

Autorité  
de la concurrence



Only the French version is authentic. In the event of any discrepancy,  
the French version will prevail over the translation.

**Decision 24-D-03 of 15 March 2024  
regarding compliance with the commitments in  
Decision 22-D-13 of 21 June 2022 of the *Autorité de la concurrence*  
regarding practices implemented by Google in the press sector\***

The *Autorité de la concurrence* (section IB),

Having regard to Decision 23-SO-01 of 20 July 2023 registered under number 23/0041 R, by which the *Autorité de la concurrence* decided at its own initiative to examine the compliance with the commitments given by Google in Decision 22-D-13 of 21 June 2022;

Having regard to Book IV of the French Commercial Code (*Code de commerce*), and in particular Articles L. 420-2 and L. 464-3 thereof;

Having regard to Decision 22-D-13 of 21 June 2022 regarding practices implemented by Google in the press sector;

Having regard to the settlement report (*procès-verbal de transaction*) of 22 December 2023 signed by the Deputy Rapporteur General and Alphabet Inc., Google LLC, Google Ireland Limited and Google France pursuant to Article L. 464-2 III of the French Commercial Code;

Having regard to the observations submitted by Alphabet Inc., Google LLC, Google Ireland Limited and Google France and by the representative of the French Ministry of the Economy (*commissaire du Gouvernement*);

Having regard to the other evidence in the case file;

The representatives of the French Ministry of Culture, Accuracy, the Syndicat des Éditeurs de la Presse Magazine, the Société des Droits Voisins de la Presse, the SIPA Ouest-France group and the Reworld Media group having been heard on the basis of Article L. 463-7, paragraph 2 of the French Commercial Code;

The case officers (*rapporteurs*), the Deputy General Rapporteur, the representatives of Alphabet Inc., Google LLC, Google Ireland Limited and Google France and the representative of the French Ministry of the Economy having been heard at the hearing of the *Autorité de la concurrence* on 24 January 2024;

Adopts the following decision:

## Summary<sup>1</sup>

Under the terms of this decision, the *Autorité de la concurrence* (hereinafter the “*Autorité*”) is fining Alphabet Inc., Google LLC, Google Ireland Limited and Google France (hereinafter “Google”) €250 million for failing to comply with the commitments made binding by Decision 22-D-13 of 21 June 2022 (hereinafter the “Commitments Decision”). These commitments concern Google’s application of French law 2019-775 of 24 July 2019, which aims to establish a related right for press agencies and publishers. The aim of these commitments is to restore the balance of power between the various players in the press sector and Google, by establishing a binding negotiating framework tailored to the specific features of the sector.

In this decision, the *Autorité* concludes that Google did not comply with Commitments 1, 2, 4 and 6 of the Commitments Decision.

Firstly, the *Autorité* considers that Google did not comply with its obligation to negotiate remuneration offers for the use of protected press content on its services based on transparent, objective and non-discriminatory criteria within three months (Commitments 1 and 4) and did not provide press agencies and publishers with all the information needed to negotiate with Google (Commitment 2).

In this respect, the *Autorité* notes that Google not only failed to meet its obligations with regard to the provision of its methodology notes, but also that these notes were opaque and did not enable the negotiating parties to understand how Google determined its financial offers. Moreover, Google did not provide all the information that should have been provided to the negotiating parties under the Commitments Decision. As a result of this series of breaches, Google kept the negotiating parties in a situation of information asymmetry, thereby hampering their ability to negotiate, whereas the commitments were intended to do precisely the opposite.

In addition, the *Autorité* considers that Google reduced the remuneration base for press agencies and publishers, in breach of the principles of the Commitments Decision:

- On the one hand, Google undervalued the indirect revenues derived from the attractiveness brought to its services through the display of protected press content. The *Autorité* notes, in this regard, that Google limited indirect revenues to a marginal share in the calculation of its financial offers, while the Commitments Decision found that indirect revenues represented the biggest share of revenues derived from the display of protected press content on Google’s services.
- On the other hand, Google excluded any form of remuneration for the display of press article headlines, which is not consistent with the previous decisions issued by the *Autorité* or with the Court of Appeal case law referred to in the Commitments Decision.

The *Autorité* also notes that Google gave no contractual expression to the commitment to update and, where appropriate, regularise remuneration in the majority of the contracts signed with publishers since the commitments came into force, or has done so only in part.

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<sup>1</sup> The summary is for information purposes only and provides an overview of the following numbered reasons for the decision. Only the French version of the decision is authentic. In the event of any discrepancy, the French version will prevail over the translation.

Secondly, the *Autorité* found several other breaches by Google following the launch of its artificial intelligence service Bard, now called Gemini.

The *Autorité* notes that Google, by not informing press agencies and publishers of the use of their content by Bard, failed to comply with its obligation of transparency under Commitment 1.

