".

According to the SEPM, Google (translated) "*earns revenue from the data collected during user queries across all of its platforms, including Google News and Discover*". The SEPM adds that "*Google also benefits from publishers' news content to improve the usability and attractiveness of all its platforms (Google Search, Google News and Discover). Improving the usability and attractiveness of these platforms allows it to attract and retain users, who in turn enable it to generate its various revenues*".

- The SEPM then states that Google apparently did not justify the estimates it provided to the SEPM to substantiate its offer. In particular, the calculation steps used by Google were apparently not backed up by documentary evidence. Moreover, there was no evidence that the samples used by Google are representative.
- The SEPM stresses that, contrary to what Google claims, the information requested on several occasions has not been provided, or was partial and incomplete. With regard to direct and indirect revenues in particular, the SEPM stresses that the data communicated by Google only pertain to advertising revenues and therefore exclude indirect revenues. Moreover, these data also exclude revenues generated by non-IPG content. With regard to displays of SEPM content,

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<sup>141</sup> Classification marks VC 778-783 and VNC 4,793-4,798, 20/0083 F.

the SEPM notes that the data provided is limited to Google Search and therefore does not reflect how it is used on Google News and *Discover*.

209. Finally, in its letter, the SEPM proposes a calculation method to estimate the value of its content used by Google on the latter's different services. According to Google, this is the first counter-proposal from the SEPM for all of its members, for which the remuneration is based on a share of all of Google's revenues in France, not just revenues from news content<sup>142</sup>.
210. **On 30 July 2020**, a meeting was held between Google and the SEPM. Google indicated that the SEPM stated that their main problem was the fact that the remuneration was limited to publishers with IPG certification<sup>143</sup>.
211. **On 4 August 2020**, Google sent a memo to the SEPM clarifying its methodology for evaluating the value of news content within Google Search<sup>144</sup>.
212. This evaluation methodology is based on an estimate of the Google Ads advertising revenue generated by displays with potentially protected IPG content on the pages of *Search*, applying a weighting according to the position in search results of this content. According to Google, the revenues that could be attributed to the IPG-certified publications of the SEPM under this method amount to €[5-10] million. More generally, the Google revenues that could be attributed to all members of the SEPM amount to €[25-30] million.
213. **On 11 August 2020**, Google sent a letter to the SEPM in response to its letter of 29 July 2020<sup>145</sup>. In this letter, Google refutes the accusations made by the SEPM that it refused to conduct negotiations in good faith. Google also comes back to several points from the exchanges that had taken place up until that point:
  - With regard to the scope of Google's proposal: Google states that the proposal consists of a total offer of €[confidential] for IPG-certified members of the SEPM and €0 for non-certified members. Nevertheless, Google states that it is open to working on an "*approach*" for a group of [20-30] non-IPG members of the SEPM who have paywall access to their website.
  - With regard to the calculation assumptions used by Google to value related rights, Google maintains that it does not generate direct revenue from displaying news content, and that a user only generates revenue when he or she clicks on an ad. Under these conditions, according to Google, the ad revenue it derives from displaying news content can only be considered as indirect revenue.
  - Furthermore, Google argues that while it displays protected content in Google News and *Discover*, these services are not monetised in France. According to Google, this is the reason why it (translated) "*estimated its indirect advertising revenue that could be attributable to news content on Search only*".
  - Furthermore, Google clarifies in the letter that user data is only collected when users make queries, and not when content relating to these queries is displayed. Under these conditions, news content would not contribute to the collection of data by Google.

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<sup>142</sup> Classification marks VC 717-718 and VNC 4,740, 20/0083 F.

<sup>143</sup> Classification marks VC 718 and VNC 4,740, 20/0083 F.

<sup>144</sup> Classification marks VC 785-789 and VNC 6,064-6,068, 20/0083 F.

<sup>145</sup> Classification marks VC 902-905 and VNC 4,908, 6,076, 4,910 and 4,911, 20/0083 F.

- Finally, as regards improving the usability and attractiveness of Google's services, Google says that news queries account for only 3% of all queries on Google Search. Consequently, according to Google (translated), "*news content cannot be considered as contributing materially to the usability and attractiveness of [its] services*".
- With regard to the valuation of content proposed by the SEPM in its letter of 29 July 2020, Google criticises this valuation, primarily for the fact that it is based on data that is much less accurate than the calculations it has made.

**e) 12 August 2020: the request to extend the deadline**

214. **On 12 August 2020**, Google sent an email to the SEPM informing it of its plans to request an extension of the negotiation deadline from the *Autorité*.<sup>146</sup>

**f) 14 August - 20 August 2020: Google's second offer and subsequent discussions**

215. **On 14 August 2020**, Google provided the SEPM with a valuation proposal addressing the current uses of IPG news content in Google Search, Google News and *Discover*<sup>147</sup>. As Google states in its letter (translated), "*given its narrower scope and the absence of editorial curation and access by our users to paywall-protected content as in our previous proposal, such a licence would offer less value to Google*". Consequently, Google explains that (translated) "*the licence fees for this proposal would therefore be lower than our previous offers*".
216. As such, Google proposes in its email to value its current use of news content by reference to the amounts of licences it pays for weather content, sports content and the Oxford English dictionary and Le Robert French dictionary. In effect, these licences authorise Google to display the entirety of the content in question in search results and in its other interfaces. In concrete terms, the methodology used by Google is as follows:
- Initially, Google calculates a fee per display;
  - Google then multiplies this fee per display by the number of views of IPG-certified content under two years old in France on Google Search from June 2019 to May 2020.
217. Applying this method results, according to Google, in (translated) "*an upper limit fee for the content of news publishers of approximately USD [confidential] per year for the IPG class as a whole*". Google adds in its letter that it continues to believe, however, that its (translated) "*broader offering of a licence for related rights [...] provides the best path to successful negotiation as it [allows it] to offer higher licence fees and develop new designs that will create additional value for publishers*".
218. With regard to non-IPG content, Google indicates in the email that it is willing to discuss how it might "*work*" with non-IPG certified members of the SEPM, but with a paywall.

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<sup>146</sup> Classification mark 113, 20/0084 F.

<sup>147</sup> Classification marks VC 907, 908-911 and VNC 6,086, 4,914, 6,088, 6,089, 4,917, 20/0083 F.

219. **On the same day**, Google provided the SEPM with data regarding the number of views of SEPM press content on Google News and *Discover*<sup>148</sup>. Google specifies in its email that it has not shared this data to date because (translated) "*Google News and Discover are not currently monetised by Google in France, so there is no revenue on these interfaces*".
220. **On 18 August 2020**, the SEPM responded to Google's emails of 14 August 2020<sup>149</sup>. In this email, the SEPM criticises the conduct of Google and in particular:
- Google apparently did not provide the information requested by the SEPM. In this regard, the SEPM states that the information provided by Google on 14 August is irrelevant to their request.
  - Google reportedly refused to negotiate any remuneration for publishers who do not have IPG certification.
  - Google reportedly refused to make any proposal for remuneration for related rights for current uses of content of members of the SEPM. It was only 10 days before the end of the negotiation period that Google apparently made a remuneration proposal for all press publishers. However, this proposal appears to have been unacceptable, as it was financially derisory and was limited to publishers with IPG certification, in violation of the criteria set out in the IPC.
  - Finally, the SEPM informed Google that it was refusing to go along with Google's request for an extension of the deadline for conducting negotiations.
221. **On 20 August 2020**, Google responded to the SEPM via email. Google explains that (translated) "*(i) [it] offered to negotiate solely on the basis of Google's current content usage categories recalling, as requested by the SEPM, (ii) [that it] is willing to negotiate with non-IPG certified members of the SEPM, (iii) Injunction 2 of the Autorité only instructs Google to share with the SEPM data that is relevant to evaluating Google's offers, and (iv) Google's appeal against the decision of the Autorité is not a sign of unwillingness to negotiate*"<sup>150</sup>.

#### **g) The expiry of the negotiation period**

222. **On 24 August 2020**, the three-month period for conducting negotiations stipulated in the Injunctions expired, without agreement between the SEPM and Google.
223. According to the evidence on file, no discussions have resumed between Google and the SEPM since that date.
224. However, in a letter to the investigation services dated 24 December 2020, the SEPM states that since September 2020, Google has been offering a selection of "IPG" certified publishers to participate in the *Showcase*<sup>151</sup> service. The SEPM considers that, as a result, Google discriminates between publishers to whom it offers the service and others. Furthermore, the publishers to whom Google offers the service apparently have no possibility of negotiation, since Google apparently offers a "comprehensive package" covering the remuneration for *Showcase* and other forms of

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<sup>148</sup> Classification marks VC 120-121 and VNC 262-263, 20/0084 F; classification marks VC 913-914 and VNC 4,919-4,920, 20/0083 F.

<sup>149</sup> Classification marks VC 916-919 and VNC 4,922-4,925, 20/0083 F.

<sup>150</sup> Classification marks VC 868 and VNC 4,882, 20/0083 F.

<sup>151</sup> Classification marks 5,727-5,731, 20/0083 F.

reusing protected content. The SEPM also points out that subscription to the *Showcase* service itself is apparently conditional on subscription to the *Subscribe with Google* service, with the result that publishers become more dependent on Google.

#### 4. THE NEGOTIATIONS BETWEEN GOOGLE AND OTHER NEWS AGENCIES AND PRESS PUBLISHERS

225. Besides the AFP, the APIG and the SEPM, Google has received formal requests to enter into negotiations from nine other entities.
226. With the exception of one of these, according to the information in the case file, no negotiations have been concluded to date. The dates of entry into negotiations and expiration of the three-month period for each of these entities, as well as the outcome of the negotiations, are presented in the table below.

<b>Entity that has made a request to negotiate</b>	<b>Date of request to enter into negotiations</b>	<b>Date of conclusion of negotiations<sup>152</sup></b>	<b>Outcome of negotiations as of the date of the hearing<sup>153</sup></b>
[confidential]	28/04/2020	18/08/2020	No agreement
[confidential]	12/05/2020	30/09/2020	No agreement (an agreement was reached after the date of conclusion of the negotiations)
[confidential]	24/04/2020	03/10/2020	No agreement
FFAP	25/06/2020	29/10/2020	No agreement
TF1	04/06/2020	28/10/2020	No agreement
[confidential]	24/07/2020	24/10/2020	No agreement
Groupe Amaury/L'Équipe	25/01/2021	25/04/2021	No agreement
[confidential]	27/01/2021	27/04/2021	Outcome of negotiations unknown
[confidential]	01/03/2021	01/06/2021	Outcome of negotiations unknown

*Source: classification marks VC 478-483 VNC 4,441-4,446; classification marks VC 722 and VNC 4,744; classification marks VC 6,196-6,197; classification mark VC 6,376; classification mark VC 5,990; classification marks VC 6,706 and VNC 7,336, 20/0083 F and Table 1 of Google's comments in reply (pages 8 to 10)*

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<sup>152</sup> The date of conclusion of the negotiations may be set after the three-month period following the request for entry into negotiations in at least two cases: (i) when the request for entry into negotiations precedes the lifting of the suspension of deadlines pursuant to Article 8 of Ordinance No. 2020-306; (ii) when this extension is decided jointly by the parties to the negotiations.

<sup>153</sup> Within the negotiation period provided for in the Injunctions or the period extended under the conditions referred to in the preceding footnote.

## 5. THE CONTRACTS CONCLUDED WITH PRESS PUBLISHERS FOLLOWING THE NEGOTIATIONS AFTER THE NEGOTIATION PERIOD PROVIDED FOR IN THE INJUNCTIONS.

227. After the negotiation period, following requests from the APIG and the SEPM, and provided for in the Injunctions, bilateral discussions were held between Google and certain press publishers who are members of these trade associations<sup>154</sup>.
228. In its response to the questionnaire of the *Autorité* of 14 October 2020, as well as in its reports No. 5 and No. 6<sup>155</sup>, Google states that it has entered into a partnership with three press publishers, namely Libération, Le Groupe Le Monde and L'Express<sup>156</sup>. According to Google, these partnerships cover related rights (translated), "*including Google's current uses of all content protected by Law 2019-775 across its services as well as participation [...] in a new modular Google News Showcase feature.*" These three publishers are joined by Le Figaro, with whom Google also entered into a partnership on 31<sup>st</sup> October 2020<sup>157</sup>. In its subsequent compliance reports (Nos 7 to 11), Google also states that it has concluded contracts with the [confidential] press agency and several other publishers or press groups, namely [confidential]<sup>158</sup>, [confidential], L'Obs<sup>159</sup> and [confidential]<sup>160</sup>.
229. The agreements with Le Figaro, Le Monde and L'Express follow discussions that began in September 2020<sup>161</sup>. As regards Libération, according to statements made at the hearing, these discussions began in June 2020<sup>162</sup>.
230. An examination of the contracts for Publisher Curated News ("PCN") signed by each of the publishers in question shows that these contracts are not entirely identical, although they do have significant similarities.
231. Firstly, most of the contractual clauses in these contracts concern the terms and conditions for implementing the *Showcase* offer and, in particular, the minimum requirements expected of press publishers in terms of the content made available to users (through Article 2 and Annex 2 of the PCN contracts concluded with the publishers - see, for example, the contract concluded by Libération<sup>163</sup>).

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<sup>154</sup> It also appears from the information provided by Google that Google did not wait until the end of the initial negotiation period with the APIG before making an individual financial proposal to Le Figaro on 29 July 2020 (classification marks VC 484 and VNC 4,447, 20/0083 F).

<sup>155</sup> Classification marks VC 2,248 and VNC 5,038, 20/0083 F.

<sup>156</sup> Classification marks VC 483-484 and VNC 4,446-4, 20/0083 F.

<sup>157</sup> Classification marks VC 3,366 and VNC 3,531, 20/0083 F.

<sup>158</sup> Classification marks VC 6,045 and VNC 6,051, 20/0083 F.

<sup>159</sup> Classification marks VC 7,833 and VNC 8,761, 20/0083 F.

<sup>160</sup> Classification marks VC 8,290 and VNC 9,200, 20/0083 F.

<sup>161</sup> Classification marks 3,367, 2,173, 2,177, 20/0083 F.

<sup>162</sup> Classification marks VC 2,164 and VNC 2,426, 20/0083 F.

<sup>163</sup> Classification marks VC 2,184-2,197 and VNC 3,913-3,926, 20/0083 F.

232. The centrality of *Showcase* in these PCN contracts is also apparent from the statements of the publishers concerned. For example, while Le Figaro explained during its hearing that the partnership with Google covered the use of the *Showcase* programme and the remuneration of related rights<sup>164</sup>, Groupe Le Monde only portrayed the partnership with Google from the *Showcase*<sup>165</sup> perspective. The same applies for L'Express, which states that it has concluded (translated) "*A partnership around Google's initiative called Publisher Curated News, which Google has communicated about under the name Google Showcase.*"<sup>166</sup>. Similarly, Libération states that (translated) "*This partnership pertains to a new service set up by Google in the context of its Publisher Curated News. This contract allows Libération to put forward daily articles selected by the editorial staff in this new service.*"<sup>167</sup>
233. Secondly, these contracts provide for an overall remuneration for the publishers for their protected content used by Google, and this since 24 October 2019 (Article 3.e of the PCN contracts, see for example the contract concluded with Libération<sup>168</sup>). However, there is no clause identifying, within this remuneration, what falls within the scope of use of protected content in the context of *Showcase*, and what falls within the scope of other uses (including current uses).
234. When asked about the distinction between (translated) "*amounts relating to (i) the use of protected content and (ii) the 'Showcase' service*" in the draft contracts discussed individually with certain press publishers, Google explained in this respect that the *Showcase* programme fell under the context of using protected content. As such, according to Google (translated), "*any remuneration relating to the 'Showcase' service constitutes remuneration for the use of protected content*"<sup>169</sup>.
235. Thirdly, some of the publishers (Le Monde, Libération, L'Express and Le Figaro in particular) in addition to the PCN contract, have entered into a set of contracts relating to the *Subscribe with Google* service (hereinafter "*SwG*")<sup>170</sup>, a subscription tool via Google. The *SwG* contract aims to increase the subscriber base of participating publishers, in particular through advertising budgets financed by Google and targeting users of its services. The *SwG* service allows publishers to offer their users a subscription process that is based on the user's Google Account and offers, among other features, specific usability that relies on the use of the Google Account for login and the use of credentials related to payment methods. If the user's Google Account already contained these credentials, the user can subscribe without having to re-enter them, which removes a barrier to subscription and thus, according to Google, increases subscription rates.

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<sup>164</sup> Classification mark 3,367, 20/0083 F.

<sup>165</sup> Classification mark 2,172, 20/0083 F.

<sup>166</sup> Classification mark 2,176, 20/0083 F.

<sup>167</sup> Classification marks VC 2,164 and VNC 2,426, 20/0083 F.

<sup>168</sup> Classification marks VC 2,190 and VNC 3,919, 20/0083 F.

<sup>169</sup> Classification mark 3,964, 20/0083 F.

<sup>170</sup> Google explains on its blog that "*Subscribe with Google is a platform designed to help publishers drive conversions and engage existing subscribers across Google and the web. This solution enables customers to use their Google account and payment methods to subscribe across the web and also helps users stay logged in, retain access to their premium content, and encounter that content on Google products.*" Available at the following address: <https://developers.google.com/news/subscribe>.

236. As regards Libération and L'Express, SwG agreements were concluded simultaneously on 5 October 2020<sup>171</sup>. As regards Le Figaro, the two SwG and PCN agreements were concluded simultaneously on 31 October 2020<sup>172</sup>. Le Monde, for its part, entered into the SwG contract on 23 January 2020<sup>173</sup> and the PCN contract on 5 October 2020<sup>174</sup>.
237. In response to the investigation services, Google explains that (translated)<sup>175</sup> "*Subscribe with Google*" (SwG) helps news publishers grow their subscriber base by making it easy for users to sign up for subscriptions on participating publishers' sites using their Google account. This service simplifies the subscription process by using the user's Google Account for login and payment methods already stored, so users can subscribe in just two clicks. Eliminating the process of entering credit card numbers and creating new accounts actually increases the conversion rate to subscriptions for publishers. Google can also highlight content that the user has subscribed to in a special section of Google News, to show the user the value they get from their subscription and to facilitate the relationship between the user and the publisher".
238. This description corresponds to statements made at hearings with publishers who subscribed to the offer. Le Figaro stated (translated)<sup>176</sup>: "*Why did we decide to do it? In particular because our main competitor, Le Monde, has done the same thing for several months. It is also a lever to accelerate subscriptions on the Google Android / Google Play environments (all mobile devices except Apple). [...] These amounts are linked to the activation of marketing campaigns and SwG on our part and will allow us to incrementally increase our subscriber base. It is a kind of package*".
239. Libération also states that<sup>177</sup> (translated) "*As regards SwG, it is a rapid subscription system allowing customers who already have a Google account to easily subscribe (one click). Google's support consists, firstly, of financing the technical cost of the development and, secondly, the marketing expenses incurred to promote this feature. Google earns revenue by taking a percentage of the subscription every month. [...] This co-marketing budget will be used to finance ads inviting users to subscribe to Libération via this service (by taking advantage of trial offers)*".
240. In an email sent to Groupe Le Monde on 5 October 2020, Google summarised the objective of the SwG<sup>178</sup> programme as follows (translated): "*Growing digital subscriptions through the use of Subscribe with Google and implementing co-marketing campaigns*".
241. In its compliance report No. 11 dated 6 April 2021, Google states that it has not entered into any new agreements with press publishers since 19 February 2021, the date of receipt of the Report of the investigation services<sup>179</sup>.

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<sup>171</sup> Classification marks 2,163 and 2,176-2,177, 20/0083 F.

<sup>172</sup> Classification marks VC 3,366 and VNC 3,531, 20/0083 F.

<sup>173</sup> Classification mark 3,910, 20/0083 F.

<sup>174</sup> Classification mark 2,173, 20/0083 F.

<sup>175</sup> Classification marks VC 3,966-3,967 and VNC 5,208-5,209, 20/0083 F.

<sup>176</sup> Classification marks VC 3,371 and VNC 3,536, 20/0083 F.

<sup>177</sup> Classification marks VC 2,168 and VNC 2,430, 20/0083 F.

<sup>178</sup> Classification marks VC 3,414 and VNC 3,417, 20/0083 F.

<sup>179</sup> Classification marks VC 8,496 and VNC 9,409, 20/0083 F.

## E. SUMMARY OF THE STRUCTURING POINTS OF THE NEGOTIATION

### 1. THE SCOPE OF THE CONTENT AND SERVICES COVERED BY THE NEGOTIATION

242. It can be seen from the exchanges with the AFP, the APIG and the SEPM that Google, during almost the entire three-month negotiation process provided for in the Decision, preferred to conclude a global partnership mainly relating to new services, whereby related rights for current uses of protected content would only be an ancillary component, without any specified financial value.

#### a) Negotiations with the AFP

243. With regard to the negotiations with the AFP, Google linked the negotiations on related rights for current uses of protected content to other Google services. This can be seen from the following elements in particular:

- From the very first exchanges, following the request of the AFP to enter into negotiations on 17 April, Google brought up a partnership, without reference to related rights, as well as the new "*News experience on Google surfaces*". This is confirmed by the agenda set by Google for a meeting in an email dated 3 June 2020<sup>180</sup>. However, the AFP's letter of 17 April 2020, requesting that negotiations be opened, stated unequivocally that the object of the negotiations was the remuneration owed by Google for the use of content protected by related rights<sup>181</sup>.
- In its letter of 17 June 2020, Google again brings up partnerships involving images and news, which Google believes could be the basis for covering its use of the AFP's protected content<sup>182</sup>.
- The draft Term Sheets communicated by Google on 8 and 29 July 2020 provide, firstly, for the supply of photographic content by the AFP and, secondly, for the AFP's participation in the Publisher Curated News programme. As explained above, this programme involves, as stated by Google, the generation and provision of content by the publisher or agency for display within "modules", and also includes the granting of a licence to Google covering current uses of the protected content on all Google services (including Search, Google News and *Discover*). The remuneration proposed by Google for participation in the Publisher Curated News programme does not, however, identify in its calculation or final amount what specifically falls under the supply of content intended to make up the "modules", and what falls under the current uses of content protected under related rights<sup>183</sup>.

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<sup>180</sup> Classification mark 78, 20/0085 F.

<sup>181</sup> Classification marks 64 and 65, 20/0085 F; 585-586, 20/0083 F.

<sup>182</sup> Classification mark 89, 20/0085 F; classification mark 692, 20/0083 F.

<sup>183</sup> Classification marks VC 96-97 and VNC 223-224, 20/0085 F; classification marks VC 478 and VNC 4,441; classification marks VC 793-794 and VNC 4,807-4,809, 20/0083 F.

- On 24 July 2020, Google did send information about its annual "attributable revenue" from displaying protected content from the site afp.com, but the message did not include a financial proposal as such<sup>184</sup>.
  - The financial proposal sent by Google to the AFP on 19 August 2020 brings up, once again, a partnership covering related rights and "innovative" products, without however specifying the share of the remuneration that could be attributed to the related rights<sup>185</sup>. The AFP once again rejected the proposal, arguing that Google had not provided the data that the AFP had requested, which it said was essential for the discussions, and that the offer was only for an overall licence and not for related rights<sup>186</sup>.
244. Google's only proposal regarding the current uses of the AFP's content was made in an email dated 14 August 2020, four days before the expiry of the negotiation period. In this email, Google proposes, for the first time, discussing an offer limited to the current use of the protected content, while stressing that the royalties for such a licence would be much lower<sup>187</sup>. The offer was rejected by the AFP on the grounds that it was late, that it still did not recognise the AFP's related rights, and that the amount of Google's offer was based on comparisons that were not really relevant<sup>188</sup>.
245. The AFP, for its part, had requested Google to distinguish negotiations over the current uses of its protected content on Google's various services on at least five occasions:
- In its letter of 19 June 2020, the AFP said that discussions on possible partnerships concerning images and news could be envisaged, provided (translated) "*that such discussions do not replace the discussion on related rights*"<sup>189</sup>.
  - In its letter of 13 July 2020, the AFP reiterated its dissatisfaction with the way the negotiations had been conducted, pointing out that the discussions during the meeting of 30 June 2020 (translated) "*focused on ancillary issues such as the distinction between news and images, which is not relevant, or the ways in which the related right is to be presented (i.e. discussing a contractual partnership, rather than the ways in which the law is to be applied)*"<sup>190</sup>.
  - In its letter of 20 July 2020, following Google's draft Term Sheet of 8 July 2020, the AFP stated that, while it was willing to discuss an agreement that may cover other aspects or benefits than just remuneration for related rights, the draft agreement must contain two components<sup>191</sup>. The AFP therefore underlines the fact that (translated) "*the legal context and*

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<sup>184</sup> Classification marks VC 809 and 811 and VNC 4,817, 4,818 and 6,070, 20/0083 F.

<sup>185</sup> Classification marks VC 953 and VNC 4,946; 20/0083 F.

<sup>186</sup> Classification mark 125, 20/0085 F; classification marks 956-957, 20/0083 F.

<sup>187</sup> Classification marks VC 479 and VNC 4,442; classification marks VC 936-937 and VNC 6,092, 20/0083 F.

<sup>188</sup> Classification marks 139 and 140, 20/0085 F; classification marks VC 946-947 and VNC 4,939-4,940, 20/0083 F.

<sup>189</sup> Classification mark 93, 20/0085 F; classification mark 696, 20/0083 F.

<sup>190</sup> Classification mark 102, 20/0085 F; classification mark 799, 20/0083 F.

<sup>191</sup> Classification mark 106, 20/0085 F; classification mark 803, 20/0083 F.

*the time frame in which this agreement must be reached cannot be ignored [...] In other words, the draft agreement we are proposing to you must contain two components, even if they can be included in the same contractual document*"<sup>192</sup>. The AFP then makes a proposal for remuneration, in the form of a range, covering only the current uses of the AFP's protected content<sup>193</sup>.

- In its email of 30 July 2020 referring to Google's draft Term Sheet of 29 July 2020, the AFP requested Google to (translated) "*look again at its proposal, and provide us with the amount of the remuneration applicable to a licence covering only Google's current use of AFP content, i.e. a licence limited to the display of image content produced by the AFP (photographs, videos and infographics) in the search results of Google's search engines (Google Search and Google News) as well as on the Google Discover service (including the display of the AFP's content integrated with the content of press publishers)*". This time around, and to the extent that Google's proposal was global in scope, the AFP expresses its wish to have the elements that would allow it to identify, within Google's proposal, what falls within the scope of content displays in France<sup>194</sup>.
- In its message of 22 August 2020, the AFP again objects to Google's approach of linking the discussions on related rights with other negotiations, without a specific discussion on related rights (translated): "*during all this time, Google always restricted the discussions to the offer of an overall licence for additional services*"<sup>195</sup>.

## **b) Negotiations with the APIG**

246. With regard to the negotiations with the APIG, the link Google made between the negotiations on related rights under current uses of protected content and other services, can be seen from the following elements in particular:

- The presentation communicated to the APIG by Google and dated 3 June 2020<sup>196</sup> does not mention the issue of related rights, not even on the last page illustrating the calculation of remuneration<sup>197</sup>. In its response to the questionnaire of 14 October 2020, Google, while believing that related rights were covered by the partnership, also acknowledged that the proposed partnership was not limited to this aspect (translated): "*This offer covered the use of protected content on all Google interfaces as well as the participation of APIG publishers in a new news product developed by Google to give greater prominence to news content (Google News Showcase)*"<sup>198</sup>.

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<sup>192</sup> Classification mark 106, 20/0085 F; classification mark 803, 20/0083 F.

<sup>193</sup> Classification marks VC 107-109 and VNC 227-229, 20/0085 F; classification marks VC 804-806 and VNC 4,812-4,814, 20/0083 F.

<sup>194</sup> Classification mark 121, 20/0085 F; classification mark 820, 20/0083 F.

<sup>195</sup> Classification mark 125, 20/0085 F; classification mark 956, 20/0083 F.

<sup>196</sup> Classification marks 186-191, 20/0083 F

<sup>197</sup> Classification mark 191, 20/0083 F.

<sup>198</sup> Classification marks VC 480 and VNC 4,443, 20/0083 F.

- In its letter of 11 June 2020, Google justifies extending the discussions on the grounds that a negotiation limited to the current uses of press content would be likely to significantly reduce the remuneration of publishers. Google maintains that its offering covers current uses, and also makes it possible to enhance the value and uses of content, and that this partnership is specifically aimed at helping the journalism industry<sup>199</sup>. A summary of this offer was again sent to the APIG by e-mail dated 18 June 2020, in which reference was made to the introduction of "new features". The amount shown is for the IPG-certified press as a whole, not specifically the APIG<sup>200</sup>.
  - In its letter of 14 July 2020, Google reaffirms the principles set out in its letter of 11 June 2020 and the need to include (translated) "*within the scope of the licence a new "News" product, aimed at promoting and further enhancing publishers' content.*" Google also maintains that its proposal (translated) "*has evolved significantly since [our] initial discussions in January 2020 [...]*"<sup>201</sup>.
  - In its email of 24 July 2020, Google makes a proposal for IPG-certified members of the APIG. Google reiterates that the proposed licence will cover current uses and (translated) "*participation in our new experience in News and Discover.*" Google adds (translated): "*As part of this new experience, the largest publications could create 7 panels and smaller ones 5 or 2 panels, and they would provide access to an agreed number of unlocked articles on their websites*"<sup>202</sup>.
247. Google attaches to this message a "*Google - Draft APIG Framework Agreement Proposal*", which provides for Google to be granted a worldwide licence for the use of content selected by publishers under the Publisher Curated News programme and for the use of protected content by news publishers under Google's current uses<sup>203</sup>. The draft framework agreement provides for an overall remuneration package for all these services, broken down by publisher<sup>204</sup>, but without identifying any calculation element or amount specific to current uses of content, as distinct from uses in the context of new services. The exact amount per publisher is subject to individual agreement with each publisher. The draft agreement specifies that this overall package, together with the value created by the traffic redirected by Google, constitutes sufficient remuneration for content protected by related rights<sup>205</sup>.

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<sup>199</sup> Classification marks VC 200 and VNC 359; classification marks VC 569 and VNC 4,649, 20/0083 F.

<sup>200</sup> Classification marks VC 204 and VNC 363; classification marks VC 480 and VNC 4,443; classification marks VC 623 and VNC 4,676, 20/0083 F.

<sup>201</sup> Classification marks VC 232 and VNC 381; classification marks VC 729 and VNC 4,751, 20/0083 F.

<sup>202</sup> Classification marks VC 243-244 and VNC 392-393; classification mark 248; classification marks VC 480 and VNC 4,443; classification marks VC 740-742 and VNC 4,762-4,764; classification mark 748, 20/0083 F.

<sup>203</sup> Classification marks VC 248- 249 and VNC 397-398; classification marks VC 480 and VNC 4,443; classification marks VC 748-749 and VNC 4,770-4,771, 20/0083 F.

<sup>204</sup> Article 5.1, classification marks VC 249 and VNC 398; classification marks VC 749 and VNC 4 771, 20/0083 F.

<sup>205</sup> Article 3.3, classification marks VC 249 and VNC 398; classification marks VC 749 and VNC 4 771, 20/0083 F.

248. Moreover, article 6.4 of the draft framework agreement envisages, as the only variable in the amount paid individually to publishers, only the added value of the selected content - to the exclusion of other forms of use of the protected content<sup>206</sup>. Finally, article 7.2 of the draft agreement allows Google to withhold remuneration from a publisher - including for content protected by related rights - if the publisher breaches the terms of its individual contract.
249. In a similar vein to the situation with the AFP negotiations, Google agreed for the first time to consider a remuneration offer limited to current uses of protected content in an email dated 14 August 2020, while specifying that this remuneration would be lower than its previous offers<sup>207</sup>.
250. However, as early as its request of 6 May 2020 to enter into negotiations, the APIG sought a negotiation to calculate the remuneration owed by Google for the latter's reuse of protected content on its services, and not the discussion of partnerships on future services<sup>208</sup>. Moreover, the APIG had requested Google to distinguish negotiations over the current uses of protected content on Google's services and those pertaining to other services, on at least three occasions during the course of the negotiations:
- The APIG objected to Google's position on this matter in an email dated 8 June 2020 in which it explained: "*We understand the proposal of partnership you made during our meeting on Wednesday April 3 as an attempt to circumvent the French legal framework. In our understanding, your proposal aims at creating value thanks to new services proposed through Google News and Discover, that would be split between Google and publishers. We think this proposal does not answer in any way the requests we made in our May 6 letter, neither to the April 9 decision from the French competition authority, which ordered Google to share the current value generated by existing services, primarily Google search engine – not hypothetical value to be created by future services*".(emphasis added).<sup>209</sup>
  - Following Google's offer of 18 June 2020, the APIG reiterated by letter of 30 June 2020, its desire to limit the discussions to related rights only<sup>210</sup>. The APIG states in this regard that (translated) "*these amounts are almost identical to those discussed during informal contacts between Google representatives and the main French publishers during the visit by Richard Gingras to Paris in January 2020. It should be noted that the decision issued by the French Competition Authority in April 2020 did not modify either the amount or the structure of the proposal made by Google to French publishers*"<sup>211</sup>.
  - In an email dated 27 July 2020, the APIG objects to Google's proposal of 24 July 2020, noting that again related rights are not specifically identified. The APIG specifies that (translated) "*Subject to in-depth analysis, the offer in your e-mail essentially repeats, in its amount and in its terms, the parameters already put forward in your previous correspondence. In particular,*

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<sup>206</sup> Classification marks 250 and 750, 20/0083 F.

<sup>207</sup> Classification marks VC 282-284 and VNC 426, 6,106-6,107; classification marks VC 480 and VNC 4,443; classification marks VC 882-884 and VNC 4,893, 6,083-6,084, 20/0083 F.

<sup>208</sup> Classification marks 172-173 and 551-552, 20/0083 F.

<sup>209</sup> Classification marks 193 and 564, 20/0083 F.

<sup>210</sup> Classification marks 212 and 632, 20/0083 F.

<sup>211</sup> Classification marks VC 213 and VNC 367; classification marks VC 633 and VNC 4,680, 20/0083 F.

*we understand that it implies an overall remuneration for all uses of press publications by Google, without identifying any remuneration specifically related to related rights [...]*<sup>212</sup>.

### **c) Negotiations with the SEPM**

251. With regard to the negotiations with the SEPM, the link Google made between the negotiations on related rights under current uses of protected content and other services, can be seen from the following elements in particular:
- In its letter of 1 July 2020, Google proposes "*broadening the scope of our discussions*" and setting up a new programme for news. According to Google, the current use of protected content does not allow for significant remuneration for press publishers<sup>213</sup>. Google then considers remuneration for the titles of SEPM members who are only IPG certified, considering that this criterion reflects one of the elements identified by the Law.<sup>214</sup> However, this remuneration does not distinguish between related rights and other partnerships<sup>215</sup>.
  - In a letter dated 23 July 2020, Google again defends the idea of an extended offer, arguing that current uses of protected content do not justify significant remuneration. Google reiterates its position regarding non-IPG certified content<sup>216</sup>.
252. In a similar vein to the situation with the AFP and APIG negotiations, Google agreed for the first time to consider a remuneration offer for related rights under the current uses of protected content in an email dated 14 August 2020, while specifying that this remuneration would be lower than its previous offers<sup>217</sup>.
253. However, as early as its request of 22 May 2020 to enter into negotiations, the SEPM sought a negotiation to calculate the remuneration owed by Google for the latter's reuse of protected content on its services, and not the discussion of partnerships on future services<sup>218</sup>. Moreover, the SEPM requested Google to distinguish between the negotiations on current uses from other services on at least three occasions:
- Firstly, in its letter of 6 July 2020, the SEPM objects to the fact that Google does not specifically identify related rights in its proposal of 1 July<sup>219</sup>;

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<sup>212</sup> Classification marks 260 and 761, 20/0083 F.

<sup>213</sup> Classification marks VC 682 and VNC 6,060, 20/0083 F.

<sup>214</sup> Classification marks VC 683 and VNC 4,709, 20/0083 F.

<sup>215</sup> Classification marks VC 686 and VNC 4,712, 20/0083 F.

<sup>216</sup> Classification marks VC 90-91 and VNC 234-235, 20/0084 F; classification marks VC 773-774 and VNC 4,788-4,789, 20/0083 F.

<sup>217</sup> Classification marks VC 907, 908-910 and VNC 6,086, 6,088-6,089, 20/0083 F.

<sup>218</sup> Classification marks 43-44, 20/0084 F; classification marks 573-574, 20/0083 F.

<sup>219</sup> Classification mark 85, 20/0084 F; classification mark 768, 20/0083 F.

- Secondly, in its letter of 22 July 2020, the SEPM contests Google's proposal to put in place an "overall" licence<sup>220</sup>;
- Thirdly, the SEPM reminds Google, in an email of 18 August 2020 in response to Google's email of 14 August 2020, that the "overall licence" envisaged by Google relates to a new service, not to the current use of content protected by related rights<sup>221</sup>.

## 2. THE EXCLUSION OF CERTAIN CONTENT FROM THE DISCUSSIONS ON RELATED RIGHTS

254. Throughout the discussions with the press publishers, Google was at pains to exclude press content from titles that do not have IPG certification. It also told the AFP and the Fédération Française des Agences de Presse (French Federation of Press Agencies) (hereinafter the "FFAP") on several occasions that, as press agencies, they could not claim to benefit from the provisions of the Law.

### a) On the exclusion of non-IPG titles of the SEPM and the APIG

255. During the negotiations with the SEPM, Google repeatedly indicated that it planned to exclude non-IPG certified titles from the negotiations on related rights. This can be seen from the following elements in particular:

- In a letter dated 1 July 2020, Google explains that it has developed a remuneration model, based on objective criteria, in which IPG certification is a fundamental criterion in accordance with the Law, which calls for the contribution of political and general information publications to be taken into account. In application of this grid, Google would be willing to work with IPG certified members of the SEPM<sup>222</sup>.
- In a letter dated 23 July 2020, Google reiterated its refusal to include non-IPG certified titles in the negotiation on the grounds that IPG certification would constitute an objective and transparent criterion and that it would have no commercial interest in taking out paying licences from them and that neither the Law nor the Decision would oblige it to purchase "*all content*"<sup>223</sup>.
- In a letter dated 11 August 2020, Google further clarifies its position by explaining that its offer covers both IPG-certified and non-IPG-certified content, but that the latter will not be remunerated<sup>224</sup>.

256. However, it should be noted that Google's position changed slightly at the end of the negotiation period, since in an email dated 14 August 2020, a few days before the end of the negotiation

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<sup>220</sup> Classification marks 87-88, 20/0084 F; classification marks 770-771, 20/0083 F.

<sup>221</sup> Classification marks VC 917 and VNC 4,923; 20/0083 F.

<sup>222</sup> Classification marks VC 683 and VNC 4,709, 20/0083 F.

<sup>223</sup> Classification marks VC 91 and VNC 235, 20/0084 F; classification marks VC 774 and VNC 4,789, 20/0083 F.

<sup>224</sup> Classification marks VC 109 and VNC 292, 20/0084 F; classification marks VC 903 and VNC 6,076, 20/0083 F.

period, Google mentions for the first time the possibility of discussing a partnership covering non-IPG certified members but with paywalls.<sup>225</sup>

257. For its part, the SEPM contested the position adopted by Google throughout the negotiations regarding non-IPG certified titles: on 22 July<sup>226</sup>, 29 July<sup>227</sup>, and 18 August<sup>228</sup>.
258. In its letter of 29 July, the SEPM points out in particular that the contribution of publishers to the IPG press is only one criterion among others laid down by the law, that non-IPG content accounts for most of the editorial content displayed on Google, and lastly that this content is more easily monetised and therefore particularly profitable for Google<sup>229</sup>.
259. The exclusion of non-IPG content can also be seen from the exchanges between the APIG and Google, both in the methodological notes provided by Google and in the draft framework agreement of 24 July 2020. Indeed, Article 5.1 ("*Total licence Fees*") provides that the remuneration will only be paid in respect of APIG members who are IPG-certified. Similarly, Article 6.1 ("*Scope of the Framework Agreement*") states that individual contracts will be concluded between Google and IPG-certified publishers who are members of the APIG<sup>230</sup>.
260. Although it is not apparent from the documents in the file that this exclusion was criticised by the APIG, at least one member of the APIG contested this point of view after the three-month negotiation period. The Groupe Amaury/L'Équipe thus maintains that such an exclusion, on the one hand, appears to be restrictive in relation to the scope of related rights provided for by the Law, and, on the other hand, does not appear to comply with Article L. 420-2 of the French Commercial Code (Code de commerce), given the discrimination it creates between non-IPG and IPG publishers<sup>231</sup>.

#### **b) The exclusion of certain news agency content**

261. During the negotiations, Google repeatedly disputed the possibility for news agencies to claim related rights for their content displayed on Google's various services. This can be seen from the following exchanges in particular:
  - In its letter of 17 June 2020, Google explained to the AFP that content could only benefit from protection under related rights if it was included in a press publication. Under these conditions, the AFP could not claim ownership of related rights over content created by the AFP and reused in the publications of third-party press publishers. Nor could the AFP claim "additional"

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<sup>225</sup> Classification marks VC 117 and VNC 296, 20/0084 F; classification marks VC 910 and VNC 6,089, 20/0083 F.

<sup>226</sup> Classification mark 88, 20/0084 F; classification mark 771, 20/0083 F.

<sup>227</sup> Classification marks VC 95-96 and VNC 239-240, 20/0084 F; classification marks 778 and VC 779 VNC 4,794, 20/0083 F.

<sup>228</sup> Classification marks VC 123 and VNC 265, 20/0084 F; classification marks VC 917 and VNC 4,923, 20/0083 F.

<sup>229</sup> Classification marks VC 779 and VNC 4,794, 20/0083 F.

<sup>230</sup> Classification marks VC 249 and VNC 398, 20/0083 F.

<sup>231</sup> Classification marks 5,590-5,591, 20/0083 F.

remuneration for content for which it already receives remuneration from press publishers<sup>232</sup>. Google also shared this position with the FFAP in emails dated 12 August, 1 and 25 September 2020<sup>233</sup>.

- In its letter of 24 July 2020, the only data shared by Google for the purposes of the negotiations on related rights concerns Google's annual "attributable revenues" linked to the display on Google Search of content from the website *afp.com*, which is (translated) "*the only 'B2C' press publication of the AFP that we are aware of at this stage*". No data or estimates of revenues related to AFP content from third-party publishers' press publications are provided by Google in its "attributable revenues" estimate<sup>234</sup>.
- In its email of 14 August 2020, Google once again argued that the AFP does not hold related rights when its content is incorporated into third-party press publications, and that in any case Google could not be required to "*pay twice for the same content*"<sup>235</sup>.

262. As such, while Google has agreed to envisage remuneration for protected content when it is published in publications edited by news agencies<sup>236</sup>, it disputes that any related rights are held, and thus any remuneration due, for content reused by third-party press publications. This position is summarised in a legal consultation added to the file by Google<sup>237</sup> and realised by Professor Jérôme Passa after the judgement of the Cour d'Appel de Paris (Paris Court of Appeal):

*(translated) "[...] press agencies cannot rely on, for their productions (dispatches, photos, videos, computer graphics), the related right established by Article 15 of Directive 2019/790 and Articles L. 218-1 et seq. of the Intellectual Property Code if these productions are the subject, not of an in-house or autonomous publication by the agencies themselves, but of a publication integrated into the press publications of press publishers.*

*In order to contest this and claim remuneration from the operators of online public communication services, such as Google, press agencies cannot rely solely on the decisions of the Autorité de la concurrence and the Paris Court of Appeal issued on 9 April and 8 October 2020 respectively or on the title itself of the law of 24 July 2019, because,*

*i) the existence, ownership and scope of the new related right depend exclusively on the legal provisions, as analysed above, and of course not on these decisions, which are in any case handed down under competition law, nor can they be inferred from the general title of French law without taking into account the details of its provisions,*

*ii) the two decisions do not distinguish, and do not even raise the question of the legal need to distinguish, between the respective situations of news agencies and press publishers, as distinguished above. As such, the decision of the Autorité de la concurrence always refers,*

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<sup>232</sup> Classification marks 88-89, 20/0085 F; classification marks 691-692, 20/0083 F.

<sup>233</sup> Classification marks 5,976, 969-970, 5,972-5,973, 975-976, 5,970-5,971 and 1,046, 20/0083 F.

<sup>234</sup> Classification marks VC 809-811 and VNC 4,817, 4,818 and 6,070, 20/0083 F.

<sup>235</sup> Classification mark 946, 20/0083 F.

<sup>236</sup> See, for example, classification mark 691; classification marks VC 809 and VNC 4 817, 20/0083 F.

<sup>237</sup> Classification mark 5,582, 20/0083 F.

including in its framework, to "press publishers and news agencies", as if they constituted a homogeneous whole that did not require any distinction".

263. This legal consultation produced by Google therefore concludes that (translated):

" [...] It is naturally without much rigour that, in its judgement of 8 October 2020, the Cour d'Appel de Paris (Paris Court of Appeal) indicated (§99) that "the law of 2019 is aimed at 'press publishers and news agencies', meaning that it is pointless to claim, as Google does, that the AFP cannot directly claim related rights, all the more so as a large majority of the AFP content reproduced by the search engine corresponds to images"; This last part of the formula is even less understandable, since, as we have seen, images cannot be qualified as "press publications"<sup>238</sup>.

264. While challenging the AFP and the FFAP's right to claim related rights over its content not integrated into their own press publications, on 8 July and 29 July 2020, Google sent the AFP two draft Term Sheets explicitly referring to related rights over the protected content. In these two draft Term Sheets, however, the remuneration of related rights is not precisely defined and is incorporated in a more comprehensive licence covering the production of news content by the AFP and made available to Google in the context of the Publisher Curated News programme, as explained in paragraph 95 above<sup>239</sup>.

### **3. THE BASIS OF THE REMUNERATION DUE BY GOOGLE FOR THE USE OF PROTECTED CONTENT ON ITS SERVICES**

265. The scope of the basis of the remuneration, based on "direct and indirect revenues" in accordance with Article L. 218-4 of the IPC, is clearly a major aspect of any discussions between Google and press publishers and news agencies.

266. In the course of the negotiations, Google took the position that, since it does not sell access to press publishers' content, there can be no direct revenue from the display of protected content. In particular, this position is expressed in a letter and a methodological note sent to the APIG on 11 June 2020<sup>240</sup>, and then in identical terms in a letter of 1 July 2020 to the SEPM<sup>241</sup>.

267. Subsequently, Google envisages a methodology for estimating the revenue attributable to protected content that consists of retaining the Google Ads revenue generated as a result of displaying at least one item of protected content in search results. This approach is detailed in Google's

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<sup>238</sup> Classification mark 5,582, 20/0083 F.

<sup>239</sup> Classification marks VC 95-97 and VNC 223-224; 20/0085 F; classification marks VC 116-119 and VNC 233-236, 20/0085 F; classification marks VC 792-794 and VNC 4 807-4 809, 20/0083 F; classification marks VC 815-818 and VNC 4 823-4 826, 20/0083 F.

<sup>240</sup> Classification marks VC 199 and VNC 358; classification marks VC 568 and VNC 4,648, 20/0083 F.

<sup>241</sup> Classification marks VC 680-681 and VNC 4,706-4, 20/0083 F.

methodological note communicated to the APIG<sup>242</sup> and the SEPM<sup>243</sup> on 4 August 2020. This position is also apparent from Google's letter to the AFP of 24 July 2020<sup>244</sup>.

268. As such, Google rules out the existence of revenues attributable to protected content appearing in its Google News and *Discover* services. To justify its position, Google simply states in its letters of 23 July and 11 August 2020 to the SEPM that it "*does not monetise*" Google News and *Discover* in France<sup>245</sup>. This is also the reason given by Google in a letter to justify the lack of communication of information concerning the use of APIG and SEPM content on these two services<sup>246</sup>.
269. Similarly, Google rules out the existence of revenues linked to mining user data collected when protected content is displayed on its various services, as well as the existence of indirect revenues resulting from improving the usability and attractiveness of its services. In this regard, Google states in its letter to the SEPM dated 11 August 2020 that user data is only collected on queries, not on the display of content in response to those queries. Google also disputes in the letter the existence of revenues related to improving the usability and attractiveness of its services, on the grounds that news queries represent less than 3 % of all queries on Google Search<sup>247</sup>.
270. It should also be noted that on 14 August 2020, a few days before the expiry of the negotiation period with the AFP, the APIG and the SEPM, Google proposed a new methodology for determining the value it derives from news publishers' protected content on its services, based in particular on the royalties granted to other content publishers, which are supposed, in Google's opinion, to reflect (translated) "*the total value that Google can derive from displaying the content in its results pages, including any conceivable indirect value*"<sup>248</sup>. Again, the estimate of the total value that Google derives from news content on its services is estimated in the light of the number of displays of protected content from press publishers and news agencies in the search engine, Google Search, and not on its other services.
271. Google's position on the estimate of direct and indirect revenues from protected content on its services was criticised by the APIG and the SEPM on various occasions during the negotiations.
272. With regard to the APIG, it should be noted that in its letter requesting to enter into negotiations, the APIG emphasises that (translated) "*all types of indirect revenues should be taken into consideration, such as those related to data mining for targeting advertising or similar purposes,*

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<sup>242</sup> Classification marks VC 272-275 and VNC 6,101-6,104; classification marks VC 763-766 and VNC 6,078-6,081, 20/0083 F.

<sup>243</sup> Classification marks VC 785-789 and VNC 6,064-6,068, 20/0083 F.

<sup>244</sup> Classification marks VC 809-811 and VNC 4,817, 4,818 and 6,070, 20/0083 F.

<sup>245</sup> Classification marks VC 92 and VNC 236, 20/0084 F; classification marks VC 775 and VNC 4,790, 20/0083 F; classification marks VC 904 and VNC 4,910, 20/0083 F.

<sup>246</sup> Classification marks VC 120 and VNC 262, 20/0084 F; classification marks VC 913 and VNC 4,919, 20/0083 F; classification marks VC 286 and VNC 430, 20/0083 F; classification marks VC 887 and VNC 4,898, 20/0083 F.

<sup>247</sup> Classification marks VC 904 and VNC 4,910; 20/0083 F.

<sup>248</sup> Classification marks VC 283 and VNC 6,106; classification marks VC 908-909 and VNC 6,088; classification marks VC 936-937 and VNC 6,092, 20/0083 F.

but also the intrinsic value of press publications, which allow Google to have access to quality content that is varied on the same theme, fresh (recent), relevant to users' immediate interests, particularly in terms of expertise, and very frequently renewed"<sup>249</sup>. Furthermore, the APIG disputed Google's position on at least four occasions:

- First, in a letter dated 30 June in response to Google's communication of 11 June 2020, the APIG disputes the fact that Google only takes into account revenue from Google Ads<sup>250</sup>.
- Second, and following Google's communication of 14 July 2020, the APIG sent a letter dated 20 July 2020, again disputing Google's method of calculating its revenue, which is only based on (translated) "*certain advertising revenue*."<sup>251</sup>
- Third, and following a new proposal from Google on 24 July 2020, the APIG again disputes, in an email dated 27 July 2020, Google's approach of not taking into account "*direct and indirect*"<sup>252</sup> operating revenues.
- Fourth, and following Google's communication of 4 August 2020, the APIG again notes in an email of 6 August 2020 that Google only retains "*a fraction of the revenue from certain Google activities (Google Ads)*"<sup>253</sup>.