Moreover, the *Autorité* considers that Google did not comply with Commitment 6 concerning the obligation to ensure that negotiations on related rights did not affect any other economic relationships between Google and press agencies and publishers. The *Autorité* notes that Google did not propose any technical solution for press agencies and publishers to opt out of the use of their content by Bard. Press agencies and publishers wanting to opt out had to insert an instruction opposing any crawling of their content by Google, including on the Search, Discover and Google News services, which were the subject of negotiation for the remuneration of related rights. In doing so, Google linked the use of press agencies' and publishers' content by its artificial intelligence service to the display of protected content, thus obstructing the ability of press agencies and publishers to negotiate remuneration under Commitment 1.

Thirdly, the *Autorité* considers that Google, by failing to share all the information necessary for the monitoring trustee to monitor the commitments, did not comply with its obligation to cooperate with the monitoring trustee.

In accordance with its decision-making practice, the *Autorité* considers the breaches identified to be serious, as commitments are proposed and made at the initiative of the parties involved.

Google asked the *Autorité* to apply the settlement procedure, pursuant to Article L. 464-2 III of the French Commercial Code (*Code de commerce*). In accordance with this procedure, Google did not contest the alleged breaches. A settlement report was drawn up following the implementation of this procedure (*procès-verbal de transaction*), setting the maximum and minimum amounts of the fine that could be imposed by the *Autorité*.

Google has also presented corrective measures to remedy the breaches identified by the Investigation Services.

These measures, of which the *Autorité* takes note, do not modify the commitments and in no way exempt Google from complying in full with the Commitments Decision.

After examining all the facts of the case, the *Autorité* has decided to impose a fine on Google in an amount within the range set out in the settlement report, i.e. €250 million.

## CONTENTS

<b>I. FINDINGS .....</b>	<b>6</b>
<b>A. THE PROCEEDINGS .....</b>	<b>6</b>
1. DECISION 20-MC-01 .....	6
2. DECISION 21-D-17.....	6
3. DECISION 22-D-13.....	7
4. THE CURRENT PROCEEDINGS.....	7
<b>B. THE SECTOR CONCERNED .....</b>	<b>7</b>
<b>C. THE ENTITIES CONCERNED .....</b>	<b>8</b>
<b>D. THE COMMITMENTS GIVEN BY GOOGLE IN DECISION 22-D-13 .....</b>	<b>9</b>
<b>E. OBSERVED PRACTICES.....</b>	<b>11</b>
1. THE PROCEDURE FOR DESIGNATING THE MONITORING TRUSTEE, ITS MISSIONS AND ITS REPORTS .....	11
2. IMPLEMENTATION OF THE COMMITMENTS BY GOOGLE .....	14
a) Implementation of the first commitment .....	14
<i>Development of remuneration offers for publishers.....</i>	<i>14</i>
<i>Development of remuneration offer for press agencies.....</i>	<i>22</i>
<i>Annual update of the remuneration offer.....</i>	<i>24</i>
b) Implementation of the second commitment.....	27
<i>Transmission of a minimum set of information .....</i>	<i>27</i>
<i>Transmission of additional information .....</i>	<i>28</i>
c) Implementation of the third commitment .....	29
d) Implementation of the fourth commitment .....	30
e) Implementation of the fifth commitment.....	30
f) Implementation of the sixth commitment.....	31
g) Implementation of the seventh commitment .....	32
h) General commitments.....	32
3. COOPERATION WITH THE MONITORING TRUSTEE .....	32
a) Implementation of the ENP Scaled Solution .....	32
b) Payment of the Monitoring Trustee's fees by Google.....	33
c) Google's questioning of the Monitoring Trustee's missions .....	34
4. THE BARD ARTIFICIAL INTELLIGENCE SERVICE .....	35
a) How Bard works.....	35
b) The possibility for press agencies and publishers to opt out of the use of their content by Bard .....	37
<i>The period preceding the launch of Google-Extended.....</i>	<i>37</i>