273. The SEPM, for its part, disputed Google's position regarding the calculation of revenues derived from protected content on its services on at least two occasions:

- First, in response to Google's letters of 1 and 23 July 2020, the SEPM argues, in a letter of 29 July 2020<sup>254</sup>, that the criteria to be used in calculating the remuneration should include, among other things (translated), "*direct revenues (i.e., advertising revenues) and indirect revenues (i.e., revenues related to data and to improving the usability and attractiveness of its [Google's] services)*". The SEPM therefore considers that (translated) "*Google's proposal is formulated in direct violation of the law since it does not take into account all the revenues, direct and indirect, that Google derives from displaying the content of all press publishers on all its services*"<sup>255</sup>.
- Second, and in response to the new methodology proposed by Google in its email of 14 August 2020, the SEPM again criticises, in a letter dated 18 August 2020, Google's position that it would not "*derive any indirect revenue from displaying content from all of our members, contrary to the findings of the Autorité and the legislator*"<sup>256</sup>. The SEPM adds that this proposal

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<sup>249</sup> Classification marks 172-173; 551-552, 20/0083 F.

<sup>250</sup> Classification marks VC 633 and VNC 4,680, 20/0083 F.

<sup>251</sup> Classification marks 235 and 732, 20/0083 F.

<sup>252</sup> Classification marks 260 and 761, 20/0083 F.

<sup>253</sup> Classification marks 277 and 876, 20/0083 F.

<sup>254</sup> Classification marks VC 779 and VNC 4,794, 20/0083 F.

<sup>255</sup> Classification marks VC 781 and VNC 4,796, 20/0083 F.

<sup>256</sup> Classification marks VC 917 and VNC 4,923; 20/0083 F.

does not comply with French law, insofar as it is only formulated for publishers with IPG certification, and it is unconnected with the criteria set out in Article L. 218-4 of the IPC<sup>257</sup>.

#### **4. THE COMMUNICATION OF INFORMATION BY GOOGLE ON THE USE OF CONTENT PROTECTED BY ITS SERVICES AND NECESSARY FOR A TRANSPARENT EVALUATION OF THE REMUNERATION DUE FOR SUCH CONTENT**

##### **a) Spontaneous communication of information by Google**

274. In response to the questionnaire sent by the investigation services on 14 October 2020, Google indicated that it had spontaneously communicated information to each of the three complainants on 14 August 2020. This information relates to the number of views on *Discover* and Google News of press publications of (i) IPG-certified members of the relevant entity, (ii) all members of the relevant entity, and (iii) all IPG-certified publications, for the period from 9 June 2020 through 5 August 2020<sup>258</sup>.
275. Google clarifies that it also sent information to an entity on 28 July 2020 concerning Google Search advertising revenue relating to news-related searches and the number of views of that entity's news publications in response to news-related and non-news-related queries for the period 1 July 2019, through 30 June 2020<sup>259</sup>.
276. Finally, Google underlines the fact that (translated) "[...] *all data concerning the number of clicks by users on the websites of press publishers and news agencies following a redirection from Google Search are accessible free of charge and permanently to all sites listed on Google Search (including therefore the sites of press publishers and news agencies) via the Search Console tool*"<sup>260</sup>.

##### **b) The responses given by Google to the requests for information made by the complainants**

###### ***Google's position***

277. In its response to the questionnaire of the investigation services of 14 October 2020, Google states that (translated) "*As can be seen from this table, the various parties with whom Google spoke made a wide variety of requests, ranging from very extensive to very vague, some of which are unrelated to the negotiations that are the subject of the interim measures. In order to circumscribe these requests and provide them with a framework, Google therefore proposed to the publishers and agencies, given the limited negotiation deadlines that had been laid down in the decision of the Autorité, that they be included in the framework of a methodology to be agreed between the parties. In the interests of transparency and non-discrimination, Google has shared the same information*

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<sup>257</sup> Classification marks VC 917-918 and VNC 4,923-4; 20/0083 F.

<sup>258</sup> Classification marks VC 498 and VNC 4,461, 20/0083 F.

<sup>259</sup> Classification marks VC 498 and VNC 4,461, 20/0083 F.

<sup>260</sup> Classification mark 499, 20/0083 F.

with the APIG, the SEPM and the AFP, as well as with other publishers and agencies that have requested communication of the criteria applied by Google<sup>261</sup>.

***Requests for information made by the AFP***

278. During the negotiation period, the AFP requested the communication of information from Google on several occasions:
- On 17 April 2020, in its letter requesting that negotiations be opened, the AFP asked Google to provide it with (translated) "*any element that makes it possible to specifically evaluate the remuneration proposal made by Google to the AFP*"<sup>262</sup>. This request gave Google the possibility of defining the scope of the information communicated, as long as it provided the AFP with elements of understanding of the proposal that would be made.
  - On 11 June 2020, the AFP sent an email to Google in which it stated that it had not received any information to date, even though Google had promised to provide it with information by 10 June 2020. The AFP therefore reiterates its request for communication of the information provided for in the Law<sup>263</sup>.
  - On 13 July 2020, the AFP sent a letter to Google. In this letter, the AFP reiterates the progression of the negotiations up until that point, inter alia, the fact that requested figures had not been communicated by Google "*for many months*" according to the AFP (translated), "*and these were necessary to be able to engage in objective negotiations as required by law and the decision of the Autorité*"<sup>264</sup>.
  - On 16 August 2020, the AFP sent an email to Google criticising what it believes to be Google's refusal to provide the requested information concerning the value of its content<sup>265</sup>.
279. Following these various requests, Google communicated the following information to the AFP on 24 July 2020<sup>266</sup>:
- General information concerning Google's advertising revenue relating to news, namely the percentage of news-related queries and Google Search advertising revenue related to news searches in France in 2019.
  - Information on the display of IPG-certified content by news agencies on Google Search and an estimate of the resulting Google Ads revenue, as well as a note describing the calculation methodology<sup>267</sup>.

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<sup>261</sup> Classification mark 493, 20/0083 F.

<sup>262</sup> Classification mark 585, 20/0083 F; classification mark 64, 20/0085 F.

<sup>263</sup> Classification mark 688, 20/0083 F; classification mark 84, 20/0085 F.

<sup>264</sup> Classification marks 798-801, 20/0083 F; classification marks 101-104, 20/0085 F.

<sup>265</sup> Classification mark 943, 20/0083 F; classification mark 137, 20/0085 F.

<sup>266</sup> Classification marks VC 496 and VNC 4,459; classification marks VC 809-811 and VNC 4,817, 4,818 and 6,070, 20/0083 F.

<sup>267</sup> Classification marks VC 811 and VNC 6,070, 20/0083 F.

280. However, this information is not specific to the AFP and is identical to that communicated to the APIG and the SEPM (see below). As regards the note describing the calculation methodology, it is not accompanied by any sourced data, so that it is impossible to reproduce and assess the estimate of the Google Ads revenue made by Google.
281. In the same email, Google also provided the AFP with information on the number of times content from the website *afp.com* was displayed on Google Search in response to any type of query or in response to news queries. However, Google did not communicate any information concerning the uses it makes of AFP content when it is integrated into the press publications of third-party publishers.
282. Finally, on 14 August 2020, as indicated in paragraphs 116 et seq., a few days before the negotiation period expired, Google sent the AFP information concerning the number of views on the Google News and *Discover* services of (i) the publications on the website *afp.com* and (ii) all IPG-certified publications<sup>268</sup>.

### ***Requests for information made by the APIG***

283. During its negotiations with Google, the APIG made requests for information on various occasions:
- On 6 May 2020, in its letter opening the negotiations, the APIG requested that Google provide the data necessary to assess direct and indirect revenues, including traffic data, as well as financial information<sup>269</sup>.
  - On 8 June 2020, with no response from Google regarding its requests for information, the APIG reiterated by email its request for the communication of information requested on 6 May<sup>270</sup>.
- On 30 June 2020, the APIG sent Google a non-exhaustive list of information (see paragraph 142) that it believes are necessary for a transparent assessment of Google's remuneration for related rights<sup>271</sup>.
- On 1, 20 and 27 July, and 6 and 17 August 2020, the APIG reiterated its requests for the communication of information<sup>272</sup>. In particular, in its email of 17 August, the APIG informed Google that it considered the information Google had provided to date to be (translated) "*insufficient to determine the value on its own*". It therefore reiterated its requests and invited Google to send it (translated) "*all the information requested in [its] previous communications, starting with Google's revenue figures in France*".

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<sup>268</sup> Classification marks VC 871 and VNC 4,885; classification marks VC 940 and VNC 4,933, 20/0083 F.

<sup>269</sup> Classification marks 172-173 and 551-552; classification marks VC 494 and VNC 4,457, 20/0083 F.

<sup>270</sup> Classification marks 193-194; 564-565, 20/0083 F.

<sup>271</sup> Classification marks 214 and 634, 20/0083 F.

<sup>272</sup> Classification marks 226 and 644; VC 235-237 and 384-386; VC 732-734 and VNC 4,754-4,756; 260 and 761; 277; 876-877; VC 890 and VNC 6,074, 20/0083 F.

284. In response to these requests for information, Google indicated in its response to the investigation services' questionnaire of 14 October 2020 that it provided information to the APIG during a meeting on 29 May 2020, as well as in correspondence dated 11 June and 4 August 2020<sup>273</sup>.
285. With regard to the meeting of 29 May 2020, a review of the documents in the file shows that the APIG and Google have divergent positions on the information that appeared to have been communicated on that occasion. According to Google, at this meeting it communicated information concerning the proportion of news searches in France and the advertising revenue associated with these searches<sup>274</sup>.
286. The APIG, for its part, maintains that none of the requested information was communicated to it on that occasion<sup>275</sup>.
287. With regard to the letter of 11 June 2020, in addition to the information already communicated on 29 May according to Google, it contains information concerning the amount of Google Ads revenue in relation to queries displaying at least one news result on the first result page for all IPG content and for members of the APIG, as well as a note outlining the methodology used to make this calculation<sup>276</sup>.
288. However, the *Autorité* notes that this note is not accompanied by any source data, so that it is not possible for the APIG to reproduce and assess these calculations. Moreover, the methodology provided by Google targets protected content from IPG-certified publishers in general, not specifically members of the APIG<sup>277</sup>. The APIG is therefore not in a position to identify what, within Google's evaluation, is specific to its members.
289. With regard to the email of 4 August 2020, it contains a more detailed methodological note and presents, according to Google, the intermediate steps of the calculation of the value of press content communicated on 11 June 2020<sup>278</sup>. The new information communicated to the APIG in this note consists of:
- an estimate based on an analysis of 10% of Google Search traffic in France, over one day, of the number of displays including a result with IPG press content and the share of content less than 2 years old;
  - the breakdown of these displays according to their position and result pages;
  - the amount of Google Ads revenue associated with this protected IPG content according to their position on the results pages;
  - the same data for IPG-certified members of the APIG.

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<sup>273</sup> Classification marks VC 494 and VNC 4,457, 20/0083 F.

<sup>274</sup> Classification marks VC 199 and VNC 358; classification marks VC 568 and VNC 4,648, 20/0083 F.

<sup>275</sup> Classification marks VC 11 and VNC 334, 20/0083 F.

<sup>276</sup> Classification marks VC 198-201 and VNC 6,095, 358-360; classification marks VNC 567-570 and VNC 6,056, 4,648-4,650, 20/0083 F.

<sup>277</sup> Classification marks VC 202 and VNC 6,097; classification marks VC 571 and VNC 6,058, 20/0083 F.

<sup>278</sup> Classification marks VC 272-275 and VNC 6,101-6,104; classification marks VC 763-766 and VNC 6,078-6,081, 20/0083 F.

290. As such, most of the data communicated by Google to the APIG was provided on 4 August 2020, more than two months after the negotiations began, and only fourteen days before the expiry of the 3-month period provided for in Injunction 4.
291. Finally, on 14 August 2020, as noted in paragraphs 167 et seq. just days before the negotiation deadline, Google sent the APIG elements of information regarding the uses of its members' content within the *Discover* and Google News services<sup>279</sup>.

***Requests for information made by the SEPM***

292. During its negotiations with Google, the SEPM made requests for information on various occasions.
293. On 22 May 2020, in its letter requesting negotiations to be opened, the SEPM requested Google to provide certain information within 10 days for each of its members' websites, namely (translated):
- *"The number of displays of editorial content on each of Google's services [...] and across all media (mobile, tablet, computer), for each calendar month between 1 January 2019 and receipt of this letter";*
  - *"The number of visits (measured in the amount of "clicks") of these sites by internet users from each of the above-mentioned Google services [...] and across all media (mobile, tablet, computer), for each calendar month between 1 January 2019 and receipt of this letter";*
  - *"revenue of any kind, direct and indirect, earned by Google from displaying editorial content by members of the SEPM for (i) all of 2019 and (ii) each calendar month between 1 January 2019 and receipt of this letter."<sup>280</sup>*
294. The SEPM reiterated this request for the communication of information on several occasions, and in writing on 29 June, 6 July, 22 July, 29 July and 18 August 2020<sup>281</sup>. Until the expiry of the negotiation period, the SEPM was of the opinion that it had not received a satisfactory response from Google to these requests.
295. In response to these requests for information, Google indicated in its response to the investigation services questionnaire of 14 October 2020 that it provided information to the SEPM in correspondence dated 1 July and 23 July 2020, and in a note dated 4 August 2020<sup>282</sup>.
296. With regard to the letter of 1 July 2020, it contains information regarding the proportion of searches ranked by Google as "news searches" in France and the advertising revenue associated

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<sup>279</sup> Classification marks VC 286 and VNC 430; classification marks VC 887-888 and VNC 4,898-4,899, 20/0083 F.

<sup>280</sup> Classification marks 573-574, 20/0083 F; classification marks 43-45, 20/0084 F.

<sup>281</sup> Classification marks VC 664-665 and VNC 4,690-4,691, 20/0083 F; classification marks VC 61-62 and VNC 210-211, 20/0084 F; classification marks 768, 20/0083 F; classification mark 85, 20/0084 F; classification marks 770-771, 20/0083 F; classification marks 87-88, 20/0084 F; classification marks VC 778-783 and VNC 4,793-4,798, 20/0083 F; classification marks VC 916-919 and VNC 4,922-4,925, 20/0083 F.

<sup>282</sup> Classification marks VC 495 and VNC 4,458, 20/0083 F.

with these searches. However, these data are not specific to the SEPM and were communicated in the same way to the AFP and the APIG.

297. It also contains information concerning the amount of Google Ads revenue in relation to queries displaying at least one news result on the first result page for all IPG content and for members of the SEPM (all members or only IPG-certified members), as well as a note outlining the methodology used to make this calculation<sup>283</sup>. However, similar to the note sent to the APIG and the AFP, this note was not accompanied by any source data, so that it is not possible for the SEPM to reproduce and assess these calculations. Moreover, the methodology provided by Google pertains to protected content from IPG-certified publishers in general, not specifically members of the SEPM. The SEPM is therefore not in a position to identify what, within Google's evaluation, is specific to its members.
298. With regard to the letter of 23 July 2020, it contains additional data to the data communicated on 1 July and pertaining to<sup>284</sup>:
- the number of displays of SEPM content in Google Search in response to a query ranked by Google as a news query (and the proportion corresponding to IPG content);
  - the number of displays of SEPM content in Google Search in response to any query (and the proportion corresponding to IPG content).
299. With regard to the note of 4 August 2020, this is a more detailed version of the methodology note communicated by Google on 1 July<sup>285</sup>. The new information communicated to the SEPM in this note consists of:
- an estimate based on an analysis of 10% of Google Search traffic in France, over one day, of the number of displays including at least IPG press content and the share of displays pertaining to content less than 2 years old;
  - the breakdown of these displays according to their position on the results page and the number of the results pages;
  - the amount of Google Ads revenue associated with this protected IPG content according to their position on the results pages;
  - the same data by including (i) all SEPM members and (ii) only IPG-certified members.
300. It was therefore only on 4 August 2020, bearing in mind that the deadline for the negotiation period was 14 August, that Google communicated most of the data presented as pertaining to the Google Ads revenue it derives from the protected content of the SEPM in response to queries on Google Search.

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<sup>283</sup> Classification marks VC 680-686 and VNC 4,706, 4,707, 6,060, 4,709, 4,710, 6,062 and 4,712, 20/0083 F.

<sup>284</sup> Classification marks VC 773-776 and VNC 4,788-4,791, 20/0083 F; classification marks VC 90-93 and VNC 234-237, 20/0084 F.

<sup>285</sup> Classification marks VC 785-789 and VNC 6,064-6,068, 20/0083 F.

301. Finally, on 14 August 2020, as described in paragraphs 215 et seq., Google provided the SEPM with data pertaining to the number of views of SEPM members' press publications within the *Discover* and Google News services<sup>286</sup>.

## II. Assessment

### A. REMINDER OF THE APPLICABLE PRINCIPLES

#### 1. REMINDER OF THE DECISION-MAKING PRACTICE AND CASE LAW

302. When the *Autorité* issues injunctions to a party in the context of a decision on interim measures or sanctions, that party is required to comply formally with the terms of the injunction, while refraining from adopting strategies to circumvent the injunctions that would undermine their purpose. The same principles apply, *mutatis mutandis*, to parties which have given commitments made binding by a decision of the *Autorité* which has been adopted in view of anti-competitive practices or merger control.
303. In accordance with the established decision-making practice of the *Autorité* (translated), "*commitments, like injunctions, must be interpreted strictly*"<sup>287</sup>. In this respect, in Decision 20-D-07 of 7 April 2020<sup>288</sup>, the *Autorité* had occasion to clarify that an assessment of compliance with the injunctions is focused, initially and primarily, on formal compliance with the injunctions, the verification of which is distinct from a re-assessment of the injunctions in light of events occurring after the decision. The strict interpretation of injunctions in this respect is based on a rigorous analysis of the terms used in the wording of the injunction.
304. However, the principle of strict interpretation cannot have the effect of limiting the assessment of compliance with an injunction or a commitment to purely formal considerations. As such, the effect of the infringement on the competition, which the injunctions were intended to preserve will, where appropriate, be taken into account, if the parties have attempted to circumvent the injunctions, which has the effect of limiting the scope of the injunctions and producing the anticompetitive effects that the injunctions were intended to prevent. The effect of the infringement on competition

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<sup>286</sup> Classification marks VC 913-914 and VNC 4,919-4,920, 20/0083 F; classification marks VC 120 and VNC 262, 20/0084 F.

<sup>287</sup> Decisions 20-D-07 regarding compliance with the commitments contained in the decision of the *Autorité de la concurrence* n° 14-D-04 of 25 February 2014 regarding practices implemented in the online horse betting sector, paragraph 94, 15-D-02 dated 28 February 2015 concerning the compliance of the GIE "Les Indépendants" with the commitments made in *Conseil de la concurrence* decision 06-D-29 of 6 October 2006, paragraph 99, and 10-D-21 of 30 June 2010 on compliance by Neopost France and Satas with the commitments made in *Conseil de la concurrence* decision 05-D-49 of 25 July 2005, paragraph 69.

<sup>288</sup> Decision 20-D-07 regarding compliance with the commitments contained in the decision of the *Autorité de la concurrence* 14-D-04 of 25 February 2014 regarding practices implemented in the online horse betting sector, paragraph 96.

may also be taken into account in assessing the seriousness of the non-compliance. In this regard, formal compliance with the letter of an injunction may be regarded as non-compliant, if it turns out that parallel amendments result in the injunction being rendered wholly or partly meaningless.

305. The Cour d'Appel de Paris (Paris Court of Appeal) thus considered, with regard to compliance with injunctions obliging that clauses from a standard contract be deleted, that (translated) "*it was without exceeding its powers that the Conseil (de la concurrence) [...] verified whether the deleted clauses had not been replaced by other stipulations which, although worded differently, would have produced the same prohibited legal consequences*"<sup>289</sup>. With regard to commitments made pursuant to Article L. 430-5 of the French Commercial Code (Code de commerce), the French Administrative Supreme Court (Conseil d'État) ruled in the same vein that (translated): "*the Autorité de la concurrence is entitled to investigate whether, even if formal compliance with the criteria expressly provided for in a commitment that has not been rendered meaningless by the evolution of the market, the parties who made the commitment adopted measures or acted in a way that rendered the injunction meaningless and produced the anticompetitive effects that it was intended to prevent*"<sup>290</sup>.
306. Compliance with injunctions or commitments must therefore be assessed in the light of the reasons for the decision which justified their being imposed. Where the *Autorité* has to examine whether the company has taken measures which may constitute circumvention of the injunctions or commitments of such a nature as to limit their scope, it is necessary to examine them in the light of their purpose. With regard to proceedings for failing to comply with commitments, the Cour de cassation (French Supreme Court) ruled that (translated): "*(...) the observation of a failure to comply with commitments leads to a verification that they have been formally complied with, and then, where appropriate, whether there are no infringements regarding the competition concerns that gave rise to the commitments*"<sup>291</sup>.
307. Moreover, the modalities for implementing the injunctions laid down in the decisions of the *Autorité*, and in particular the deadline for their implementation, form an integral part of the injunctions. As a result, (translated) "*the late execution of an injunction may therefore be sanctioned under Article L. 464-3 of the French Commercial Code (Code de commerce)*"<sup>292</sup>. Only a reprieve ordered by the first president of the Cour d'Appel de Paris (Paris Court of Appeal) can suspend the enforceability of the decision. Unless such a reprieve is sought and obtained, it is not for the parties to decide when an injunction will be enforced<sup>293</sup>.

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<sup>289</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 21 February 2006, SEMUP, RG n° 2005/14774.

<sup>290</sup> Judgement of 21 December 2012, Groupe Canal Plus and Others, No 353856, paragraph 29.

<sup>291</sup> Judgement of the Cour de cassation (French Supreme Court) of 26 September 2018, No. T 16-25.403.

<sup>292</sup> Decision 04-D-47 of 12 October 2004 regarding the implementation of Decision 03-D-12 of 3 March 2003, paragraph 13. See also Decision 05-D-08 of 9 March 2005 regarding the implementation of Decision 02-D-36

of 14 June 2002 regarding practices identified in the optical glasses distribution sector, paragraph 16, and Decision 05-D-09 regarding the implementation of Decision 03-D-07 of 9 March 2003 on practices identified in the transfer of purchase markets for vertical road signs, paragraph 16.

<sup>293</sup> Decision 05-D-09 of 14 March 2005 regarding the implementation of Decision 03-D-07 of 9 March 2003 on practices identified in the transfer of purchase markets for vertical road signs, paragraphs 17 and 22.

308. Finally, a verification of the implementation of the decision must focus on whether the individual injunctions have been complied with, each of which is binding. The fact that certain injunctions have been partially complied with cannot therefore rule out full non-compliance being confirmed.

## 2. APPLICATION TO THE CASE AT HAND

309. Injunctions, such as the ones issued in this case, must necessarily be interpreted in light of the reasons why they were adopted, as set out in the Decision. In this case, the Injunctions imposed on Google constitute public order measures, taken at the end of proceedings for interim measures that identified practices that were likely to constitute an abuse of a dominant position within the meaning of Article L. 420-2 of the French Commercial Code (Code de commerce) and Article 102 of the TFEU, and for which the purpose is to intervene in an urgent situation, pending a decision on the merits.
310. The *Autorité*, and then the Cour d'Appel de Paris (Paris Court of Appeal), emphasised the immediacy of the damage caused by Google's practices that were identified in the Decision. This immediacy is due among other things to the urgent need to rebalance the balance of power between the various press publishers and the digital platforms, and justified the setting out in the Decision of an imperative negotiating framework adapted to the circumstances of the case.
311. The Decision reiterates that (paragraph 285) "*The expected speedy holding and completion of negotiations between platforms and news publishers and news agencies was also an objective that was emphasised by parliamentarians, as is apparent from the preparatory work for the Law*". Similarly, the Cour d'Appel de Paris (Paris Court of Appeal) emphasised that (paragraph 175 of the judgement of 8 October 2020) (translated) "*As a result, in the economic circumstances and legal context in which the practices are taking place, which were rightly taken into account by the Autorité, there is indeed an urgent need, as the contested decision held, to immediately rebalance the balance of power between the various market participants*".
312. It was in the light of these considerations and "*In line with the urgency of the situation in the press sector*" (paragraph 308 of the Decision) that the *Autorité* set a negotiation period of three months. As such, Google's compliance with the Injunctions must be assessed within the time frame that the Decision considered relevant in order to respond to the urgent situation in this case, and that the Cour d'Appel de Paris (Paris Court of Appeal) validated. Such analysis is the only guarantee of the effectiveness of a competition authority's actions, which depends, in particular, on its ability to act quickly, taking into account the economic time frame. In the present case, compliance with this time limit was, moreover, all the more important as the legislator had shown their willingness to act swiftly in implementing the related right, by transposing the Directive of 17 April 2019 within a short period.
313. It follows from the foregoing that in assessing whether Google complied with the Decision, the *Autorité* will mainly take into account Google's conduct during the negotiation period set out in the Decision, taking into account the decisions that have been taken to clarify the computation of time limits with regard to the COVID-19 crisis (see paragraphs 5 and 6). Any negotiations that may have been undertaken by Google after the three-month period set forth in the Injunctions shall be considered, except in specific circumstances justifying the exceeding of the three-month period, as delays in execution, which may constitute non-compliance with the Injunctions.
314. Finally, the *Autorité* will take into account all relevant factors occurring after the period during which the injunctions had to be implemented, insofar as they relate to the execution of the injunctions and make it possible to assess compliance with them.

## B. ASSESSMENT OF GOOGLE'S COMPLIANCE WITH THE INJUNCTIONS

315. Law No. 2019-775 - which transposes EU Directive 2019/790 of 17 April 2019 - created a related right to copyright for the benefit of press publishers and news agencies. The creation of this related right - which is a property right - was intended to enable the latter publishers and agencies to receive remuneration in return for the use of their protected content by the operators of Internet platforms. This right was introduced in order to rebalance the sharing of the value created by editorial content on these platforms, to the benefit of press publishers and news agencies.
316. Notwithstanding the entry into force of the Law on 24 October 2019, Google has, as of September 2019, unilaterally amended its display policy, by requiring press publishers to forego any form of financial remuneration for the reuse of their news content on Google's existing services, or risk a downgrade in the display of their news content on its online search services.
317. Under the terms of the Decision, the *Autorité* considered that the conditions for display imposed by Google allowed the latter to avoid any form of negotiation and remuneration for their reuse of protected content, of whatever nature, whereas the related rights created by the Law gave press publishers and news agencies the possibility of negotiating for the valuation of their content, according to the criteria laid down in the Law on related rights.
318. The *Autorité* was of the opinion that Google's implementation of the Law on Related Rights was likely to be qualified as an abuse of a dominant position and, pending a decision on the merits of the case, issued interim measures. These measures contained the primary obligation of negotiating in good faith on the modalities for the reuse and display of protected content, and on the associated remuneration.

### 1. ON COMPLIANCE WITH INJUNCTION 1

319. Injunction 1, which imposes on Google an obligation to negotiate in good faith, constitutes the core of the framework provided for by the Decision. The injunction directly tackles the practices by which Google ruled out, as soon as the Law of 2019 came into force, any negotiation with press publishers and news agencies, declaring that it was opposed to remuneration for protected content on principle. This Injunction must be interpreted in light of the reasons for the Decision, and in particular paragraph 304, which states that "*the implementation of this injunction must cover all Google services that reuse content protected by Law 2019-775, in particular its online search site Google Search. Once defined, the scope of the interim measures must make it possible to avoid any risk of circumvention of the measures by Google*".
320. With regard to the foregoing, Google was required by Injunction 1 to enter into good faith negotiations with press publishers and news agencies that so requested, with a view to formulating a financial proposal for the display of protected content on Google's existing services, and in particular for the reuse of excerpts of news articles and photos on its Google Search engine, or its extensions (Google News, Discover).
321. However, in the negotiations initiated by Google after the Decision, and despite the objections raised on several occasions by the press publishers and news agencies, Google unilaterally imposed discussions on a comprehensive partnership, called *Showcase*, which primarily came down to the offer of new services to the publishers.
322. It was only a few days before the end of the negotiation period with the complainants that Google agreed to address the issue of remuneration of related rights for current uses of protected content. Furthermore, although under the terms of the framework agreement concluded with the APIG on

12 February 2021, i.e. more than five months after the end of the period provided for in the Injunctions, the publishers may negotiate specific remuneration for the current use of their protected content on Google's services, it should be noted that, in return, they had to waive their participation in the *Showcase* programme, which has the effect of reducing their remuneration and exposure on Google, compared with competitors who do participate in it. The publishers therefore have a strong incentive to favour Google's offer of overall remuneration on current and new uses of Google's display of protected content.

323. Moreover, by relying on an interpretation of Article L. 218-4 of the IPC, which cannot be considered as being in good faith, even though this article is unambiguous, Google significantly reduced the scope of application of the law on related rights, by excluding the principle of remuneration for press content originating from titles that do not have "Political and General Information" (or "IPG") certification<sup>294</sup>, contrary to the provisions of the law, even though, according to its own evaluations, the revenues that Google derives from "non-IPG" content are greater than those that it derives from "IPG" content.
324. Moreover, Google denied news agencies the benefit of remuneration for their content reused by publishers, again in breach of the law, the decision of the *Autorité* and the judgement of the Cour d'Appel de Paris (Paris Court of Appeal).

**a) On the negotiation of a contract for an overall licence relating primarily to the Showcase service**

***On the redirecting of negotiations for related rights for current uses of protected content towards the new Showcase service***

325. The elements of the case show that Google refused to separately negotiate remuneration for related rights for the reuse of protected content on its existing services for almost the entire negotiation period laid down in the Decision. Google systematically redirected the negotiations towards the conclusion of a contract for a comprehensive licence, called PCN (Publisher Curated News), which is primarily designed to be a new service offered to the public based on the reuse of news articles, which Google refers to as *Showcase*, and which was previously not available on Google's portals.
326. The *Showcase* service introduces new obligations for publishers, who need to create, organise and complete a number of modules on a daily basis intended to provide press content for the service ("*daily briefing*", "*story cluster*" and other sections) which is intended to be displayed in its entirety on Google News, *Discover* and *Search*<sup>295</sup>. The draft framework contract sent by Google to the APIG on 24 July 2020 provides that the top ranked publishers in terms of audience must complete 5-7 modules per day, while smaller publishers have to undertake to completing 2 modules per

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<sup>294</sup> IPG certification is issued by the Commission paritaire des publications et agences de presse (Joint Commission for Publications and Press Agencies) ("CPPAP"), an independent body made up of equal numbers of representatives of the State administration and press professionals. The certification of online press services is based on articles 1 and 2 of the Decree of 29 October 2009, which states (translated): "*Online press services whose main purpose is to provide, on a permanent and continuous basis, information, analysis and commentary on local, national or international political and general news likely to enlighten the judgement of citizens, are of a political and general information nature. The information must be of interest beyond the concerns of any one category of reader. The editorial team must include at least one professional journalist, within the meaning of Article L. 7111-3 of the Labour Code (Code du travail)*" More information is available on the site: <http://www.cppap.fr/>.

<sup>295</sup> <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase>.

day<sup>296</sup>. Access to the *Showcase* programme also requires publishers to allow Google users to access paid news content on the publisher's site for free<sup>297</sup>, which requires significant development work within the titles to make these paid articles accessible only to users of Google's services.

327. The *Showcase* service is not unique to France. Its global launch was announced on 1 October 2020 by Google CEO Sundar Pichai, who stated that Google is investing \$1 billion in partnerships with news publishers to create and select high-quality content through this new product<sup>298</sup>. In particular, the *Showcase* service was announced in countries where legislation does not provide for related rights, for example Brazil in October 2020<sup>299</sup>.
328. The proposed contract for a comprehensive PCN licence issued by Google comprises a single royalty covering both current uses of protected content and new uses of news articles in the context of the new *Showcase* service (see paragraph 233 et seq. above). This offer of overall remuneration does not distinguish between the revenues attributable to the use of protected content - complete articles made available free of charge on the Google platforms - in the context of Google's new *Showcase* service and those attributable to the existing use of protected content in the form of excerpts from press publications.
329. As a result, press publishers and news agencies had no possibility to negotiate, if they so wished, the remuneration due just for the current uses of their respective protected content.
330. For example, in the presentation to the APIG on 3 June 2020, Google does not mention related rights in the calculation of remuneration, even though the APIG's request to enter into negotiations specifically referred to these rights (see above paragraph 132).
331. Another example of this conduct is illustrated by the draft contract communicated by Google to the APIG on 24 July 2020. In this contract, which covers both participation in *Showcase* and Google's other uses of protected content (including current uses), the modalities of calculating remuneration only envisage the visibility of a publisher's protected content within *Showcase*, and not Google's current uses of that protected content, as the only factor in the variability of the remuneration paid to a publisher. Nor do these modalities take into account the evolution of current uses of protected content over time, or even the emergence of new publishers whose protected content might be used by Google. In this regard, Article 6.4 of the draft contract states that:<sup>300</sup>

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<sup>296</sup> Classification mark 748, 20/0083 F.

<sup>297</sup> Classification mark 282, 20/0083 F.

<sup>298</sup> <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase>

<sup>299</sup> Google's press release on the launch of the *Showcase* service is available at: <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/>.

<sup>300</sup> "Individual Agreements, and the fees payable in Article 5, may vary if the Individual Agreement negotiated by a Publisher materially limits or changes Google's ability to offer a minimum level of product viability for Publisher-Curated News (acknowledging that any product requirements presented to a Publisher in an Individual Agreement will be the same for all similarly-situated Publishers). For the avoidance of doubt, this Framework Agreement does not obligate Google to enter in to an Individual Agreement, or pay fees, if an individual publisher and Google do not arrive at mutually-agreeable terms."

<sup>301</sup> Classification marks 250 and 750, 20/0083 F.

332. Such a clause introduces even more uncertainty for publishers as to the amount, if not the existence, of their remuneration for current uses of protected content, since the same contract also provides for a maximum remuneration for each of the APIG publishers with IPG certification for their online content<sup>302</sup>. In fact, the publishers have been placed in a situation where no real guarantee of remuneration, nor any clear information has been given to them by Google in terms of the remuneration agreed for the current use by Google of their protected content.
333. However, this position of Google was disputed very early on in the negotiations, and on several occasions, both by the AFP (at least five times, on 19 June, and 13, 20 and 30 July, and 22 August 2020), and by the APIG (at least three times, on 8 and 30 June, and 27 July 2020) and by the SEPM (at least three times, on 6 and 22 July, and 18 August 2020). Google cannot therefore rely on an agreement between these entities to justify its insistence on setting up a global partnership in which related rights for current uses would only be one component, and of which it would in any case be impossible to discuss separately.
334. It was only a few days before the end of the negotiation period that Google took into account the wishes of the APIG, the SEPM and the AFP to limit the discussions to current uses of protected content<sup>303</sup>.
335. Moreover, Google merely indicated in its proposal of 14 August 2020, an amount in absolute value identical to each of the entities concerned, supposedly corresponding to "*the maximum upper limit*" of such a licence for all "*IPG-certified*" content in France<sup>304</sup>.  
Google's proposal does not include any calculation element or estimate specific to the situation of the AFP, the APIG or the SEPM, despite their repeated requests. Moreover, the calculation presented only concerns data relating to *Search*, and does not take into account other Google services that include protected content.
336. Furthermore, the fact that the remuneration proposed by Google is based on comparisons with content such as the dictionary (which does not require recurring investment) or weather information, without any justification, illustrates Google's lack of credibility in making such an offer. The intrinsic value of a press publication must, in accordance with the terms and objectives of the Law, take into account the investments made to produce it (the use of journalists trained in the various press professions, the cost of obtaining information and of the means used to analyse and put it into perspective, etc.), its quality, its variety on the same theme, its timeliness and relevance to the immediate interests of users, and its updating.
337. The valuation of a press publication cannot therefore be compared to the valuation of dictionary content, which does not require recurring investments and only sporadic updates, which is out of all proportion to the stream of diverse information that publishers and press agencies produce at regular intervals, or even in real time. Nor does a comparison of the value of a print publication with that of a weather information service appear to be relevant, given the diversity of content handled by press publishers and news agencies, which requires significant resources for

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<sup>302</sup> Article 5.1 "Total Licence Fees" of the draft of 24 July 2020: "*Google will pay an annual licence fee for a total amount of up to [...]*", emphasis added. Classification marks VC 249 and VNC 398; VC 749 and VNC 4,771, 20/0083 F.

<sup>303</sup> Classification mark 282, 20/0083 F; classification mark 908, 20/0083 F; classification marks VC 908-909 and VNC 6,088, 20/0083 F; classification marks VC 936-937 and VNC 6,092, 20/0083 F.

<sup>304</sup> Classification marks VC 948-949 and VNC 4,941-4,942, 20/0083 F; classification marks VC 907, 908-910 and VNC 6,086, 6,088-6 089, 20/0083 F; classification marks VC 907, 908-910 and VNC 6,086, 6,088-6,089, 20/0083 F; classification marks VC 282-284 and VNC 426, 6,106-6,107, 20/0083 F.

information gathering and analysis. Producing this content may therefore require particularly expensive resources for following certain news items, such as international news, which may require the mobilisation of press correspondents (monitoring of news from foreign countries, monitoring of international sports competitions, coverage of international summits) or missions and travel abroad. Finally, preparing given content may involve significant risks for journalists (e.g.: monitoring conflicts or natural disasters).

338. In these circumstances, it must be considered that Google's proposal, apart from being particularly late, could not be regarded as a proposal in good faith, nor could it constitute a credible basis for entering into negotiations with the entities concerned on the remuneration due in respect of current uses of protected content.
339. Furthermore, it can be highlighted that the inseparable link made by Google between the remuneration due for current uses of protected content and the remuneration for the *Showcase* offer continued during subsequent bilateral negotiations (see paragraphs 231 to 234), and that other publishers objected to this. For example, the Groupement des Éditeurs de Services en Ligne (hereinafter "GESTE") states that (translated) "*given the feedback [from its members], it does not seem possible to have a discussion on related rights without it being linked to News Showcase. Moreover, it is not certain that related rights are specifically remunerated in the contracts concluded for subscriptions to News Showcase - or at least precisely identified within the remuneration mechanism set up by Google in its new product*"<sup>305</sup>. Similarly, Groupe Amaury/L'Équipe considers that (translated) "*the fact of placing the negotiation and remuneration of related rights in the context of the launch of a new product, and therefore an imposed tied negotiation, raises several competition concerns, particularly for a publisher such as Groupe Amaury/L'Équipe*"<sup>306</sup>.
340. Furthermore, in the negotiations with the APIG that took place during the autumn of 2020, and until the agreement was reached in February 2021, Google maintained its position and rejected any changes in this regard. For example, in an internal email of the APIG dated 7 January 2021, communicated by the APIG to substantiate its complaint, it can be seen that Google refuses to limit the licence to its current services and uses<sup>307</sup>. In a memo to the board of directors of the APIG regarding the agreement of January 2021, it is explained that the remuneration for related rights is (translated) "*included in the overall remuneration amount,*" reflecting the fact that Google continues to link remuneration under *Showcase* with other uses of protected content, if such remuneration exists at all<sup>308</sup>.
341. Furthermore, although under the terms of the framework agreement ultimately concluded with the APIG on 12 February 2021, i.e. more than five months after the end of the period provided for in the Injunctions, publishers may negotiate specific remuneration for the reuse of their protected content on Google's services, in return, they had to waive their participation in the *Showcase* programme. In effect, they give up both the corresponding remuneration and exposure on Google compared to participating competitors, and the possible benefit of collective negotiation. The publishers therefore have a strong incentive to favour Google's offer of overall remuneration on current and new uses of Google's display of protected content.

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<sup>305</sup> Classification mark 155, 20/0083 F.

<sup>306</sup> Classification mark 5,591, 20/0083 F.

<sup>307</sup> Classification marks VC 6,163-6,166 and VNC 6,294-6,297, 20/0083 F.

<sup>308</sup> Classification marks VC 6,156-6,158 and VNC 6,287-6,289, 20/0083 F.

342. It follows from the foregoing that, from the start of the negotiations with the press publishers and news agencies who lodged the complaints, Google systematically made a link to the subscription of obligations relating to participation in the *Showcase* service and refused to limit the discussion to the negotiation of related rights in respect of the current uses of protected content, or to isolate them within that discussion. On 14 August, just four days before the expiry of the negotiation period with the AFP and the APIG and ten days before the expiry of the negotiation period with the SEPM, Google agreed, for some of the negotiating publishers, to formulate a proposal for remuneration for related rights that would cover only the current use of protected content. However, this proposal cannot be regarded as being in compliance with the obligation of negotiating in good faith on related rights, given its manifest lack of clarity regarding the conditions for calculating remuneration, and the completely irrelevant equating, in view of their intrinsic nature, of the protected content of press publishers and news agencies with categories of content such as the dictionary and the weather.
343. In these circumstances, Google's conduct during the three-month negotiation period provided for in the Injunctions, which continued during the period thereafter, of systematically making negotiations on the remuneration payable for current uses of protected content conditional on the supply of new services and new content by press publishers and news agencies to provide content to its new *Showcase* service, does not appear to be in keeping with the spirit and the letter of Injunction 1, which urged Google to negotiate, in good faith, the remuneration payable to press publishers and news agencies for any reuse of protected content.
344. In these circumstances, Google cannot claim to have complied with Injunction 1 when the negotiations that it intended to conduct with press publishers systematically, and almost exclusively, pertained to *Showcase* and not the remuneration payable to publishers for the uses that it currently makes of protected content.

***On the method of valuation of related rights pertaining to the current use of press content***

*On the impossibility for press publishers and press agencies to verify the amount, or even the existence, of remuneration for current uses of protected content*

345. The contractual arrangement put in place by Google, whereby the remuneration for current uses of content is linked to the remuneration for participation in *Showcase*, did not allow press publishers and news agencies to verify the amount, or even the very existence, of the remuneration for uses of protected content on Google's existing services at the time the Law was adopted, even though this was at the heart of the legislator's concerns and the *Autorité's* concerns in its Decision.
346. However, Google repeatedly suggested that remuneration for current uses of press content on its services is likely to be insignificant or even non-existent, thereby making the discussions on the current uses of press content ancillary to the discussions on the new *Showcase* partnership.
347. In its exchanges with the SEPM, Google writes in a letter dated 1 July 2020 that (translated) "*The reason Google has proposed a scope of the license that exceeds Google's current use of news content ... is because a monetary offer that is based solely on the revenue Google derives from current use of such content and the value that such use provides your members would not allow Google to offer meaningful payments to IPG-certified members of the SEPM*"<sup>309</sup>. In a letter dated 23 July 2020, Google once again argued that the current uses of protected content do not justify

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<sup>309</sup> Classification marks VC 90-93 and VNC 234-237, 20/0084 F; classification marks VC 773-776 and VNC 4,788-4,791, 20/0083 F.

significant remuneration<sup>310</sup>. In its letter of 11 June 2020 sent to the APIG, Google therefore claims that a negotiation limited to the current uses of press content would be likely to significantly reduce the remuneration of publishers<sup>311</sup>.

348. The APIG states that the amounts proposed by Google during the three-month negotiations provided for in the Injunctions are within a range comparable to the amounts proposed by Google in February 2020, even though at that time Google was ostensibly opposed to the very principle of remuneration of related rights for current uses of protected content on its existing services, arguing among other things that it was Google that was providing value to press publishers, not the other way around<sup>312</sup>.
349. This situation appears to confirm the existence of a remuneration budget envisaged only for the *Google News Showcase* programme for France (and of a budget fixed, more generally, for the world press according to the announcement made on 1 October 2020 by Google's CEO, Sundar Pichai, on the Google blog<sup>313</sup>) which Google did not change between the presentation of its programme to various publishers at the beginning of 2020, when it was contesting the principle of the related right, and the period of negotiations undertaken in the context of the implementation of the Injunctions. In this respect, the APIG states that (translated) "*During informal oral discussions with the main French press publishers, Google mentioned a budget of between [confidential] dollars envisaged for all publishers of the political and general information press ("IPG") in France if they agreed to sign up to this partnership*"<sup>314</sup>. Furthermore, the data presented by Google to back up the amount of this financial budget remains insufficient to allow press publishers and news agencies to understand and discuss the remuneration proposal made to them (see below regarding compliance with Injunction 2). This is corroborated by the statements of the representative of the newspaper L'Express, who indicated during their hearing (translated): "*Google has not provided us with any formulas or data to back up its proposal. Google has told us that it has a global budget for publishers in the context of Publisher Curated News for France nationwide*"<sup>315</sup>. It should be noted that this concept of "budget" was also used by the GESTE<sup>316</sup>.
350. Finally, it appears that these practices continued in the context of the bilateral negotiations entered into by Google with press publishers, after the three-month period set by the Injunctions. For example, according to several publishers, the individual financial amounts agreed to by Google for their participation in the *Showcase* programme in the context of the PCN contract were not negotiated. Le Figaro states that (translated) "*The comprehensive licence is the one that was*

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<sup>310</sup> Classification marks VC 90-91 and VNC 234-235, 20/0084 F; classification marks VC 773-774 and VNC 4,788-4,789, 20/0083 F.

<sup>311</sup> Classification marks VC 200 and VNC 359; classification marks VC 569 and VNC 4,649, 20/0083 F.

<sup>312</sup> Classification marks VC 24 and VNC 347, 20/0083 F.

<sup>313</sup> Google has announced that it is investing \$1 billion in partnerships with news publishers to create and select high-quality content through its new *Google News Showcase* product, which is made up of news panels that will appear initially in *Google News* on Android, and then on iOS, as well as in *Google Discover* and *Search* in the future. Blog available at: <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase>

<sup>314</sup> Classification marks VC 9 and VNC 332, 20/0083 F.

<sup>315</sup> Classification marks VC 2,178 and VNC 3,428, 20/0083 F.

<sup>316</sup> Classification mark 155, 20/0083 F.

proposed by Google in the last discussions with the APIG. We did not negotiate the amount: it is no more and no less than what was in Google's last proposal to the APIG"<sup>317</sup>. Similarly, Le Monde states that (translated) "The negotiations did not pertain to remuneration, since this corresponds, to my knowledge, to the elements shared with the APIG, and no doubt with the *Autorité de la concurrence*"<sup>318</sup>. During its hearing, Libération stated that (translated) "We did not negotiate the remuneration for the Showcase component. The Showcase agreement includes a comprehensive licence for Google's use of all content produced by Libération"<sup>319</sup>.

351. Furthermore, it should be noted that these practices took place in a context of very strong growth in Google's financial performance. Indeed, Alphabet's (Google's parent company) earnings release of 27 April 2021 for the period January-March 2021 shows a 34% increase in revenue and 163% increase in net income. In this regard, its CEO Sundar Pichai underlined the fact that "*Over the last year, people have turned to Google Search and many online services to stay informed, connected and entertained*" [emphasis added]<sup>320</sup>. However, since the remuneration proposed by online public communication services is "based on the revenues of all kinds, direct or indirect (...)", it must reflect the evolution of Google's results, all the more so when, as the CEO of Google himself points out, information searches were an essential driver of consultation of Google's services during the year 2020.
352. It can be seen from the above elements that the remuneration proposed by Google during the negotiation period covered by the Injunctions was essentially for the implementation of the new *Showcase service*, with little or no value being placed on the display of protected content on Google's existing services, despite the fact that Google's revenues had risen sharply, in particular thanks to the display of news content.

*On the partial inclusion of the indirect revenues derived by Google from displaying protected press content*

353. In a note sent to the *Autorité* on 12 June 2020, Google indicated that the only revenues that can be associated with Google's use of protected content are the advertising revenues that Google generates on pages where such content appears<sup>321</sup>.
354. This method of valuing protected content, proposed by Google in its exchanges with the APIG, the SEPM and the AFP, appears to be particularly simplistic and inconsistent with the positions expressed by the legislator, the *Autorité* and then the Cour d'Appel de Paris (Paris Court of Appeal).
355. Indeed, Article L. 218-4 of the Law stipulates that (translated) "*The remuneration due in respect of related rights for the reproduction and communication to the public of press publications in digital form shall be based on the revenue from exploitation of any kind, whether direct or indirect*" (emphasis added)
356. By relying on a highly restrictive interpretation of the notion of revenue derived from the display of press content, only taking into account, as part of this basis, the advertising revenue (*Google Ads*)

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<sup>317</sup> Classification mark 3,368, 20/0083 F.

<sup>318</sup> Classification mark 2,173, 20/0083 F.

<sup>319</sup> Classification marks VC 2,166 and VNC 2,428, 20/0083 F.

<sup>320</sup> [https://abc.xyz/investor/static/pdf/2021Q1\\_alphabet\\_earnings\\_release.pdf?cache=0cd3d78](https://abc.xyz/investor/static/pdf/2021Q1_alphabet_earnings_release.pdf?cache=0cd3d78).

<sup>321</sup> See paragraph 18 of Google's note, VC 528, 20/0083 F.

of the *Google Search* pages on which protected content is displayed, Google excludes taking into account any other form of indirect revenue generated by the presence of protected content on *Google Search*, or on other Google services such as *Google News* or *Discover*.

357. However, it is undeniable that Google earns other forms of indirect revenue from displaying protected content on its services. Displaying diversified and attractive press content on its various services allows Google to encourage users to visit these services regularly and remain in Google's environment for longer than would be the case without such content. In so doing, Google both increases the amount of data it collects and improves its ability to deliver targeted advertising, and increases the likelihood that the user will access paid sponsored links on its online search site.
358. These two ways of creating indirect value for Google were clearly identified by the *Autorité* in paragraph 210 of the Decision, which states that: "*there is a clear economic interest for Google and indirect revenues that are derived from the reuse and display of protected content. This type of display is indeed attractive for users insofar as it improves the quality and viewing experience of the search page. Statements made by Microsoft at the hearing testify to this advantage derived from the display of content belonging to publishers and news agencies (classification mark 2398). It is therefore in the interest of a search engine to develop this type of display in order to attract or retain users of its services. The attractiveness of this content can play a role both in triggering a search (which may be motivated by news content and then branch off towards another type of search) and in the time spent on the search engine and the personal data derived from the search. Microsoft also explains that this display is likely to keep users in the search engine environment and, potentially, redirect them to a sponsored link that generates revenue for the search engine. These statements were not challenged by Google during the investigation*" (emphasis added).
359. The Cour d'Appel de Paris (Paris Court of Appeal) upheld<sup>322</sup> these observations and insisted on the existence of revenues indirectly generated by Google, due to the enhanced attractiveness of its services (emphasis added):

*(translated) "Moreover, as the Autorité rightly noted in paragraphs 209 et seq. of its decision, Google, contrary to what it asserts in its submissions, derives a clear economic benefit from displaying these press publications, on account of:*

- *on the one hand, the direct advertising revenues that it earns thanks to the advertisements that are displayed with the search results, even if there are not many when the search is on a topical theme, and those that it earns as an online advertising intermediary, in respect of the targeted ads that it generates on the publisher's site to which the user of the search engine is redirected; and for which it earns a commission;*
- *on the other hand, and above all, the attractiveness conferred to its search engine by displaying content, an attractiveness that can play a role both in initiating a search and in the time spent by the user on the search engine and the personal data derived from it.*

*While this attractiveness also indirectly benefits the press publishers, it represents a major interest for Google, given that the collection of its users' personal data is one of the two pillars of its business model".*

360. Finally, it should be noted that in 2008, Google itself acknowledged that its "Google News" service<sup>323</sup>, although not monetised directly through advertising, could be valorised and generates

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<sup>322</sup> Judgement of 8 October 2020, No. 20/08071, paragraphs 105 and 106.

<sup>323</sup> Classification mark 148, 20/0084 F.

profits in terms of increased use of the Google platform, which is evidence of indirect revenues from this service.

361. The *Autorité* further notes that by enhancing the attractiveness of its online search site by displaying protected content, Google is in fact reinforcing the existing indirect network effects between the use of the general search engine and search-related advertising services. As more users provide data, the quality of Google's advertising services improves, and Google is able to grow its advertising revenues.
362. In its comments to the report (paragraph 181)<sup>324</sup>, Google acknowledges, moreover, for the first time, the existence of indirect revenues generated thanks to data collection and the enhanced attractiveness of its online search engine due to the display of protected content. However, it believes that there is no reliable way of calculating these indirect revenues, and that the proposal it made to publishers is also based on a flat-rate rationale - provided for by the Law - and goes beyond the strict revenues of the pages on which protected content is displayed.
363. Nonetheless, this argument demonstrates a complete reversal of the position previously adopted, both in exchanges with press publishers and news agencies and with the services of the *Autorité*, since Google had previously indicated that indirect revenues should not be taken into account, since they did not exist.
364. The documents in the file also show that during the negotiations, Google restricted the scope of the revenue taken into account, by limiting it to advertising revenue generated on the pages of its *Search* service on which the news content appears<sup>325</sup>. There is nothing in the file to support the idea that Google would have taken into account revenue from *Discover* and Google News, as it now claims. In this respect, Google explicitly rules out, in its letter of 12 June 2020, the hypothesis that press content would contribute to advertising revenues for pages on which this content is not displayed<sup>326</sup>.
365. Such an assertion contradicts both paragraph 210 of the Decision and Google's past statements on this issue. Indeed, as explained in paragraph 360, Google had previously stated that its Google News service provided value to the company, even though no ads were displayed on that service. Google could not therefore dispute the existence of indirect revenues generated by displaying content from the increased use of its services and refuse to take them into account in constructing its remuneration offer in its negotiations with press publishers and news agencies. In conclusion, the method used by Google to value the display of press content on its existing services completely excludes the forms of indirect revenue highlighted in the Decision. It does not therefore appear to comply with either the Law or the Decision, confirmed on this point by the judgement of the Cour d'Appel de Paris (Paris Court of Appeal).

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<sup>324</sup> Classification marks VC 6,743, VNC 7,372 and 7,373, 20/0083 F.

<sup>325</sup> Classification marks 199 and 286, 20/0083 F.

<sup>326</sup> See paragraphs 18 and 19 of Google's note, classification mark VC 528, 20/0083 F.

*On the retroactive non-consideration of the period starting from the entry into force of Law No. 2019-775, i.e. 24 October 2019*

366. Under the terms of Injunction 1, the negotiations to determine the remuneration payable by Google to press publishers and news agencies for any reuse of protected content on its services had to "cover the period of content reuse since 24 October 2019".
367. In its response to the investigation service's questionnaire of 14 October 2020, Google indicated that all of its offers retroactively covered the period that started from 24 October 2019<sup>327</sup>.
368. However, no information provided by Google makes it possible to identify how this period was taken into account, nor its impact on the financial proposals. With regard to the discussions with the AFP, it is not clear from the calculations presented how this period has been determined. With regard to the discussions with the APIG and the SEPM, the amounts indicated are on an annual basis, with no explanation of how the period prior to the conclusion of the agreement is taken into account. As such, the draft contract submitted by Google to the APIG on 24 July 2020 does provide that the first year begins on 24 October 2019 and ends one calendar year from the date of signing<sup>328</sup>. However, by proposing a fixed annual amount, it does not make it possible to fathom, and therefore negotiate, the amount for the retroactive period<sup>329</sup>.
369. It can also be noted that these practices continued during the bilateral negotiations with the press publishers interviewed by the investigation services, until after the deadline for implementation of the Injunction. There is therefore no evidence in the file, either from Google or from the press publishers concerned, to identify or fathom the portion of the remuneration relating to the reuse of protected content by Google since 24 October 2019. Le Figaro states that (translated) "*As regards retroactivity, there is a clause in the contract that specifies that the remuneration covers the use of content since the law came into force, but we have not discussed this. We focused on an annual amount*"<sup>330</sup>. When questioned on this point, Google did not provide any information on how this period was taken into account in individual contracts<sup>331</sup>.
370. Nevertheless, it should be noted that the framework agreement, concluded on 12 February 2021 with the APIG, is accompanied by a settlement agreement, concluded on the same day, which provides for financial compensation to be paid by Google, inter alia, for the use of protected content on all of Google's services for the period prior to the signing of individual licence agreements with publishers who are members of the APIG. In its note to the board of directors of 12 January 2021, the APIG therefore specifies that (translated) "*Google has also agreed that the framework agreement will refer to the settlement to resolve any claims on the enforcement of related rights for the full term of the contract (including the past period)*"<sup>332</sup>. While this approach appears to be consistent with the principle that the negotiation should cover the period during which the content was reused from 24 October 2019, it also reflects, *a contrario*, the fact that the contracts

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<sup>327</sup> Classification marks VC 490-492 and VNC 4,453-4, 20/0083 F.

<sup>328</sup> Classification marks VC 249 and VNC 398; classification marks VC 749 and VNC 4,771, 20/0083 F.

<sup>329</sup> Classification marks VC 244-245 and VNC 393-394; classification marks VC 742-744 and VNC 4 764-4 766, 20/0083 F.

<sup>330</sup> Classification mark 3,369, 20/0083 F.

<sup>331</sup> Classification marks VC 3,966 and VNC 5,208, 20/0083 F.

<sup>332</sup> Classification marks VC 6,157 and VNC 6,288, 20/0083 F.

previously negotiated did not take into account the period of use from 24 October 2019, as required by the Decision.

*On the justifications put forward by Google*

371. To justify the compliance of the contract for the comprehensive PCN licence with Injunction 1, Google argues that its proposal to implement the *Showcase* programme was a way to maximise the chances of reaching an agreement, by proposing a wider scope of licence with an associated remuneration, without excluding the possibility of negotiating licences with a narrower scope with a lower offer. To back up its position, Google makes four arguments:
- (i) the reuse of a press publication in its entirety (or to an extent that goes beyond mere excerpts) by an online platform falls within the scope of the Law: the PCN contract is intended to remunerate related rights<sup>333</sup>;
  - (ii) Google's offers are intended to remunerate current uses (excerpts) as well as new uses of content (proposed in the context of *Showcase*)<sup>334</sup>;
  - (iii) nothing in the Decision, and in particular Injunction 1, requires Google to issue an offer that specifically identifies the remuneration offered for just the current use of excerpts of protected content on Google's services<sup>335</sup>; and
  - (iv) Google has never, in practice, excluded from the negotiations the possibility of an agreement applicable only to current uses of excerpts of protected content<sup>336</sup>.
372. These arguments are not convincing, for the following reasons.
373. The main point is that the Law allows press publishers and news agencies to grant permission for the reproduction of their protected content. Under these conditions, and even if it cannot be excluded that an online public communication service proposes reusing content other than that initially envisaged by the press publisher or the news agency, a negotiation in good faith would have required, on the part of Google, to discuss at the very least the scope requested on multiple occasions by the latter, i.e. that relating to current uses of protected content, which it is recalled was the only one in existence at the time the Law was adopted. The request by the publishers and the AFP to negotiate on this issue appeared all the more legitimate in that it was precisely these uses that justified the adoption of the Law and the Decision. By requesting a negotiation on the current uses of related rights, the press publishers and press agencies were therefore in a framework consistent with that of the Decision, which also allowed them to analyse the relevance and adequacy of any remuneration proposal submitted to them. Moreover, there is no doubt that Injunction 1 was aimed primarily at content reused in the context of current uses, since Injunction 1 referred to uses as of the entry into force of the Law, i.e., necessarily to uses that existed on that date.
374. The *Autorité* does not dispute the fact that the content included in the *Showcase* service may also be content protected by related rights. On the other hand, Google cannot argue that it would not be opposed to negotiations relating solely to its current uses of protected content. Indeed, while the

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<sup>333</sup> Google's observations, paragraphs 70 to 73.

<sup>334</sup> Google's observations, paragraphs 74 to 76.

<sup>335</sup> Google's observations, paragraphs 77 to 78.

<sup>336</sup> Google's observations, paragraphs 79 to 80.

publishers and the AFP repeatedly expressed their wish to focus solely on current uses of protected content, Google's first proposal for remuneration for current uses dates from 14 August 2020, i.e., just a few days before the expiry of the three-month negotiation period provided for by Injunction 4. Google can all the less plead a lack of understanding as to the scope of the Injunction since the difficulty at issue was identified even before the intervention of the Decision of the *Autorité*, as the Cour d'Appel (Court of Appeal) had, moreover, noted in its judgement of 8 October 2020, which stated (translated): "*Google cannot seriously claim not to be opposed to any negotiation and, moreover, to have agreed to enter into negotiations, when the negotiations in question, opened after the complaint lodged with the Autorité, do not concern the display of excerpts of press articles or press photographs but the reuse of complete press articles in the context of the development of other Google services*"<sup>337</sup>. Furthermore, as indicated above, the evidence in the file demonstrate that Google's first (late) proposal for remuneration for current uses does not otherwise constitute a credible basis for discussion, given the categories of content which Google states it relied upon in drawing up the said proposal (see paragraphs 336 et seq. above).

375. Finally, the fact that the framework contract of the APIG provides for the possibility of reaching an agreement on just the current use of protected content is irrelevant, since that agreement was reached after the period covered by Injunction 4 and, moreover, the discussion at issue refers to an agreement concluded bilaterally.

376. Furthermore, the framework contract with the APIG does not, in any event, allow a publisher who wishes to participate in the *Showcase* programme to earn separate remuneration for the display of its protected content on Google's existing services. Under the terms of this framework contract, publishers are faced with an unsatisfactory alternative with regard to Injunction 1, which consists of:

- either agreeing to participate in the *Showcase* programme, thereby waiving any specific remuneration associated with the current use of its protected content on existing Google services;
- or negotiating specific remuneration for the current use of its protected content on Google's existing services, and opt out of the *Showcase* programme and its associated remuneration.

377. The justifications put forward by Google therefore appear to be unfounded.

#### **b) On Google's refusal to negotiate with press publishers who do not have IPG certification**

378. The evidence in the file shows that Google, in its negotiations with the press publishers pursuant to the Injunctions, systematically ruled out the principle of remuneration for press content from titles that do not have IPG certification. With regard to the negotiations with the SEPM and the APIG, Google's position on this issue was outlined in paragraphs 255 et seq. above.

379. Google maintains that the IPG certification required for any negotiation on related rights constitutes a transparent, objective and non-discriminatory criterion, in full compliance with the provisions of Article L. 218-4 of the IPC relating to the methods for calculating the remuneration due to press publishers and news agencies. Indeed, among the criteria that may be taken into account, the latter article refers to the contribution to general and political information.

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<sup>337</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, cited above, paragraph 102.

380. In support of its position, Google also invokes the fact that the Decision does not require it to purchase "all content" and that it is therefore justified in refusing to remunerate the content of publishers who do not have such IPG certification, even if such non-IPG content is protected by related rights.
381. With regard to non-IPG content, Google believes that it has no interest in reusing such content if it is not free, and specifies in this respect that it has not refused to negotiate with non-IPG publishers, but that it has made them an offer of zero remuneration<sup>338</sup>.
382. However, while it is clear that the injunction mechanism gives Google the option of not purchasing certain content, or of negotiating a zero price in the event that the criteria set by the Law do not justify the payment of remuneration, it must be noted that Google's conduct with regard to the non-IPG press equates to unjustified discrimination between non-IPG press publishers and IPG press publishers, for the following reasons:
383. Firstly, although the Law takes into account the contribution of press publications to political and general information, it does not make IPG certification a necessary condition for benefiting from the rights it establishes, which include both the right of authorisation and the right to remuneration.
384. As such, by listing, non-exhaustively, certain relevant factors that must be taken into account in setting remuneration, the Law explicitly provides that the contribution to the IPG cannot be the sole criterion for remuneration, and opens the possibility to individual handling of remuneration, and not general and undifferentiated as Google does.
385. In effect, the second paragraph of Article L. 218-4 of the IPC provides that (translated) "*Setting the amount of this remuneration shall take into account elements such as the human, material and financial investments made by press publishers and news agencies, the contribution of press publications to political and general information, and the extent to which press publications are used by online public communication services*". On this point, a reading of the parliamentary proceedings confirms without ambiguity what is clearly stated in the Law. The desire of the legislator to include all press families - and not only the press that supplies political and general information - in the remuneration mechanism, was expressed on several occasions during the debates, particularly by the rapporteurs of the text in the Senate and the National Assembly (Assemblée nationale) As such, in the second reading in the Senate, a first amendment was introduced by the Commission for Culture, Education and Communication to supplement the provisions at issue in Article L. 218-4 of the IPC with the adverb "*notamment*" ("in particular") (meeting of the Commission of 19 June 2019). This article was again amended, and then adopted, at the public session by the Senate, replacing this wording with the words "*tels que*" ("such as") in order to relativise the criterion of "the contribution of press publications to political and general information" and thus to include all press families in the scope of the Law, thereby confirming the non-cumulative and non-exhaustive nature of the criteria (examination in public session on 3 July 2019).
386. Ultimately, it appears that Google's conduct during the negotiation period, but also during the period thereafter, in that it sought to make any remuneration conditional on the press title having IPG certification, violated the Law and the Decision. This attitude resulted in a failure to take into account other characteristics specific to the different publishers concerned, such as, for example, "*human, material and financial investments*" or "*the extent of the use of press publications by online public communication services*", which could have led to the setting of relevant remuneration criteria for the non-IPG press, in accordance with the letter of the Law and the

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<sup>338</sup> Google's observations, paragraphs 118 to 121.

legislator's intention. In this context, Google did not take into account the use of protected non-IPG press content by the services it operates. By unjustifiably excluding all non-IPG press publishers from the negotiations, Google did not comply with either the letter or the spirit of Injunction 1.

387. Secondly, Google's exclusion of non-IPG-certified content leads to equivalent content being treated differently: the same content (two articles on the same sporting event, for example) will not necessarily be remunerated, depending on whether it is published by an IPG-certified press title or not.
388. In this respect, several press publishers (Groupe Amaury/L'Équipe) expressed concerns about Google's conduct during the investigation<sup>339</sup>. According to the latter, such an exclusion could be regarded as an attempt by a dominant operator to introduce differential treatment between competing press publishers on the basis of a discriminatory criterion which does not reflect the intention of the legislator. Similarly, for the APIG, such an exclusion could be seen as an attempt by an association of companies to agree on differential treatment between competitors.
389. It should also be noted that Google applied restrictions even within the category of IPG-certified news. Indeed, for Google, the fact of having an IPG certification for a print version is considered insufficient. For example, [confidential] magazine, which has IPG certification for its print version only (and not for its online version), was denied the right to negotiate remuneration for related rights by Google<sup>340</sup>.
390. It also appears that the principle of excluding non-IPG content from the negotiations on related rights continued during the bilateral negotiations conducted by Google after the expiry of the period provided for in the Injunctions, as indicated by Groupe Amaury/L'Équipe concerning the negotiations conducted by the APIG<sup>341</sup>. This point is confirmed by the press release issued by Google on 21 January 2021, which stated (translated): "*This agreement sets out the principles under which Google will negotiate individual licensing agreements with members of the APIG whose publications are recognised as Political and General Information*"<sup>342</sup>.
391. Thirdly, excluding non-IPG certified news cannot be justified by a lack of valuation of such content, even though Google's own assessment is that the revenue from such content is likely to be higher than that generated by IPG content.
392. In its letter of 1 July 2020, Google provides the SEPM with an estimate of the revenues associated with the presence on Google Search of protected content from SEPM members' IPG-certified news as well as an estimate of the revenues associated with the presence of protected content from SEPM's non-IPG-certified news<sup>343</sup>. However, according to Google's own calculations, detailed in its memo to the SEPM on 4 August 2020, the latter revenues are higher than the former<sup>344</sup>.

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<sup>339</sup> Classification marks 5,590-5,591, TF1 - classification marks 5,999- 6,000, GESTE - classification marks 2,153-2,154, SEPM - classification mark 5,730, 20/0083 F.

<sup>340</sup> Classification mark 7,204, 20/0083 F.

<sup>341</sup> Classification mark 5,590, 20/0083 F.

<sup>342</sup> <https://france.googleblog.com/2021/01/APIG-Google.html>.

<sup>343</sup> Classification marks VC 681 and VNC 4,707, 20/0083 F.

<sup>344</sup> Classification marks VC 787-789 and VNC 6,066-6,068, 20/0083 F.

### c) On Google's refusal to negotiate with news agencies for remuneration for related rights

393. The evidence in the file shows that Google's position during the negotiations was to deny news agencies the benefit of related rights when their content is integrated into news headlines that they do not publish themselves.
394. According to Google, it follows from the terms of the Directive<sup>345</sup> and the Law<sup>346</sup> that a news agency is entitled to claim the benefit of related rights only for the content it distributes to the public, and not for the content it produces for inclusion in the publications of press publishers. Indeed, Google believes that the content produced by the news agencies for publication by third parties does not constitute press publications within the meaning of Article L. 218-1 of the IPC, which defines these as (translated) "*a collection primarily made up of literary works of a journalistic nature, which may also include other protected works or objects, in particular photographs or videograms, and which constitutes a unit within a periodical or regularly updated publication bearing a single title, with the aim of providing the public with information on current events or other subjects published, in any medium, on the initiative, under the editorial responsibility and under the control of press publishers or a press agency*". Consequently, Google believes that this content is only covered by copyrights that these agencies monetise through the licensing agreements they enter into with publishers.
395. Furthermore, Google considers that it cannot pay twice for the same content by making a payment to the news agency for an item of content and a payment to the publisher for that content of the agency that is reused by a publisher in a press publication<sup>347</sup>. Google also argues that it does not have the tools that would allow it to identify content within publishers' press publications that has been licensed to the latter by news agencies.
396. This position taken by Google during the negotiations with the news agencies was detailed in paragraphs 261 et seq. above. This position was also maintained in the negotiations it conducted with the AFP and the FFAP after the period of implementation of the Injunctions<sup>348</sup>.
397. However, Google's refusal to recognise the benefit of a related right for news agencies appears to be directly inconsistent with the terms of the Law - the very title of the Law and several of its

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<sup>345</sup> Paragraph 2 of Recital 55 of the Directive provides that: "*The concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive*". Article 15(1) of the Directive provides that: "*Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers*".

<sup>346</sup> Article L. 218-2 of the IPC stipulates that (translated) "*The authorisation of the press publisher or news agency is required prior to any reproduction or communication to the public, in whole or in part, of its press publications in digital form by an online public communication service*".

<sup>347</sup> In the context of the discussions held between the AFP and Google, the latter believes that Google should also pay it for its content embedded within a publisher's press publication. Google considers that if a publisher authorises Google to use its content which itself contains content belonging to the AFP, in violation of the licence it has concluded with the latter, then this is a matter of contractual nature between the AFP and the publisher, in which Google cannot interfere. According to Google, it is up to the AFP to require publishers to apply the terms of their licence agreements and ask them not to allow Google to display AFP content, or to adapt the scope of its licences.

<sup>348</sup> Classification marks VC 5,596-5,615 and VNC 5,616-5,635, and classification mark 6,379, 20/0083 F.

articles expressly refer to news agencies - and to the fundamental objectives pursued by the legislator.

398. In this regard, it is pertinent to refer to the report submitted to the 'Conseil supérieur de la propriété littéraire et artistique' (Higher Council for Literary and Artistic Property) (CSPLA) on 13 February 2018 by Mrs Laurence Franceschini, Senior judge at the French Supreme Court for administrative law, on the purpose and scope of the related right of press publishers before the adoption of the Law. The report states in this regard that (translated): "*the extension [of the related right] to press agencies for their own content is justified because they are faced with the same difficulties as press publications, while, like them, they have had to invest heavily in view of the potential offered by digital technology*". In this report, the author points out that the evolution of the uses of online platforms threatens the economic viability of news agencies, since the platforms make available the news content published by the media that largely comes from news agencies (text, photo, video, infographics, etc.), without their authorisation or financial compensation accruing to them. The key issue today, according to the author, is the possibility for news agencies to be remunerated for their information services used by online platforms, as is the case for publishers of press publications.
399. In adopting the Law on Related Rights, the legislator intended to grant producers of journalistic content a property right, with a view to remunerating their investments, and to achieve a better sharing of value between the producers of press content and online public communication services. The French legislator was explicit regarding the need to include news agencies in this system, noting that they contribute actively to the dynamism of the press sector. By way of illustration, the AFP alone produces some 5,000 dispatches and 3,000 photographs every day for press publishers, and deploys considerable resources to ensure that its information is both complete and reliable (2,400 staff in 151 countries around the world)<sup>349</sup>.
400. The unequivocal acknowledgement of the benefit of the related right to news agencies in the Law necessarily requires a material understanding of the notion of press publication as defined in (I) of article L. 218-1 of the IPC, understood as related to the journalistic content produced by a news agency or by a press publisher.
401. Adopting a contrary position would be to deprive the legislator's provision for news agencies of any useful effect. Google's position amounts to saying that the latter agencies are holders of a related right only when they have the status of press publisher. Such an interpretation of the Law is untenable, in that it would render meaningless the numerous references made by the legislator to news agencies in the articles of the Law, which methodically state their role in the implementation of the legal regime of related rights.
402. Google's interpretation is also directly inconsistent with the parliamentary work that framed the adoption of the Law and to the decision of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, which confirmed the scope of the Law.
403. As such, the parliamentary work carried out in the context of the drafting of the Law clearly indicates that its objective is to ensure legal protection and remuneration for both press publishers and news agencies. This was emphasised in paragraph 78 of the Decision, which states that "*The above-mentioned report [Report No. 243 drawn up by Senator David Assouline] also looks at specific developments relating to news agencies, which are the main providers of images and videos to press publishers, stressing that "Content produced by agencies and licensed to publishers may end up online without any authorisation in the context of an unintended and therefore non-remunerated use. This is especially true for images, which can be stored ad infinitum in "image*

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<sup>349</sup> Observations of the AFP in response to the Report, page 13.

*banks". The objective pursued by the Law therefore concerns the protection of content produced by both press publishers and news agencies (excerpts from articles, photos, videos and computer graphics). (emphasis added). This report also stresses that "There is a very real urgency to act on this matter: publishers and news agencies are losing resources every day and, every day, the major platforms are making huge profits by using articles written by journalists and photos produced by agencies" (see paragraph 76 of the Decision). Finally, it is worth noting the continual reference during these discussions to press publishers and news agencies, as pointed out in paragraphs 80 to 82 of the Decision.*

404. For its part, the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) underlines the fact that (translated) "*the law of 2019 is aimed at 'press publishers and news agencies', meaning that it is pointless to claim, as Google does, that the AFP cannot directly claim related rights, all the more so as a large majority of the AFP content reproduced by the search engine corresponds to images*". (emphasis added, paragraph 90). This clarification came only a few days after Google told the FFAP that it could not rule out that (translated) "*the Court of Appeal could also shed light [on the matter]*"<sup>350</sup>.
405. In these circumstances, the position of the *Autorité* expressed in the Decision should have prompted Google not to refuse, as a matter of principle, throughout the three-month period set by the Injunctions, any discussion of the remuneration of news agency content reused by third parties, solely on the basis of the supposed absence of any ownership of related rights by these same news agencies. This position is all the more unacceptable in that the "*clarification*" provided by the Cour d'Appel de Paris (Paris Court of Appeal) did not prompt Google to subsequently modify its conduct vis-à-vis the news agencies, either after the expiry of the three-month period for the negotiations with the AFP, or during the three-month negotiation period for the FFAP.
406. Google's argument that there is a risk of double payment for press content in the context of related rights does not appear to invalidate this observation.
407. Firstly, the existence of multiple rights holders on a press content does not imply that they are remunerated for the same thing, but that they are granted their own remuneration for their respective contribution, even if all these contributions are combined in the same journalistic piece<sup>351</sup>.
408. The report of 13 February 2018 by the Senior judge at the French Supreme Court for administrative law, Mrs. Laurence Franceschini<sup>352</sup>, indicated, on this point, before the adoption of the Law, that a related right granted to news agencies could legitimately be exercised on their own content, and that the justification of the related right of the news agency therefore exists:
- when the content it develops for the press ("B2B" content) is reproduced verbatim by the publisher. This is the case in particular for photographs and video footage produced by news

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<sup>350</sup> Classification mark 5,971, 20/0083 F.

<sup>351</sup> This is the case, for example, with databases, which may be protected by copyright (Articles L. 111-1 et seq. of the IPC), particularly with regard to the design and architecture of the database, but also protection under *sui generis* rights (Article L. 341-1 of the IPC), which protect the same database against misuse. The second paragraph of this article states (translated): "*This protection shall be separate from and without prejudice to the protection resulting from copyright or any other right in the database or any of its constituent elements*".

<sup>352</sup> Report presented to CSPLA on 13 February 2018 by Ms Laurence Franceschini, Senior judge at the French Supreme Court for administrative law, on the purpose and scope of the related right of press publishers.

agencies, and for AFP dispatches reproduced in their entirety within press publications (which usually include the mention "AFP dispatch");

- for all content that it develops with users in mind ("B2C" content). This report indicates that, as regards other agency content (an article written on the basis of an agency dispatch, for example), it is the press publisher alone who must have the related right on the text of the article and that it is up to the contract signed by the agency with the press publications, in the event that a related right is allocated to the latter, to take into account this new use of the information.

409. Contrary to what Google maintains, the evidence in the file shows, moreover, that it is possible to identify and individualise, in particular as regards images, the journalistic content produced by a news agency which is integrated into a press article published by a third party publisher.
410. The functioning of Google's online search engine services is also based on the continuous analysis by Google's robots of the web pages whose content it is supposed to crawl in whole or in part. This crawling provides the search engine with particularly accurate information, as it comes from sources that are regularly updated and which contain elaborate content. In order to maximise the use of data contained on press sites, and thus supply search engines, Google encourages website publishers to use "structured data" corresponding to data formats that it favours<sup>353</sup>.
411. However, there are two standards - IPTC metadata<sup>354</sup> and schema.org tags, used by Google's own services, which identify the source of an image. Google recommends using the first solution to be able to display the licence information associated with images in search results pages<sup>355</sup>.

### Ajouter des données structurées ou des métadonnées de photo IPTC

Pour indiquer à Google quelles images sont susceptibles d'être disponibles sous licence, ajoutez des données structurées ou des métadonnées de photo IPTC à chacune des images concernées sur votre site. Si la même image est utilisée sur plusieurs pages, ajoutez les données structurées ou les métadonnées de photo IPTC à chaque image de chaque page.

Deux options s'offrent à vous pour ajouter des informations de licence à une image. Pour pouvoir bénéficier du badge "Sous licence", il vous suffit de choisir une de ces options en suivant l'une des méthodes ci-dessous :

- **Données structurées** : les données structurées constituent une association entre l'image et la page sur laquelle elle apparaît avec le balisage. Vous devez ajouter des données structurées à tous les endroits où une image est utilisée, même s'il s'agit de la même image.
- **Métadonnées de photo IPTC** : les métadonnées de photo IPTC sont intégrées dans l'image. L'image et les métadonnées sont donc préservées d'une page à l'autre. Il suffit d'intégrer les métadonnées de photo IPTC une fois par image.

*Source: excerpt from the site [www.developers.google.com](http://www.developers.google.com) published by Google*

412. The AFP also stated that, on the one hand, its images were always supplied to licensed press publishers with the metadata included and, on the other hand, that the contracts concluded with the publishers prohibited the deletion of AFP metadata.

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<sup>353</sup> <https://developers.google.com/search/docs/advanced/structured-data/intro-structured-data>.

<sup>354</sup> International Press Telecommunications Council.

<sup>355</sup> <https://developers.google.com/search/docs/advanced/appearance/image-rights-metadata>.

413. The fact that certain press sites may host AFP photographs without their metadata, even if it were established, is not in itself such as to justify Google's conduct vis-à-vis the AFP. If Google had explained the reasons for the unreliability of the metadata to the AFP, which it did not do, the latter could, if necessary, have implemented solutions to better enforce the publishers' contractual commitments.

414. On the other hand, Google's argument that the fact that content produced by news agencies and licensed to press publishers can be found online without the agency's authorisation is a contractual issue between the agencies and the publishers is not admissible in this case. Indeed, on the one hand, the assessment of compliance with the Injunction must be made in the light of the terms of the Law and the Decision. Furthermore, the AFP expressly warned Google of the illegal nature of any licensing agreement concluded between Google and publishers who might use AFP content without its prior authorisation, in an e-mail dated 2 November 2020 sent by the AFP's president to the president of Google France:

1. (translated) *"In our discussion last Friday, you asked me to clarify my point about the illegality of the agreements Google may make with press publishers if they were to cover, without their authorisation, the display of news agency content embedded in publishers' articles.*

*So that everyone is perfectly clear on this point. I would like to remind you that:*

- *In the context of the contracts concluded between the AFP and its publisher clients, the AFP has never given publishers the right or authorisation to have (or to authorise the use of) AFP content on digital media (such as Google services) other than their own websites.*
- *The AFP has full related rights over all of the journalistic content it produces (text and images), and this right allows the AFP to claim directly from Google the remuneration due to it under the related rights. All this was unambiguously confirmed by the Cour d'Appel de Paris (Paris Court of Appeal) on 8 October.*

*If, as you point out, the agreements concluded between Google and the press publishers provide for the reuse of AFP content without our prior authorisation, then those agreements will be illegal on that point, with two main consequences:*

- *Publishers entering into such agreements will be at risk of liability for having granted rights or permissions that they do not have. For our part, we will continue to solicit Google for the remuneration due to us for the related right. Indeed, such contracts, which were concluded without our agreement, even though they partly covered the reuse of content produced by the AFP, would not be enforceable against us.*
- *Beyond the publishers themselves, Google would also be directly liable to the agencies for knowingly entering into these agreements. Google is in fact aware of the rights and obligations of the publishers vis-à-vis the AFP, if only on account of the exchanges that took place during the proceedings before the Autorité de la concurrence. Google could then be held liable as a third-party accomplice to a breach of contract between the AFP and its publisher clients, in which they are not authorised to have AFP content reused or displayed on Google's services without the prior authorisation of the AFP.*

*The APIG and the SEPM were recently formally alerted by the FFAP to the risks inherent in this situation, so that they would ensure that the rights they grant and the guarantees they give to Google do not result in the rights of agencies being circumvented"<sup>356</sup>.*

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<sup>356</sup> Classification mark 2,414, 20/0083 F.

415. It should be noted that Google's approach of disputing the AFP's claim to hold related rights to content integrated into the press publications of third-party publishers went hand in hand with a categorical refusal to negotiate with the FFAP, for the same reason.
416. The legal arguments put forward by Google in that news agencies do not hold rights to content reused in third-party press publications appear to be incompatible with any form of negotiation in good faith with news agencies. They do not comply with the spirit or the letter of Injunction 1.
417. Google's conduct after the three-month negotiation period set by the Injunctions does nothing to change this observation.

#### **d) Conclusion as regards compliance with Injunction 1**

418. In light of the foregoing, it can be stated that Google failed to comply with the letter and spirit of Injunction 1.
419. The bilateral negotiations that took place after the three-month period with the complainants or publishers are not in themselves reason to claim that Injunction 1 has been complied with. Indeed, as explained in paragraphs 309 et seq., compliance with the Injunctions must of course be assessed within the three-month time frame set by the Decision, insofar as this conditioned the effectiveness of the *Autorité's* action and reflected the legislator's desire for a rapid solution. Moreover, it can be asserted that the observations that lead to the conclusion that Google did not negotiate in good faith with the APIG, the SEPM and the AFP during the three-month period provided for in the Injunctions remain applicable for the period thereafter, as Google's conduct was the same during that period.

## **2. ON COMPLIANCE WITH INJUNCTION 2**

420. Injunction 2 provides for the obligation for online public communication services to communicate to publishers and press agencies the information provided for in Article L. 218-4 of the IPC. As stipulated in the third paragraph of this article (translated) "*The online public communication services are required to provide press publishers and news agencies with all the information relating to the use of press publications by their users, as well as all the other information necessary for a transparent evaluation of the remuneration referred to in the first paragraph of this article, and the breakdown thereof*".
421. As stated in paragraph 305 of the Decision, the communication of this information was intended to guarantee the effectiveness of Injunction 1, by allowing the negotiating publishers and press agencies to have the elements necessary (translated) "*for a transparent evaluation of the remuneration due, in accordance with the provisions of Article L. 218-4, paragraph 3, of the IPC*".
422. The communication of information was the subject of numerous exchanges between Google and the complainants during the three-month negotiation period set by the Injunctions. Spontaneously, and also in response to requests from the complainants, Google communicated information relating to its use of protected content which was intended to back up its financial proposals. However, this information was either partial, in terms of the scope of Google's services and revenues, or late in relation to the deadline for negotiations, or not specific to the protected content of the entity to which the disclosure was addressed, or insufficient to allow the complainants to make the link between Google's use of protected content, the revenue it derives from it and its financial proposal(s).

423. Firstly, the only information communicated by Google to the AFP, the APIG and the SEPM, during most of the negotiation period, was limited to the Google Search service, to the exclusion of other Google services.
424. However, there is no doubt that protected content is also displayed in other Google services, at the very least in Google News and *Discover*. In this respect, the Decision covers all of Google's services that include protected content, not just Google Search.
425. Furthermore, Google cannot rely on the fact that it eventually communicated data to the AFP, the APIG and the SEPM concerning the use of press content on Google News and *Discover*, insofar as this information was only communicated very late, on 14 August 2020, i.e. barely 4 days before the expiry of the negotiation period with the AFP and the APIG and 10 days before the expiry of the negotiation period with the SEPM. This late communication therefore kept the AFP, the APIG and the SEPM in a situation of information asymmetry for most of the negotiation period provided for in the Decision, and subsequently impaired the balance of the negotiations between the parties.
426. Google's argument that information on the use of protected content by press publishers and news agencies on Google's services is already available for each publisher, and is very in-depth, in the *Search Console* tool, is not admissible in this respect.
427. On the one hand, Google was obliged to provide this information in the context of the implementation of the Injunctions, and should have done so all the more promptly if it was readily available, rather than waiting until 14 August 2020 to provide it to the parties. On the other hand, the data available on the *Search Console* tool, while providing information on the traffic redirected by Google from the search engine to the sites of press publishers, does not provide information on the revenue generated by Google from reusing and displaying protected content. In effect, the impact on Google's revenues can only be determined by reconciling this traffic data with different revenue data, including advertising data, which Google has not provided in full (see paragraphs 274 et seq. below).
428. Secondly, despite repeated requests by the APIG and the SEPM, the only data relating to the revenues generated by Google thanks to protected content only pertain to advertising revenues (Google Ads) of the Google Search pages on which protected content is displayed and therefore do not reflect all of Google's "*direct and indirect*" revenues as referred to in Article L. 218-4 of the IPC.
429. However, besides the direct advertising revenue that Google derives from the ads displayed on the results pages, Google also derives other indirect advertising revenue from displaying protected content.
430. On the one hand, displaying protected content generates traffic to the websites of press publishers, which benefits Google indirectly, on account of Google's intermediation activities in online advertising. When acting as sellers of advertising space, some publishers may choose to enter into an advertising network agreement with Google Ad Exchange. Under this contract, Google markets given advertising space of press publishers to advertisers. In return for this service, Google earns a commission on the sale of advertising space on behalf of the publisher concerned. No information was provided by Google concerning these indirect revenues in its exchanges with the press publishers.
431. On the other hand, and more importantly, both the Decision and the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) also noted that Google derived indirect revenues from the display of protected content on its services, in particular through the attractiveness conferred by its content, which makes it possible to trigger visits of Internet users to Google's ecosystem, to keep them there longer or to attract them more frequently. As highlighted in the Decision, the attractiveness of

protected press content is first and foremost a trigger for searches that generate revenue for Google (for example: the Internet user who comes to consult a news result then decides to perform a marketable search such as buying goods, travel, booking hotels, etc.). In this respect, in addition to monetisation through ads generated by Internet users attracted by press content or staying longer in the Google ecosystem, the latter will derive an additional benefit from the data generated by the Internet user. This data may be used for marketing or advertising intermediation services, as well as improving the quality of all its other services.

432. In support of its positions, Google informed the APIG in a letter dated 14 July 2020, that the APIG's requests were (translated) "*unrelated to the ongoing negotiations*" and that "*Google has already shared data with the APIG that allows it to evaluate its proposal.*"<sup>357</sup> Moreover, in its letter of 23 July 2020 letter to the SEPM, Google contends that it shared (translated) "*all relevant data that allows you to evaluate [its] offer, namely "operating revenues of any kind, direct or indirect".*" It added that the data communicated only pertained to Google Search (translated), "*as Google does not currently monetise either Google News or Discover in France*" and that in any case Google would not be obliged to respond to any request for communication of data as the SEPM would like<sup>358</sup>.
433. However, the fact that Google does not monetise the Google News or Discover services in France does not mean that they do not generate indirect revenues. As indicated in paragraph 42 above, Google provided an estimate of the value of its "Google News"<sup>359</sup> service in 2008, which shows the indirect revenues it generates in terms of increased use of the Google platform, even though this service was not funded by advertising.
434. The explanations given by Google to justify its refusal to communicate more complete data on its uses of protected content and the revenue it derives from it therefore appear to be inadmissible, since the data communicated did not allow the APIG, the SEPM and the AFP to estimate all the "*direct and indirect income*" from using protected content on all Google services.
435. More generally, the terms of the Law, the Decision and the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) highlight the essential issue of the revenues indirectly derived by Google from using protected content. Clearly, good faith negotiations would have required Google to provide the qualitative and/or quantitative revenue data required by press publishers and news agencies to transparently assess the remuneration, in accordance with Injunction 2.
436. Among the information requested by the APIG, for which no response was forthcoming during the negotiations, is the following:
- the total direct and indirect revenues in euros generated by the activity of French users of the Google ecosystem, in absolute value and per user;
  - Google's margin on its advertising operations in France (Adex, Adsense, etc.);
  - the complete Google crawl data of the IPG sites of the members of the APIG (daily volume, frequency, etc.);

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<sup>357</sup> Classification marks VC 230-233 and VNC 379-382; classification marks VC 727-730 and VNC 4,749-4,752, 20/0083 F.

<sup>358</sup> Classification marks VC 90-93 and VNC 234-237, 20/0084 F; classification marks VC 773-776 and VNC 4,788-4,791, 20/0083 F.

<sup>359</sup> Classification mark 148, 20/0084 F.

- the exhaustive details of the Google services and tools (including back-office) for which the content resulting from the crawl of the IPG sites of the members of the APIG is used, directly or not;
- the details of the mechanism of the uses made by Google's algorithm of news content;
- the share of search results containing at least one piece of IPG press content, for users logged into their Google account, for other users, and for all users;
- in the search results containing at least one IPG press content, the part directly monetised by Google (presence of a sponsored link);
- the share of IPG press content in the content pushed by Google Discover to its users.<sup>360</sup>

437. In its letter of 22 May 2020, the SEPM requested Google to enter into good faith negotiations to reach an agreement on remuneration for related rights, within three months. The SEPM specifically identified the information needed for a transparent assessment of the remuneration. It therefore requested the communication of the following, within ten days, for each of the SEPM members' websites:

- *"the number of displays of editorial content on each of Google's services (the 'all' tab in Google Search, the 'news' tab in Google Search, Google News and Discover) and across all media (mobile, tablet, computer), for each calendar month between 1 January 2019 and receipt of this letter;*
- *The number of visits (measured in the amount of "clicks") of these sites by internet users from each of the above-mentioned Google services [...] and across all media (mobile, tablet, computers), for each calendar month between 1 January 2019 and receipt of this letter;*
- *Revenue of any kind, direct or indirect, earned by Google from displaying editorial content by members of the SEPM for (i) all of 2019 and (ii) each calendar month between 1 January 2019 and receipt of this letter"*<sup>361</sup>.

438. In a letter dated 29 June 2020, the SEPM reiterated its requests and made further requests, asking Google to also transmit the share of results pages (in French) on *Google Search*, *Google News* and *Discover* that display at least one item of press content, as well as the share of these pages displaying at least one item of press content from SEPM-member publishers<sup>362</sup>.

439. Between the first day and last day of the negotiation period laid down by the *Autorité*, the AFP repeated its request to Google in writing on five occasions, in order to be provided with the information required by the Law<sup>363</sup>. Google did not comply with this request, arguing that the AFP

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<sup>360</sup> Classification marks VC 212-214 and VNC 366-368; classification marks VC 632-634 and VNC 4,679-4,681, 20/0083 F.

<sup>361</sup> Classification marks VC 7,072 and 7,073; 7,610 and 7,611, 20/0083 F.

<sup>362</sup> Classification marks VC 7,070 and 7,071; VNC 7,608 and 7,609, 20/0083 F.

<sup>363</sup> On 17 April 2020 in the letter requesting the start of negotiations sent by the AFP to Google (file no. 20/0085 F, classification marks 64 and 65), then on the following dates: 11 June 2020 (file no. 20/0085 F, classification marks 84), 13 July 2020 (file no. 20/0085 F, classification marks 101 to 104), 30 July 2020 (file no. 20/0085 F, classification mark 121) and 14 August 2020 (file no. 20/0085 F, classification marks 136 to 140).

did not own the related rights to the content it produces and which is embedded in the press publications of third-party publishers.

440. However, the various requests thus formulated appear to be totally relevant and in conformity with the legislative provisions insofar as they make it possible to assess the (translated) "*exploitation revenues of any kind, direct or indirect*" referred to in Article L. 218-4 of the IPC, and are linked to (translated) "*the contribution of press publications to political and general information*" or to (translated) "*the extent of the use of press publications by online public communication services*", as well as corresponding to the two hypotheses referred to in the third subparagraph of Article L. 218-4 of the IPC, by referring to (translated) "*information relating to the use of press publications by their users as well as all other information necessary for a transparent evaluation of the remuneration referred to in the first paragraph of this article and its breakdown*". It should be noted in this respect that only Google had this information, which was not accessible to press publishers and news agencies.
441. It follows from the foregoing that the information provided by Google did not reflect all the direct and indirect revenue that it derives from the use of protected content and that Google ignored a number of relevant requests made to it and thus deprived press publishers and news agencies of any ability to negotiate on grounds other than those unilaterally determined by Google.
442. Indeed, during most of the negotiations, the data provided by Google was limited to the *Google Search* service, despite the display of protected content in other Google services (*Google News* and *Discover*, among others). Some data pertaining to the use of content on *Google News* and *Discover* was not provided to the complainants until 14 August 2020, just a few days before the end of the negotiation periods. Moreover, the information pertaining to the revenue generated by Google from protected content only concerned the advertising revenue of *Google Search* pages on which protected content is displayed. It does not reflect all the direct and indirect revenues referred to in Article L. 218-4 of the IPC.
443. As of the date of the hearing, Google had still not responded to any of the requests for information from the APIG, the SEPM and the AFP.
444. Thirdly, the various methodological notes provided by Google to press publishers and news agencies on its revenues from using protected content do not make it possible to make the link between its revenues and the financial proposals it made (see paragraphs 278 to 301 above). Among other things, this data is intended to cover protected content from IPG-certified publishers in general and not specifically those produced by the publishers making the request. Furthermore, they were not accompanied by any source data that would make it possible to replicate the calculation. Moreover, this link is all the more non-existent in that the information communicated by Google pertains to current uses of protected content, whereas the financial proposals were systematically made within a broader scope, incorporating *Showcase*. In this respect, the calculations relating to the "*maximum upper limit*" that Google would be prepared to pay for just using protected content were brought to the attention of the APIG<sup>364</sup>, the SEPM<sup>365</sup> and the AFP<sup>366</sup> only a few days before the end of the negotiation period provided for in the Injunctions, and are not reflected in a precise and specific proposal addressed to each of these entities. They are therefore

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<sup>364</sup> Classification marks VC 283 and VNC 6,106; VC 883-884 and VNC 6,083-6,084, 20/0083 F.

<sup>365</sup> Classification marks VC 117 and VNC 296, 20/0084 F; VC 909-910 and VNC 6,088-6,089, 20/0083 F.

<sup>366</sup> Classification marks VC 936-937 and VNC 6,092, 20/0083 F.

not involved in a transparent evaluation of the remuneration proposed by Google that would allow for a balanced negotiation.

445. With regard to the APIG in particular, there was also no information provided by Google that makes it possible to understand how the amount of the offer was calculated or to reconstruct the allocation of the amounts granted to individual publishers. The mere fact that the draft contract sent on 24 July 2020 refers to criteria such as the audience of publishers' websites, the certifications held and the presence of paid content, appears in any case insufficient, since neither the precise calculation methodology nor the underlying data were provided by Google<sup>367</sup>.
446. Fourthly, and more specifically with regard to news agencies, Google put forward various reasons for the absence or delay in providing the requested information. As such, in a letter dated 17 June 2020 to the AFP, Google gives the following two reasons<sup>368</sup>:
447. On the one hand, Google invokes the fact that Article L. 218-2 of the IPC obliges it to request the AFP's authorisation in order to reuse the latter's "*press publications*" online. However, the AFP did not communicate any precise list of publications (translated) "*likely to enable it to clearly identify its press publications within the meaning of Articles L. 218-1 and L. 218-2 of the IPC*" and, consequently, to share the relevant data with the AFP.
448. Google could not be unaware that the AFP does not publish its own press titles, as its activity consists almost exclusively of supplying journalistic content that is intended to be integrated into the press publications of third-party publishers. Google's request for information therefore appears to be an underhanded way of refusing to pay the AFP for its related rights.
449. On the other hand, Google argues that it is difficult for it to identify data relating to the display of AFP content in press publications. In its own words (translated), "*Google is not currently able to reliably identify how much of the content crawled on publishers' websites comes from the AFP,*" and that "*even if it were able to do so, such information would be commercially sensitive, and Google would therefore need to obtain the consent of each publisher before it could share it*". Finally, according to Google (translated), "*it is not clear at this stage whether Google would even be allowed to share this information under Article 101 TFEU and Article L. 420-1 of the French Commercial Code (Code de commerce)*".
450. However, these possible difficulties were not such as to prevent Google from providing in good time the information needed to justify its various financial proposals to the AFP. However, as regards the AFP, the information communicated by Google on 24 July 2020, i.e. more than two months after the resumption of the negotiation deadlines, is fragmentary, and does not appear to facilitate an evaluation of the remuneration proposed by Google. Indeed, the only data relating to the AFP concerns the use of content from the website *afp.com*, which represents only an extremely small part of the AFP content published, and is limited to the use of content and advertising revenues by the search engine, without reflecting the other uses of protected content by Google (in particular Google News and *Discover*). Furthermore, no data is provided by Google on the publications of press publishers that incorporate content produced by the AFP<sup>369</sup>.

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<sup>367</sup> Classification marks VC 254-258 and VNC 403-407; classification marks VC 755-759 and VNC 4,777-4,781, 20/0083 F.

<sup>368</sup> Classification marks 87-89, 20/0085 F; 690-692, 20/0083 F.

<sup>369</sup> Classification marks VC 809-811 and VNC 4,817, 4,818 and 6,070, 20/0083 F.

451. Finally, in its response to the investigation services' questionnaire of 14 October 2020, Google stated that it had agreed on the principle of fixed remuneration with the AFP between 19 June and 8 July 2020, (translated) "*given the difficulty of establishing and justifying "operating revenues of any kind, direct or indirect, from displaying AFP content on its services"*"<sup>370</sup>. However, this single assertion by Google does not appear to justify the delays and failure to provide the AFP with information concerning its content, insofar as the AFP reiterated its requests for information on at least two occasions after 19 June 2020, thereby demonstrating its wish to obtain quantitative elements that would enable it to assess the financial proposals made by Google.
452. Fifthly and finally, it can be noted that the lack of communicated information that would have made it possible to clarify Google's proposal, clearly continued in the context of the negotiations that took place after the period laid down in the Injunctions.
453. With regard to the bilateral discussions between Google and certain publishers which took place after the negotiation period, the *Autorité* notes that the remuneration due for current uses of protected content was not further discussed or clarified by Google, including with the four press publishers with which Google concluded an agreement. No exchange between these publishers and Google, added to the file, makes it possible to identify the share of the remuneration that is related to the current use of the protected content. At least one press publisher, Libération, requested Google for clarification on this point, but was refused as follows<sup>371</sup>: "*Unclear what this is referring to...we did not receive an Appendix to review. The fee speaks for itself, and we do not need to include background information on calculation in the term sheet or long form agreement.*"
454. This finding was confirmed in the interview with the investigation services. As such, Le Figaro indicates that (translated) "*Within this overall amount, we do not know which part corresponds to Showcase and which part corresponds to related rights. In the discussions with the APIG, the part allocated to the related right was very low. In any event, it is a transactional rationale*"<sup>372</sup>. Similarly, L'Express states that (translated) "*Google has not provided us with any formulas or data to back up its proposal. Google has told us that it has a global budget for publishers in the context of Publisher Curated News for France nationwide*"<sup>373</sup>. For its part, Libération stated that (translated) "*We have not obtained any information on how they arrived at this remuneration, despite our requests. We also have no idea what value Google has calculated for the use of our related rights. There is a section in the contract that states it is a comprehensive licence that includes remuneration for related rights*"<sup>374</sup>.
455. There is no evidence in the file, either from Google or from the press publishers concerned, to identify or the portion of the remuneration relating to the reuse of protected content by Google since 24 October 2019. Le Figaro states that (translated) "*As regards retroactivity, there is a clause in the contract that specifies that the remuneration covers the use of content since the law came into force, but we have not discussed this. We focused on an annual amount*"<sup>375</sup>. As we have seen,

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<sup>370</sup> Classification marks VC 496 and VNC 4,459, 20/0083 F.

<sup>371</sup> Classification marks VC 2,589 and VNC 6,214, 20/0083 F.

<sup>372</sup> Classification mark 3,369, 20/0083 F.

<sup>373</sup> Classification marks VC 2,178 and VNC 3,428, 20/0083 F.

<sup>374</sup> Classification marks VC 2,166 and VNC 2,428, 20/0083 F.

<sup>375</sup> Classification mark 3,369, 20/0083 F.

when questioned on this point, Google did not provide any information on how this period was taken into account in the proposals made to the APIG, the SEPM and the AFP. The same applies to contracts concluded individually<sup>376</sup>.

456. Similarly, in the context of the negotiations with the APIG that took place after the negotiation period imposed in the Injunctions, the APIG repeatedly stressed the fact that it had not received any information that would enable it to assess how transparent, objective and non-discriminatory the remuneration proposed by Google was. This situation continued until January 2021, since the APIG indicates in an internal email that it had not received a response from Google, despite three reminders requesting a (translated) "*more precise document than the one sent at the beginning of December on the quantitative and qualitative criteria justifying the amounts stated in the Annex*"<sup>377</sup>. In a note to its board of directors dated 12 January 2021, the APIG stated (translated), "*Google has provided a document describing the methodology used to allocate the respective remuneration to each publisher. In its current form, this document is too vague to meet the legal requirements and therefore needs to be clarified*".<sup>378</sup>.
457. Google argues that the allegations that it supplied incomplete information are based on a broad reading of Injunction 2 and the Law. It adds that by simply referring to the Act, the *Autorité* has left it to Google to work out, within a very short time frame, how to comply with Article L. 218-4, whereas the provisions of this article are very general and do not specify the nature and scope of the information that online platforms must send to press publishers and news agencies.
458. These arguments could not thrive. Assessing non-compliance with Injunction 2 follows from the analysis of the facts and documents in the file, which show that Google supplied information late, or it supplied incomplete information, which meant that press publishers and news agencies were unable to assess Google's various remuneration proposals. Google has no basis for arguing in this regard that this objection is based on a broad interpretation of the Law, or an interpretation that is difficult to anticipate. Furthermore, Google cannot invoke the "short time frames" imposed by the Decision to exempt itself from its obligation to communicate information to the press publishers and news agencies, when the deadline set by the Injunctions was proportionate to the urgency of the situation and, moreover, in principle this obligation stems directly from an article of the Law, adopted on 24 July 2019, the implementation of which Google should have anticipated as soon as it was enacted. Finally, it can be noted that the obligation to provide information in a clause is, moreover, in line with the debates that preceded the adoption of Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, which enabled economic actors to start anticipating the entry into force of these new rights.
459. In view of the foregoing, it must be considered that Google has not complied with Injunction 2 relating to the communication of information in accordance with Article L. 218-4 of the IPC within the time frame imposed by the Injunctions. This non-compliance continued in the context of subsequent negotiations.

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<sup>376</sup> Classification marks VC 3,966 and VNC 5,208, 20/0083 F.

<sup>377</sup> Classification marks VC 6,164 and VNC 6,295, 20/0083 F.

<sup>378</sup> Classification marks VC 6,157 and VNC 6,288, 20/0083 F.

### 3. ASSESSMENT OF GOOGLE'S COMPLIANCE WITH INJUNCTIONS 5 AND 6

460. As explained above, Injunction 5 requires Google to respect the principle of neutrality in the way in which news publishers' and news agencies' protected content is indexed, classified and presented on Google's services. The Cour d'Appel de Paris (Paris Court of Appeal) supplemented and clarified this Injunction by stating that it does not prevent Google from launching new services, in the following terms (translated):

*"As regards Article 5, (Google LLC, Google Ireland Ltd and Google France, as an interim measure and pending a decision on the merits of the case) are ordered to take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services".*

*According to the reasons given in paragraph 309 of the contested decision, which clarify the scope of this injunction, this principle of neutrality is prescribed "[i]n order to ensure that negotiations between publishers or news agencies and Google can take place in a balanced manner" and "to prevent publishers from being adversely affected in respect of the usual conditions (...) as a result of or in connection with the ongoing negotiations". It is therefore limited to the negotiation period referred to in Article 4 of the contested decision.*

*It is indeed an interim measure, since it is designed to prevent an aberrant economic situation and cannot be described as structural, since it does not in itself impose any business model on Google and is limited to preventing the technical conditions for displaying, indexing, ranking or presenting protected content, which Google had initially applied before the dispute arose, from being changed for the sole purpose of influencing the outcome of the negotiations, by causing them to suffer adverse consequences.*

*Its wording, which is very general, does not allow the measure to be limited to what is strictly necessary to address the emergency, since it could lead to a freeze on all innovations necessary for the performance of the search engine during the negotiations undertaken with the various partners concerned.*

*Accordingly, as requested by Google in the alternative, the text should be rephrased, as follows:*

*"This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd and Google France, provided that they do not directly or indirectly result in any adverse consequences for the interests of the holders of related rights concerned by the negotiations provided for in Article 1 of the present decision".*

461. Injunction 6, for its part, requires Google to respect a principle of neutrality in the negotiations for related rights and their outcome on any other economic relationship that Google may have with press publishers and news agencies, whether or not the latter are parties to the negotiations. Injunction 6 of the Decision was upheld by the Cour d'Appel de Paris (Paris Court of Appeal), *inter alia* for the following reasons (paragraphs 246 and 247) (translated):

*"This injunction is indeed an interim measure, since it is likely to prevent an aberrant economic situation, as the contested decision rightly points out in paragraphs 310 and 311.*

*While it may have the effect of preventing Google from changing its business model, it must be noted that the constraints thus imposed on its freedom to conduct business and its contractual freedom are not disproportionate, taking into account:*

- the fact they are limited to the duration of the negotiations;*

- the possible infringement of rights related to copyright, intellectual property rights, newly enshrined by the European directive and French law for the benefit of press publishers and news agencies in order to guarantee the viability and pluralism of the press;

- the object of the complaint made to the Autorité, which pertains to a possible abuse of a dominant position, but also the resources of Google, whose situation will not be compromised by the effects of the injunction".

462. On this point, it can be recalled that Injunction 6 aims to prevent (paragraph 311 of the Decision) "Google from rendering negotiations on related rights ineffective by offsetting the remuneration paid to publishers for their related rights against other activities. The aim is also to prevent Google from using its dominant position on the market for general search services to impose the use of some of its services during negotiations with news publishers and news agencies".
463. The *Autorité* will first examine Google's compliance with Injunction 6, insofar as this may have consequences for assessing the latter's compliance with Injunction 5.

#### **a) With regard to compliance with Injunction 6**

464. For almost all of the negotiation period, Google linked the discussions on possible remuneration for current use of protected content with discussions on the new *Showcase* programme. This can be seen in the findings presented in paragraphs 242 et seq. above.
465. Indeed, during the negotiations with the APIG, the SEPM and the AFP, Google made access to the *Showcase* programme conditional on the latter's acceptance of overall remuneration covering both the current uses of content protected by related rights and the *Showcase* service. This condition can be seen in particular in clause 3.3 of the draft contract sent by Google to the APIG on 24 July 2020. This clause provides that Google acknowledges that the remuneration provided for in the contract, together with the traffic Google brings to publishers, is sufficient to cover all of Google's uses of the protected content, including *Showcase* and all current uses<sup>379</sup>. Similarly, clause 8.2 provides that any change in the Law that would reopen the question of remuneration payable for related rights would lead to the termination of the contract<sup>380</sup>.
466. Nevertheless, access to the *Showcase* programme is consequential for press publishers and news agencies, since this programme is designed to increase their visibility on Google's services. As a result, the mechanism put in place by Google is likely to give them a strong incentive to accept the conditions for the current uses of their protected content proposed by Google in order to access to the *Showcase* programme, at the risk of losing visibility.
467. Furthermore, by denying press publishers and news agencies seeking access to the *Showcase* programme the opportunity to discuss only remuneration for current uses of protected content, Google took away their opportunity to ensure that current uses of their protected content were remunerated in accordance with the criteria set forth in the Law. This conduct therefore undermined the objectives of the Law.
468. The contractual mechanism put in place by Google also deprived non-IPG press publishers, for whom Google believes it has no obligation to remunerate for current uses of protected content, of

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<sup>379</sup> Classification marks VC 249 and VNC 398; classification marks VC 749 and VNC 4,771, 20/0083 F.

<sup>380</sup> Classification marks 250 and 750, 20/0083 F.

the possibility of accessing the *Showcase* programme. This deprived them of remuneration for Google's current uses of their protected content (if Google offered remuneration in this regard, it is not possible to verify this in the proposed contracts). This is precisely the kind of "*aberrant economic situation*"<sup>381</sup> that Injunction 6 was intended to prevent.

469. Google claims that *Showcase* is a new format for displaying content, which consists of the total or partial reuse of given press publications which are protected by related rights. According to Google, the total or partial reuse of content in the context of *Showcase* does not fall within the scope of "*other economic relationships*" within the meaning of Injunction 6, but rather within the scope of negotiations for related rights covered by Injunction 1, which would not be limited solely to "current" uses of protected content<sup>382</sup>.
470. However, the fact that the press articles featured in *Showcase* are content protected by related rights within the meaning of the Law cannot justify Google's conduct. It follows from the letter and the spirit of Injunction 6 that Google was obliged to refrain from obligatorily linking the negotiation for the new *Showcase* service with the negotiation for the current use of related rights, which was the only one existing at the time the Law was adopted.
471. Indeed, contrary to what Google claims, *Showcase* is not just a new format for displaying protected content, it is actually a new service marketed to users, and was launched after the Decision was taken. Moreover, this service is based on new obligations imposed on press publishers, who are required to supply specific editorial work to select the articles to be featured on *Showcase*, and also agree to make content available to Internet users which contains hefty excerpts, or even all of the press articles. In its exchanges with the publishers, Google specified that it had (translated) "*specifically developed a programme*" to present *Showcase*.<sup>383</sup> The Cour d'Appel de Paris (Paris Court of Appeal) had itself noted, in no uncertain terms, the specific nature of *Showcase*, by describing the project to reuse the full content of press articles (translated) "*as another Google service*" in paragraph 102 of the judgement of 8 October 2020.
472. The discussions that took place after the expiry of the negotiation deadline, both with individual publishers and with the APIG and the AFP, also show that Google linked remuneration for related rights for current uses of protected content and participation in the *Showcase* programme. Indeed, as noted above, the contracts concluded with publishers provide for overall remuneration that would cover both Google's use of their protected content and participation in the *Showcase* programme. As regards the APIG contract, this link can also be seen in the agreement announced on 21 January 2021, on the subject of which a note to the board of directors of the APIG stated that the discussions with Google were intended to (translated) "*clarify the rights and obligations of the publishers of the APIG in the 'new experience in News and Discover (Google Showcase) that Google wants to include in the agreement*"<sup>384</sup>. Finally, with regard to the AFP, this can be seen in Google's draft Letter of Intent (LOI) dated 17 December 2020<sup>385</sup>. Furthermore, this possibility is

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<sup>381</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, paragraph 246.

<sup>382</sup> Google's observations, paragraphs 265 and 266.

<sup>383</sup> See, for example, classification mark 200.

<sup>384</sup> Classification marks VC 6,156 and VNC 6,287, 20/0083 F.

<sup>385</sup> Classification marks VC 5,604-5,605 and VNC 5,623-5,624, 20/0083 F.

only left open in a possible later individual agreement, and is not included in the framework agreement.

473. Consequently, Google must be considered to have failed to take "*the necessary steps to ensure that the negotiations [...] do not affect any other economic relationships between Google and news publishers and news agencies*" and, for that reason alone, to have failed to comply with Injunction 6. This conduct was not limited to the three-month negotiation period provided for in the Injunctions, but continued beyond that period in the context of the negotiations with the complainants or in the bilateral negotiations with certain press publishers and news agencies.
474. Google argues that any finding of non-compliance with Injunction 6 would have the effect of calling into question the framework agreement with the APIG, even though the APIG agreed that this agreement adequately covers its claims for remuneration for related rights<sup>386</sup>.
475. Google's possibility of offering the new *Showcase* service to press publishers and news agencies is not in question here. What Google is accused of is preventing press publishers and news agencies that wished to participate in the *Showcase* programme from negotiating separate remuneration for current uses of protected content. Indeed, the *Showcase* service does not pertain to the current uses of protected content (displaying extracts of press articles or press photographs), but rather the reuse of the full content of press articles in the context of the development of other Google services, as indicated above and as the Cour d'Appel de Paris (Paris Court of Appeal) noted in its judgement of 8 October 2020 (paragraph 102).
476. Moreover, the fact that the APIG, like other individual publishers, signed a framework agreement after the period when the obligations of the Decision applied, does not in itself prevent a finding of non-compliance with the Injunctions. Indeed, this must be assessed in the light of the terms and purpose of the Decision. Since the *Autorité* finds that the negotiations were not conducted in good faith and in compliance with the applicable injunctions, the fact that agreements were subsequently signed cannot in itself demonstrate such compliance. This is all the more the case since, in any event, the signatory publishers were in a situation of asymmetry in these negotiations. It can be noted, moreover, that although the present decision does not in itself make the signed agreements ineffectual, it constitutes a circumstance which may justify a request by the publishers for termination or amendment of the contract.
477. Furthermore, as indicated in paragraph 314 above, the *Autorité* may take into account negotiations conducted by Google after the deadline set by the Injunctions in determining whether the Injunctions have been complied with or ignored.
478. In this respect, the *Autorité* notes that in its discussions with the APIG, Google conditioned access to the PCN programme to a subscription to the *SwG* service.
479. In effect, the discussions between Google and the APIG show that benefiting from the PCN contract was linked to the use of the *SwG* service.
480. Under the terms of clause 3.2.d of the draft framework agreement communicated by Google to the APIG on 21 October 2020, three months after the end of the negotiations envisaged by the Injunctions, Google reserves the right to require publishers participating in the *Showcase* programme to use Google APIs or products, with specific reference to *SwG*:

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<sup>386</sup> Google's observations, paragraph 272.

*"Publisher-Curated News - Each Publisher shall [...] complete the integration requirements necessary to implement Publisher content in Publisher-Curated News (which may include the use of Google APIs or products that are subject to terms of service, agreements, or practices that are generally applicable to such APIs or products, including Subscribe with Google, if applicable." (paraphrased<sup>387</sup> and emphasis added)*

481. Furthermore, the model PCN contract annexed to the framework contract of the APIG does not differentiate the subscription to the *SwG* service from the other contractual stipulations and, far from making it an option left to the publisher's discretion, makes this subscription obligatory.
482. As such, clause 2.k of the model PCN contract, annexed to the framework agreement of the APIG, which is supposed to be signed by all IPG-certified publishers<sup>388</sup>, stipulates that the publisher is obliged to set up and maintain the *SwG* service for the duration of the PCN contract, as soon as the content of its press publications is accessible via a paywall.
483. [confidential]The use of the word "must" in this model contract drawn up by Google indicates that use of the *SwG* service is not optional, but mandatory for publishers using a paywall system. The draft contract proposed by Google to these publishers establishes a direct link between these two services, if the latter use a paywall system to provide access to their online press publications. It follows from the foregoing that Google incorporated in the model NCP contract annexed to the framework agreement of the APIG, at least for publishers using a paywall, a necessary link between the remuneration of related rights under the PCN programme and its *SwG* service. Furthermore, it can be noted that by doing so, Google strengthened the economic relationship with publishers and ensured for itself long-term remuneration based on the revenues of publishers. In this respect, various press actors expressed concerns about the link between related rights and signing the *SwG* partnership. For example, the Spiil (Union of independent online press) indicated, with regard to the *SwG* service, that (translated) *"these agreements further strengthen Google's power as an intermediary within the press ecosystem in France. In our view, encouraging such a situation of dependence on an actor of Google's size in order to attract and retain subscribers is a major strategic error"*<sup>389</sup>. The SEPM also criticised the link made between the PCN contract and the *SwG* service, emphasising the direct advantage that Google derives from it, insofar that publishers are obliged to pay Google a commission (between 5% and 15% of the subscription price) for each subscription made through this service<sup>390</sup>. The percentage is then collected by Google on all payments made by the subscriber over the course of the subscription.

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<sup>387</sup> Classification marks VC 1,083-1,084 and VNC 4,476-4,477, 20/0083 F.

<sup>388</sup> See the draft PCN contract sent to a publisher of the SEPM (Classification mark VNC 7,214, 20/0083 F) or the model PCN contract annexed to the agreement between Google and the APIG on 2 January 2021 (Classification mark 6,846, 20/0083 F).

<sup>389</sup> Press release of the Spiil of 8 February 2021, available (in French) at: <https://www.spiil.org/s/position/droits-voisins-le-spiil-d-nonce-des-accords-opaques-in-quitables-et-nuisibles-po-20Y2o000004JcIEAE>.

See also the memo of the SEPM dated 24 December 2020: classification mark 5,731, 20/0083 F.

<sup>390</sup> Classification mark 7,549, 20/0083 F.

484. Google argues that the *Showcase* service was not conditional on a SwG<sup>391</sup> partnership being concluded, and that if it had pulled out of the SwG negotiations, it might have been accused of failing to comply with Injunction 6.
485. However, while Google was free to conduct negotiations and conclude agreements pertaining to SwG separately from the negotiations on related rights, it had to take the necessary measures to ensure a clear separation between these potential negotiations and the negotiations envisaged by the Injunctions. Google conducted such negotiations in the context of discussions with the APIG, as seen above, but also in the context of discussions with L'Express and Libération. As such:
- L'Express stated that (translated) "*In the negotiation, we incorporated Publisher curated news and Subscribe with Google in both of its aspects (technical and marketing) in the same discussion. We discussed an overall amount for all these services at the same time. In the context of an overarching partnership, our reflections were in the context of a particularly difficult year for the press. For L'Express, the aim was to be pragmatic in order to have an additional revenue stream quickly. [...]*"<sup>392</sup>;
  - In practice, the negotiations between Libération and Google concerning the two partnerships were conducted at the same time. It says a lot, in this respect, that a single Term Sheet for both partnerships was therefore drafted<sup>393</sup>.
486. In view of the above, Google's practice of linking the conclusion of other partnerships to the negotiation of related rights falls within the scope of the "*aberrant economic situation*"<sup>394</sup> that Injunction 6 sought to prevent, and therefore constitutes a violation of that Injunction.

#### **b) With regard to compliance with Injunction 5**

487. As covered above in paragraphs 242 et seq., Google linked the negotiations for remuneration for Google's current use of protected content to new partnerships, including the *Showcase* and SwG services.
488. However, in response to the investigation services' questionnaire of 26 November 2020, Google stated that the *Showcase* service (translated) "*aims to increase the visibility of their [publishers'] publications on Google's platforms [...]*"<sup>395</sup>.
489. This statement echoes the expectations of the publishers interviewed by the investigation services. With regard to the expected benefits of *Showcase*, Le Figaro states that (translated) "*We expect a better exposure than in Google News and therefore additional traffic. However, Google did not give us any information about this additional benefit that we can expect to have, since Showcase does not exist. Our feedback from US publishers on Facebook News has been generally*

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<sup>391</sup> Classification marks 6,799 and 6,800, 20/0083 F.

<sup>392</sup> Classification marks VC 2,178 and VNC 3,428, 20/0083 F.

<sup>393</sup> Classification marks 2,438, VC 2,439-2,441 and VNC 6,205-6,207; 3,132, VC 3,133-3,137 and VNC 6,228-6,232; VC 2,652-2,658 and VNC 6,218-6,224; 2,584, VC 2,585-2,590 and VNC 6,210-6,215, 20/0083 F.

<sup>394</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, paragraph 246.

<sup>395</sup> Classification mark 3,964, 20/0083 F.

positive"<sup>396</sup>. For its part, Libération states that: "*The aim for Libération was to find more readers and generate an audience*"<sup>397</sup>.

490. Google considers that Injunction 5 should not result in all publishers being denied access to the *Showcase* service on the grounds that some may not wish to join. According to Google, the possibility of participating in *Showcase* is not such as to (translated) "*threaten the existence or outcome of negotiations*" with these publishers (which Injunction 5 is intended to prevent)<sup>398</sup>. (paragraph 288)
491. Assessing Google's compliance with Injunction 5 must be done in light of the other circumstances of the case, in particular Google's failure to comply with the other Injunctions issued in the Decision.
492. While there is nothing to stop Google from launching a new programme that could have the purpose or effect of improving the visibility of publishers on its services, the fact that Google has made access to this new programme conditional on overall remuneration, which does not include any element of determining the remuneration specific to the current uses of protected content and which, moreover, risks impairing the visibility of publishers on these services in the event of their refusal, amounts to non-compliance with Injunction 5.
493. Google's strategy strongly encourages publishers to accept the contractual terms of the *Showcase* service and to waive any negotiations specifically relating to current uses of protected content, which was the subject of the Injunctions, at the risk of having their exposure and remuneration impaired in relation to their competitors, who did accept the proposed terms.
494. Google cannot therefore claim to have taken the necessary measures to avoid the negotiations affecting the display of protected content in its services, when it systematically linked and combined the discussions on the remuneration for related rights for current uses of protected content with the remuneration of the *Showcase* service.
495. Consequently, by making remuneration for protected content conditional on joining up to a new service that offered overall remuneration, Google failed to comply with Injunction 5.

#### **4. ON GOOGLE'S COMMUNICATION WITH THE LEGAL SERVICE OF THE AUTORITÉ**

496. Google repeatedly invoked its exchanges with the Legal Service of the *Autorité* to establish its good faith in conducting negotiations with press publishers and news agencies and, more generally, its compliance with all of the injunctions issued in the Decision.
497. In this regard, Google stated that it sent a note to the Legal Service of the *Autorité* on 12 June 2020, clarifying the scope of the proposals it wished to address to the APIG and the SEPM. This note sets out in particular: (i) the structure of the overall remuneration offer made by Google linking the *Showcase* programme and the current use of protected content, (ii) the decision to use a fixed sum method to remunerate protected content displayed in *Showcase* and its other services, (iii) the decision to exclude non-IPG content and (iv) the doubts about the obligation to remunerate news agencies and any related risks of double payment.

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<sup>396</sup> Classification mark 3,369, 20/0083 F.

<sup>397</sup> Classification marks VC 2,164 and VNC 2,426, 20/0083 F.

<sup>398</sup> Classification marks VC 6,769 - 6,770 and VNC 7,398 - 7,399, 20/0083 F.

498. Google states that it was transparent with the services of the *Autorité* on these issues on numerous occasions. In this regard, it cites a letter to the President and the Legal Service dated 16 August 2020, as well as the monthly reports submitted to the *Autorité* under Injunction 7.
499. However, one should first and foremost recall the clear and unambiguous nature of the Decision and the Injunctions contained therein.
500. Secondly, it must be stressed that it behoves the company that is the subject of an injunction decision by the *Autorité*, including in the context of interim measures, to execute it correctly, by determining its scope in the light of all its terms, and taking into account, where appropriate, the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) that ruled on this Decision. In this regard, the company cannot discharge its own responsibility by seeking the advice of the *Autorité*, albeit on an informal basis, on the conduct it should adopt in order to correctly implement the Decision. Where appropriate, the attitude of the company which has expressed interpretation issues may be taken into account as extenuating circumstances, but this cannot in itself prevent a finding of non-performance. In the case at hand, it should also be noted that Google clearly has considerable resources, both material and human, to carry out the analyses or seek the advice necessary for the correct implementation of the Decision.
501. Thirdly, in order to respect the good faith and transparency stipulated in Injunction 1, the negotiations must take place between Google and the press publishers and news agencies, and cannot be assessed in the context of an offer made unilaterally by Google and presented by the latter to the Legal Service of the *Autorité* without discussion with the publishers. Consequently, compliance with the principle of good faith in the negotiations can only be assessed with hindsight, with regard to the conduct of Google and the press publishers/news agencies during these negotiations, and not beforehand, on the basis of an offer made unilaterally by Google, the principles and scope of which have not yet been discussed and negotiated with the press publishers and news agencies.
502. Fourthly, Google cannot rely on any position taken by the Legal Service of the *Autorité*, on the basis of which it might have a legitimate expectation. In any event, the Legal Service of the *Autorité* has never taken a position on any of the issues presented to it by Google in the course of its discussions with the latter. The fact that these exchanges were not formalised shows that the Legal Service of the *Autorité* had neither the intention nor the power to bind the *Autorité* as regards an assessment of the negotiations conducted by Google with the press publishers and news agencies in relation to the Injunctions.
503. Finally, the fact that the Legal Service of the *Autorité* did not make any remarks on Google's conduct cannot be interpreted as any form of validation or approval of Google's actions.
504. In any event, the information provided by Google to the Legal Service of the *Autorité* was not exhaustive, and the latter could not assess whether Google's offers were compliant with the Injunctions and, moreover, this information changed substantially over time.
505. It follows from the foregoing that Google cannot rely on the exchanges it had with the Legal Service of the *Autorité* to claim that it acted in good faith in implementing the Injunctions, or any breach of the principle of protection of legitimate expectations.

## **5. CONCLUSION AS REGARDS COMPLIANCE WITH THE INJUNCTIONS**

506. In light of the foregoing, Google must be considered to have failed to comply, both in regard to their letter and their purpose, with Injunctions 1, 2, 5 and 6 within the time frame set by these

Injunctions. Negotiations that took place after the deadline set by the Injunctions do not change this finding in any way.

### **C. ON THE DURATION OF THE PRACTICES**

507. The practices in question occurred during the negotiation period with the various publishers and, at least for some of them, continued thereafter.
508. With regard to Injunction 1, Google failed to comply with its obligations as of the start date of the negotiation period provided for in Injunction 4, following the requests to enter into negotiations by the three complainants, i.e. 18 May 2020 for the APIG and the AFP and 22 May 2020 for the SEPM.
509. This non-compliance continued throughout the negotiation period with the complainants, which expired on 18 August 2020 for the AFP and the APIG, and on 24 August 2020 for the SEPM.
510. The non-compliance relating to Injunction 1 also applied to the negotiations conducted with other press publishers or news agencies, including the Groupe TF1 and the FFAP, for which the negotiation periods in the context of the Injunctions started on 4 and 25 June 2020, respectively, and expired, without an agreement, on 28 and 29 October 2020, respectively.
511. The non-compliance relating to Injunction 1 therefore occurred over a continuous period from at least 18 May 2020 to 29 October 2020.
512. With regard to Injunctions 2, 5 and 6, Google failed to comply with its obligations as of the start date of the negotiation period provided for in Injunction 4, following the requests to enter into negotiations by the three complainants, i.e. 18 May 2020 for the APIG and the AFP and 22 May 2020 for the SEPM.
513. This non-compliance continued throughout the negotiation period with the complainants, which expired on 18 August 2020 for the AFP and the APIG, and on 24 August 2020 for the SEPM.
514. The non-compliance relating to Injunctions 2, 5 and 6 therefore occurred over a continuous period from at least 18 May 2020 to 24 August 2020.
515. Moreover, while only compliance with the Injunctions during the initial three-month negotiation period is assessed as regards duration in the context of the present procedure, subsequent negotiations conducted by Google may be taken into account in assessing the seriousness of the practices.
516. In this case, the various instances of non-compliance identified during the three-month period referred to in Injunction 4 continued thereafter, in the context of the negotiations conducted by Google with certain press publishers and news agencies. Indeed, these negotiations, regardless of whether they resulted in an agreement, on the one hand prompted a delay in performance which in itself could be qualified as non-compliance and, on the other hand, were not conducted by Google in accordance with the conditions laid down by the legislator, which the injunctions were intended to guarantee.

## **D. ON THE IMPUTABILITY**

517. As the Injunctions were issued against the companies Google LLC, Google Ireland Ltd. and Google France, the non-compliance with these Injunctions must be imputed to these companies.

## **E. ON THE SANCTIONS**

518. Article L. 464-3 of the French Commercial Code (Code de commerce) provides that (translated) "*if the measures, injunctions or commitments provided for in Articles L. 464-1 and L. 464-2 are not complied with, the Autorité may impose a financial penalty within the limits laid down in Article L. 464-2*".
519. Although this provision refers only to the legal maximum for financial penalties provided for in Article L. 464-2 of the French Commercial Code (Code de commerce), without requiring the *Autorité* to use the criteria for determining penalties provided for in the same article in the event of anticompetitive practices, the requirement of individualisation and the principle of proportionality oblige the *Autorité* in this case to determine the penalty according to the seriousness of the conduct of which Google is accused, on the one hand, and the impact that this conduct may have had on the competition that the Injunctions were intended to safeguard, on the other<sup>399</sup>.

### **1. ON THE FINANCIAL PENALTY**

#### **a) On the legal maximum penalties**

520. In accordance with Article L. 464-2(I) of the French Commercial Code (Code de commerce), the maximum amount of the sanction is, for a company, (translated) "*10% of the highest worldwide turnover, excluding tax, during one of the financial years closed since the financial year preceding that in which the practices occurred. If the accounts of the company in question have been consolidated or combined under the laws applicable to its corporate form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company*".

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<sup>399</sup> See in this regard Decision 12-D-05 of 24 January 2012 concerning compliance by the company SRR with the injunction issued in Decision 09-MC-02 of 16 September 2009, paragraph 84. See also, as regards non-compliance with commitments, Decision 20-D-03 of 20 February 2020 regarding the compliance with the commitments made by the Mutualité de la Réunion and made mandatory by Decision 09-D-27 of 30 July 2009 regarding practices implemented by the Mutualité de La Réunion and the death mutual insurers affiliated with it, paragraphs 114 and 115 and Decision 20-D-07 of 07 April 2020 regarding the compliance with the commitments contained in the decision of the *Autorité de la concurrence* 14-D-04 of 25 February 2014 regarding practices implemented in the online horse betting sector, paragraphs 140 and 141 and the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 6 October 2016, No. 2015/06776, upheld by the judgement of the Court of Cassation (French Supreme Court) of 26 September 2018, GIE Les Indépendants, Appeal No. 16-25.403.

521. The accounts of Google France, Google Ireland Ltd. and Google LLC are consolidated within the Alphabet group<sup>400</sup>, to which they belong. The highest consolidated turnover of this group during the period referred to in the above-mentioned Article is €160 billion<sup>401</sup> as of 31 December 2020<sup>402</sup>.
522. It follows from the above that the maximum amount of the penalty incurred by Google, taking into account the applicable legal ceiling, is €16 billion.

**b) On the seriousness of the conduct in question**

523. According to the settled case law of the Cour d'Appel de Paris (Paris Court of Appeal), non-compliance with an injunction constitutes (translated) "*in itself a practice of exceptional seriousness*"<sup>403</sup>.
524. The seriousness of such non-compliance must, moreover, be assessed in the light of the characteristics of the practices applied, and the specific circumstances of each case. To this end, the *Autorité* takes into account the scale of the non-compliance, the duration thereof, and the fact that the perpetrators were aware of the unlawful nature of the practices<sup>404</sup>. In assessing the seriousness of non-compliance with injunctions, the harm to competition or the strengthening of a dominant position are also taken into account. As such, in a judgement of 11 January 2005<sup>405</sup>, the Cour d'Appel de Paris (Paris Court of Appeal) ruled (translated): "*that, with respect to the seriousness of the facts, the Autorité noted, in particular, that non-compliance with an injunction which, in itself, constitutes an exceptionally serious practice, enabled France Telecom to close the only technical channel to competition, constituted by option 3, which remained open, and to remain on the market in a situation close to a monopoly*".
525. First, it should be noted that Google's failure to comply with Injunction 1 is the result of multiple cumulative practices, which were detailed above, and in particular:
- the fact of persistently linking the discussions on remuneration for related rights for current uses of protected content to the conclusion of a *Showcase* partnership;
  - the refusal to negotiate remuneration associated with the current use of protected content by press agencies and non-IPG publishers, even though such an interpretation is inconsistent with the Decision and disregards the provisions of the Law and, moreover, it is clear from the documents in the file that Google makes extensive use of the content in question and profits from it, whether in the form of direct or indirect revenue;

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<sup>400</sup> Classification marks VC 3,968 and VNC 5,210, 20/0083 F.

<sup>401</sup> US\$182.527 billion, converted into euros at the ECB's average 2020 exchange rate of 0.8768 EUR for 1 USD:

[https://www.ecb.europa.eu/stats/policy\\_and\\_exchange\\_rates/euro\\_reference\\_exchange\\_rates/html/eurofxref-graph-usd.en.html](https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html).

<sup>402</sup> [https://abc.xyz/investor/static/pdf/2020Q4\\_alphabet\\_earnings\\_release.pdf](https://abc.xyz/investor/static/pdf/2020Q4_alphabet_earnings_release.pdf).

<sup>403</sup> Judgement of the Cour d'appel de Paris (Paris Court of Appeal), 21 February 2006, no. 2005/14774.

<sup>404</sup> Decision 20-D-07, cited above, paragraph 161.

<sup>405</sup> Judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 11 January 2005, France Télécom, No. 04/11023.

- the excessively restrictive interpretation of the notion of revenue derived from the display of press content: Google has only taken into account, as part of this basis, the advertising revenue (Google Ads) of the Google Search pages on which protected content is displayed, and has excluded taking into account any other form of indirect revenue generated by the presence of protected content on Google Search, or on other services such as Google News or *Discover*;
- the fact that no retroactive consideration of the use of protected content is taken into account from the entry into force of the Law.

526. Google's conduct cannot therefore be considered as an isolated shortcoming owing to a misinterpretation of the Decision, but is part of a concerted approach that equates to systematic non-compliance with Injunction 1. Various elements of the case file tend to show that Google's disregard of the Decision, far from being a one-off or inadvertent occurrence, appears to be a continuation of their opposition to the very principle of related rights, expressed by Google during the discussion of the Directive<sup>406</sup>, with the aim of minimising the specific scope thereof. It is clear from the documents in the file that the negotiation framework set up by Google in France and presented as applying the Decision was part of a more overarching strategy, applied at the global level (see paragraph 242 above), and aimed at limiting as much as possible the payment of remuneration to press publishers and news agencies. In this context, the fact of focusing the negotiations on the *Showcase* service (also put forward in other countries not subject to legislation equivalent to the Law on Related Rights) reflects Google's reluctance to enter into the system created by the Directive and the Law, based on the attribution of specific rights to press publishers and news agencies for the reuse of press content. It should also be noted that Google used the negotiations on related rights to secure the supply of new content by press publishers, via *Showcase*, and to urge publishers to use the *SwG* service, which enables Google to collect additional and permanent revenue from subscriptions to press titles.
527. The seriousness of the conduct detailed in paragraph 525 above is all the more striking in that Injunction 1 was clearly the core of the provisions stipulated in the Decision, and was intended to prevent serious and immediate harm to the press sector, which plays a vital role in a democratic society<sup>407</sup>. Moreover, the failure to comply with Injunction 1 occurred despite the fact that the *Autorité* had emphasised, in its Decision and the Injunctions, the need for Google to pay particular attention to the conditions of implementation of the Law, and more particularly to putting in place a framework for good faith negotiations. The Decision, as well as the decisions suspending and then resuming the time frames for implementation thereof, also emphasised the particularly urgent nature of the implementation of the Law, both for the press publishers and news agencies concerned and for the application of this new system to all actors in the sector, including online public communication services that may be subject to the newly created related rights.
528. Second, the failure to comply with Injunctions 2, 5, and 6 amplify the seriousness of Google's conduct, by significantly reducing the scope of Injunction 1 and, more broadly, of all the Injunctions.
529. Google's failure to communicate information to make its proposals transparent was an obstacle to good faith negotiations, especially since there is substantial information asymmetry between

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<sup>406</sup> See in particular the posts on the Google blog relating to the draft directives that led to the Directive on copyright and related rights, in particular, Article 11, which became n15 in the final version. Posts of 7 February 2019: <https://blog.google/around-the-globe/google-europe/now-time-fix-eu-copyright-directive/> and of 3 March 2019: <https://blog.google/around-the-globe/google-europe/copyright-directive-one-step-forward-two-steps-back/>.

<sup>407</sup> Paragraph 277 of the Decision.

Google and the press publishers and news agencies, both in terms of data relating to visits to Google's pages and services on which content protected by the Law appears, and in terms of the revenues, direct or indirect, that Google earns from the current use of protected content.

530. Similarly, the lack of measures taken by Google to ensure the neutrality of the negotiations on the indexing, classification and presentation of protected content of press publishers and news agencies in its services was likely to place the latter publishers and agencies in a bind, preventing the realisation of the objective of negotiating in good faith intended by the Injunctions. Furthermore, the fact of linking the remuneration of related rights for current uses of protected content to participation in new Google services constitutes a departure from the aims of the Injunctions to the benefit of Google, which is likely to further enhance its dominant position on the market for generalist search services.
531. Thirdly, it should be recalled that it was only on 14 August 2020, i.e. a few days before the end of the three-month negotiation period with the complainants, that Google agreed to separately address the issue of remuneration for the current use of protected content. Moreover, as explained above, Google's offer of 14 August 2020 did not constitute a credible proposal for a good faith negotiation on the remuneration of related rights.
532. Google's conduct, which consisted in disregarding the time frames and deadlines laid down by the Decision of the *Autorité* in order to impose its own negotiation schedule, is in itself a particularly serious situation. Indeed, as these measures were laid down pursuant to an interim procedure, strict compliance with the time limits set by a decision on interim measures is an essential element of the effectiveness and credibility thereof.
533. Fourth, the various instances of non-compliance identified during the three-month period referred to in Injunction 4 continued after this period, in the context of the negotiations conducted by Google with certain publishers and agencies. Indeed, while Google and the APIG announced an agreement in January 2021, the evidence in the file shows that this agreement was not negotiated on terms consistent with the Injunctions. The same applies to the bilateral negotiations conducted with certain press publishers and news agencies.
534. Fifth, the identified cases of non-compliance have rendered the Decision ineffective, and have led to a continuation of the identified shortcomings with regard to the effectiveness of the Law. It is therefore conduct that directly undermines government action.
535. Sixth, this conduct has been applied by entities having significant size and vast resources. For example, Google Ireland's consolidated revenue amounts to €[confidential] as at 31 December 2019<sup>408</sup>. Indeed, Google France, Google Ireland Ltd. and Google LLC are part of the Alphabet group, whose consolidated revenue amounted to \$161.857 billion in 2019 (\$182.527 billion in 2020), the bulk of which (\$160.743 billion in 2019, \$181.694 billion in 2020) came from "Google" activities and more particularly from advertising revenue generated by the search engine (\$98.115 billion in 2019)<sup>409</sup>.
536. For its part, Google disputes the seriousness of the practices, highlighting the considerable efforts it has made to try to maximise the likelihood of reaching a settlement, and asked the *Autorité* to take into account the fact that it: (i) proposed alternative valuation methods during the three-month

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<sup>408</sup> Classification marks VC 3,968 and VNC 5,210, 20/0083 F.

<sup>409</sup> <https://abc.xyz/investor/static/pdf/20200204alphabet10K.pdf>.

[https://abc.xyz/investor/static/pdf/2020Q4\\_alphabet\\_earnings\\_release.pdf](https://abc.xyz/investor/static/pdf/2020Q4_alphabet_earnings_release.pdf).

period, starting to negotiate with the APIG and the SEPM before the entry into force of the Injunctions, (ii) proposed extending the negotiation period; (iii) raised the amount of its financial offers; and (iv) engaged in discussions with individual publishers who did not request any, and with the APIG and the AFP at the end of the three-month period.

537. Google further states that it did not have control over the timing of the negotiations and that the Injunctions did not require it to reach an agreement within the time frame laid down in the Decision. It believes that the Report should have also taken into account the behaviour of publishers in the conduct of these discussions.
538. These arguments do not hold water. Firstly, it is not apparent from the documents in the file that the press publishers and news agencies have, by their conduct, undermined the smooth conduct of the negotiations, or that they could be held wholly or partly responsible for the identified non-compliance on the part of Google. And, once the injunction period had expired, some press publishers or news agencies could not be blamed for not having wanted to extend the negotiations, even though no significant change in the negotiation framework applied by Google had been communicated.
539. Secondly, Google is not accused of not having concluded an agreement within the time limit set by the injunctions, but of not having complied with the obligations relating to the way in which the negotiations were conducted. Finally, although Google did propose valuation methods that have evolved somewhat, in terms of the method of calculation or the amount proposed, the fact remains that the general determinants of the negotiation could not, for the reasons already detailed, be regarded as complying with the Injunctions, in particular with regard to the obligation of good faith.
540. Furthermore, according to Google, there are uncertainties inherent in the new framework imposed by the Law, to which the Injunctions refer, which raises novel and complex issues that Google was obliged to address in an extremely short time frame. In this regard, Google stresses the fact that it requested a position from the Legal Service of the *Autorité* on various issues, without success.
541. However, Google cannot rely on uncertainties in the interpretation of the Law to absolve itself of the shortcomings identified in the present decision. Indeed, it should be stressed that although the Law is indeed recent, it is unambiguous. The obligations set out in the Decision also met the requirements of clarity, precision and certainty, thereby prompting the Cour d'Appel de Paris (Paris Court of Appeal) to confirm that they were well-founded. Moreover, as explained above, Google cannot rely on its exchanges with the Legal Department of the *Autorité* to absolve itself or limit its liability as regards non-compliance with the Injunctions. And the fact that some of the injunctions were partially complied with cannot prevent a finding of non-compliance with the Decision, since compliance with all the injunctions must be the rule.
542. Finally, Google claims that the APIG considers that the framework agreement, signed on 12 February 2021, satisfies the demands of its members and that the public authorities have reacted positively to it. In this regard, it cites comments attributed to the President of the *Autorité* by the Mlex media, according to which she stated that the framework agreement signed between Google and the APIG could "*serve as a model*" for future negotiations in Europe and beyond.
543. It should be noted in this regard, and in any event, that the APIG does not appear to be fully satisfied with the framework agreement it signed in February 2021, as is shown in paragraph 16 of its most recent observations filed on 19 March 2021 (translated): "*The APIG considers, however, that the practices noted above for the initial negotiation period have continued beyond that period and have partially vitiated the negotiation of the framework agreement, in particular the lack of information sharing that would enable transparent and fair remuneration*".

544. Secondly, it should be noted that the responses of the President of the *Autorité* to the questions of journalists do not constitute any official endorsement by the *Autorité* of the terms of the framework agreement or the conditions under which it was negotiated. While the President commented on the announcement of an agreement reached after the negotiations on related rights, she clarified that the conclusion of this agreement did not mean that the *Autorité's* investigation was finished<sup>410</sup>. In statements republished by the AFP, the President also made it clear that the *Autorité* will (translated) "*look into the details of this agreement, in the context of the procedures that have been initiated, in order to ensure that the scope of this text complies with both French and European legislation, and with the decision taken last year by the Autorité (in which the latter required Google to negotiate in good faith with press publishers)*"<sup>411</sup>. The comments therefore clearly distinguished the signing of the agreement from the details of these stipulations, from the conditions of the negotiations, with regard to the obligations resulting from the Decision. It is the investigation conducted in the context of the present proceedings, which has allowed the *Autorité* to assess the specific conditions under which the negotiations were conducted, and to conclude that they did not comply with the terms of the Decision.
545. Finally, and in any event, the conclusion of the framework agreement with the APIG took place on 12 February 2021, i.e. more than five months after the expiry of the negotiation period, and does not meet the conditions laid down in the Decision. This cannot mitigate the seriousness of Google's conduct during the three-month negotiation period set by the Injunctions.
546. In these circumstances, the identified shortcomings must be regarded as being exceptionally serious.

**c) On the impact of the identified conduct on competition that the Injunctions were intended to safeguard**

547. Regardless of the intrinsic seriousness of the infringement, it is advisable to assess the impact that Google's conduct may have had on competition and the interests that Injunctions 1, 2, 5 and 6 sought to safeguard.
548. In the present case, it can be noted that Google's shortcomings did not allow the negotiation framework put in place by the Injunctions to fully perform the role assigned to it by the *Autorité* in its Decision. Google's behaviour has therefore undermined the objective of the Decision, as set out in the Law, which was, within the meaning of Article L. 218-1 of the IPC, to allow press publishers and news agencies, if they so wished, to negotiate with Google within a balanced framework with a view to laying down both the modalities for selecting and displaying their content and any associated remuneration. This shortcoming appears to be all the more significant in its scope given Google's dominant position on the generalist search services market, which has "extraordinary" aspects highlighted by the *Autorité* in Decision 19-D-26<sup>412</sup>, and the obvious importance of the use of protected content in its search engine, as the *Autorité* noted (paragraph 272 of the Decision).
549. Beyond the effect of this conduct on the relationship between press publishers and news agencies and Google, it should be stressed, as was the case in the Decision, that Google's conduct is all the more damaging as it is likely to dissuade platforms that reuse content from press publishers and

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<sup>410</sup> Classification mark 6,591, 20/0083 F.

<sup>411</sup> Classification mark 6,950, 20/0083 F.

<sup>412</sup> Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising, paragraph 321.

news agencies from applying the Law correctly, and to place those that do comply with the Law in a disadvantageous position, including vis-à-vis Google, since they would agree to pay sums for related rights, which Google intends to exempt itself from, in whole or in part. On this point, the *Autorité* notes that the Cour d'Appel de Paris (Paris Court of Appeal) held (paragraph 160 of the judgement of 8 October 2020) that (translated and emphasis added):

*"Finally, it is clear from the proceedings, as the contested decision held, that Google Search is the main source of traffic redirected to the websites of press publishers, and it is not seriously disputed that the position adopted by a group with such power and reputation can have an incentive effect on actors in the same sector, in addition to the dissuasive effect it creates for press publishers and news agencies regarding the usefulness of entrusting their rights to a collective management organisation as authorised by Article L. 218-3 of the intellectual property code".*

550. Moreover, insofar as Google's financial proposals did not specifically identify the remuneration for current uses of protected content for each of the complainants, Google's shortcomings deprived the press publishers and news agencies of useful negotiating elements that would have allowed them to fully capitalise on their content and obtain higher levels of remuneration.
551. Finally, by encouraging certain publishers to negotiate individually after having contributed to a large extent to the failure of the collective discussions, Google once again placed press publishers and news agencies that had not yet reached an agreement in the situation described in paragraphs 99 to 119 of the Decision, a situation which the Decision sought to remedy. This situation was even aggravated by the fact that Google linked the discussions on related rights with the discussions on the *Showcase* and *SwG* offers.
552. It can be seen from the foregoing that the impact of the identified conduct on competition that the Injunctions were intended to safeguard was substantial.

#### **d) On the amount of the fine**

553. On the basis of the individual and general elements detailed above, it is therefore appropriate to impose a penalty on Google of €500 million.

## **2. ON THE PERIODIC PENALTY PAYMENTS**

554. Article L. 464-2(II) of the French Commercial Code (Code de commerce) empowers the *Autorité* (translated) "*to impose on the parties concerned periodic penalty payments of up to 5% of the average daily turnover for each day's delay from the date it sets, in order to compel them: b) (...) to comply with the measures handed down pursuant to Article L. 464-1 of the French Commercial Code (Code de commerce) (...). The turnover taken into account is calculated on the basis of the accounts of the company for the last financial year ending on the date of the decision. The periodic penalty payment shall be liquidated by the Autorité de la concurrence, which shall set the final amount*".
555. In the context of the Decision, the *Autorité* issued interim measures after having found that there was serious and immediate harm to the press sector as a result of Google's conduct, which, in the context of a major crisis in this sector, deprives press publishers and news agencies of a vital resource to ensure the survival of their business, at the crucial moment when the Law on related rights came into force.

556. The Decision stated that the interim measures would remain in force until the *Autorité* issued the decision on the merits of the case, which had not occurred by the date of publication of the present Decision.
557. The *Autorité* reiterates that Google remains bound to comply with the Injunctions as validated by the Cour d'Appel de Paris (Paris Court of Appeal) in its judgement of 8 October 2020, in particular with respect to any press publisher or news agency requesting to enter into negotiations within the meaning of Injunction 1. Compliance with these Injunctions remains subject to the control of the *Autorité* de la concurrence, which may be referred to once again by any press publisher or news agency, in accordance with Article L. 464-3 of the French Commercial Code (Code de commerce), that is of the opinion that Google has not complied with these injunctions.
558. The *Autorité* notes that the shortcomings identified above have undermined the useful effect of the interim measures issued by the *Autorité* in Decision 20-MC-01, which was primarily aimed at enabling press publishers and news agencies to negotiate an objective, transparent and non-discriminatory offer of remuneration with Google, in accordance with Article L. 218-4 of the IPC, in respect of the related rights recognised by the Law.
559. In particular, the *Autorité* found that, in the negotiations it undertook in the context of the Injunctions, Google refused to recognise specific remuneration for the current use of protected content on Google's services. It also noted that Google had refused to enter into negotiations on related rights with publishers who did not have IPG certification and news agencies, based on a restrictive interpretation of the Law and the Decision, even after the judgement of the Cour d'Appel de Paris (Paris Court of Appeal) of 8 October 2020, the reasons for which appear nonetheless to be unambiguous.
560. In view of the failure to comply with the Injunctions identified in the present decision, it is necessary, in order to ensure the proper implementation of the interim measures issued in the decision of 9 April 2020, to:
- As regards the enforcement of Injunction 1, order Google to make an offer of remuneration that meets the requirements of the Law and the Decision for the current use of protected content on Google's services to those complainants who so request. Google shall comply with such a request within two months of receipt of any request to reopen negotiations made by the complainants by registered letter with acknowledgement of receipt after notification of the present decision;
  - As regards the enforcement of Injunction 2, order Google to include in this offer the information provided for in Article L. 218-4 of the Intellectual Property Code. This information must include an estimate of the total revenue it generates in France by displaying protected content on its services, indicating the share of revenue generated by the publisher or news agency that has requested the offer of remuneration. This estimate must detail the following revenue items: (i) the advertising revenues that Google generates on the pages of its online search engine on which protected content is displayed; (ii) the revenues that Google earns as an online advertising intermediary, in respect of targeted ads generated on publishers' sites to which the search engine user is redirected and for which Google earns a commission ; and (iii) the indirect revenues earned by Google on account of the attractiveness of its services by its displaying of protected content, which may play a role both in the initiation of a search and in the time spent by the user on the search engine and all of Google's services and the personal data derived from them.
561. To ensure the effective enforcement of the injunctions detailed in the previous paragraphs, a periodic penalty payment of €300,000 per day's delay shall be imposed upon expiry of the two-month period from the formal request for the reopening of negotiations, where appropriate, by each

of the complainants. As such, this periodic penalty payment will be assessed separately for each negotiation that may be reopened by each of the complainants after the notification of the present decision.

562. Finally, Google shall justify its compliance with the present decision by providing the *Autorité* with a copy of the offers of remuneration submitted to the complainants who so request in the context of the monthly monitoring reports communicated pursuant to Injunction 7 of the decision of 9 April 2020.

## DECISION

**Article 1:** It is established that Google LLC, Google Ireland Ltd. and Google France have failed to comply with the first, second, fifth and sixth injunctions issued by the *Autorité* in Decision 20-MC-01 of 9 April 2020 on requests for interim measures submitted by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

**Article 2:** A financial penalty of €500,000,000 is hereby imposed jointly and severally on the companies Google LLC, Google Ireland Ltd., and Google France for the shortcomings referred to in Article 1.

**Article 3:** Google LLC, Google Ireland Ltd. and Google France are ordered to comply in all respects with the injunctions detailed in paragraph 560 of the present decision, subject to a penalty of €300,000 per day's delay at the end of the two-month period commencing from the formal request for the reopening of negotiations made, where appropriate, by each of the complainants, after notification of the present decision.

Deliberated on the oral report by Mr Grégoire Colmet-Daâge and Mr Frédéric Fustier, rapporteurs, and the statement by Mrs Lauriane Lépine, Deputy General Rapporteur, by Mrs Isabelle de Silva, President, Mrs Irène Luc, Vice-President and Mrs Valérie Bros, member.

Hearing secretary,

Chair,

Claire Villeval

Isabelle de Silva

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