<i>The period following the launch of Google-Extended</i> .....	38
5. CONCLUSIONS OF THE REPORT.....	38
<b>II. DISCUSSION .....</b>	<b>39</b>
<b>A. IMPLEMENTATION OF THE SETTLEMENT PROCEDURE .....</b>	<b>39</b>
<b>B. GOOGLE’S COMPLIANCE WITH THE COMMITMENTS .....</b>	<b>40</b>
1. REMINDER OF THE PRINCIPLES APPLICABLE TO COMPLIANCE WITH COMMITMENTS.....	40
2. ASSESSMENT OF GOOGLE’S FAILURE TO COMPLY WITH THE COMMITMENTS...	41
a) Commitment 1 .....	42
(i) <i>Transparency, objectivity and non-discrimination criteria</i> .....	42
(ii) <i>Indirect revenues</i> .....	48
(iii) <i>Absence of remuneration for the display of press article headlines on its services</i> .....	50
(iv) <i>Annual remuneration update</i> .....	51
(v) <i>Use of press content as part of the Bard service</i> .....	52
b) Commitment 2 .....	53
<i>Absence of communication of data at sub-domain level</i> .....	53
c) Commitment 4 .....	54
d) Commitment 6 .....	54
e) Obligation to cooperate with the Monitoring Trustee .....	55
<b>C. DURATION OF THE PRACTICES .....</b>	<b>56</b>
<b>D. ATTRIBUTABILITY .....</b>	<b>56</b>
<b>E. FINES .....</b>	<b>56</b>
1. APPLICABLE PRINCIPLES .....	56
2. LEGAL CEILING FOR FINES.....	57
3. SERIOUSNESS OF THE BREACHES OF THE COMMITMENTS OBSERVED.....	58
4. IMPACT OF THE BREACHES OBSERVED ON THE COMPETITION THE COMMITMENTS WERE INTENDED TO PRESERVE .....	59
5. CORRECTIVE MEASURES SUBMITTED BY GOOGLE AS PART OF THE SETTLEMENT PROCEDURE .....	59
6. AMOUNT OF THE FINE.....	61
<b>DECISION .....</b>	<b>62</b>

# **I. Findings**

## **A. THE PROCEEDINGS**

### **1. DECISION 20-MC-01**

1. By 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 together “APIG”), and Agence France-Presse (hereinafter “AFP”) referred to the *Autorité de la concurrence* (hereinafter the “*Autorité*”) practices implemented by Google LLC, Google Ireland Ltd and Google France (hereinafter “Google”) following the adoption of French law 2019-775 of 24 July 2019, which aims to establish a related right for press agencies and publishers (hereinafter the “Law on Related Rights”), in application of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market (hereinafter the “Directive”).
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, interim measures pursuant to Article L. 464-1 of the French Commercial Code (*Code de commerce*).
3. On 9 April 2020, the *Autorité* adopted Decision 20-MC-01 (hereinafter the “Interim Measures Decision”), ordering interim measures against Google (hereinafter the “Injunctions”).
4. In its ruling of 8 October 2020<sup>2</sup>, the Paris Court of Appeal rejected all of Google’s arguments for annulment. No appeal was lodged against this ruling, which became final.

### **2. DECISION 21-D-17**

5. By letters registered on 31 August 2020 and 2 September 2020 under numbers 20/0083 F, 20/0084 F and 20/0085 F, APIG, SEPM and AFP filed a complaint with the *Autorité* regarding the non-compliance by Google with the Injunctions ordered in the Interim Measures Decision.
6. In Decision 21-D-17 of 12 July 2021 (hereinafter the “Non-compliance with Injunctions Decision”), the *Autorité* considered that Google had failed to comply with Injunctions 1, 2, 5 and 6.
7. Consequently, the *Autorité* imposed a fine of €500 million on Google and ordered it to comply with Injunctions 1 and 2 of the Interim Measures Decision<sup>3</sup>. In order to ensure compliance with these injunctions, the *Autorité* also imposed a periodic penalty of €300,000 per day of delay as from the expiry of a two-month period starting from the formal request to reopen negotiations made by each of the complainants.

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<sup>2</sup> Paris Court of Appeal ruling of 8 October 2020, no. 20/08071. In this ruling, the Paris Court of Appeal amended Article 5 of the Interim Measures Decision, adding the following: “*This injunction does not prevent improvements and innovations to the services offered by 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 the related rights concerned by the negotiations provided for in Articles 1 and 2 of this decision*”.

<sup>3</sup> Non-compliance with Injunctions Decision, paragraph 560.

8. As Google withdrew its appeal against the Non-compliance with Injunctions Decision<sup>4</sup>, this decision became final.

### **3. DECISION 22-D-13**

9. On 3 December 2021, the Investigation Services sent Alphabet Inc., Google LLC, Google Ireland Ltd and Google France (hereinafter together “Google”) a preliminary assessment relating to practices implemented in the press, online public communication services and online advertising sectors.
10. On 9 December 2021, in response to the competition concerns expressed in the preliminary assessment, Google submitted an initial set of proposed commitments. Following the hearing of 12 April 2022 before the Board of the *Autorité*, Google successively submitted four new versions of the commitments to the Board, as well as a final version of the commitments on 9 May 2022.
11. On 21 June 2022, the *Autorité* adopted Decision 22-D-13 regarding practices implemented by Google in the press sector (hereinafter the “Commitments Decision” or “Decision 22-D-13”)<sup>5</sup> accepting the commitments proposed by Google in its last proposal (hereinafter the “Commitments”) and closed the proceedings on the merits initiated in November 2019 following the referrals from SEPM, APIG and AFP.
12. On 27 July 2022, Google was notified of the Commitments Decision. The Commitments thus became binding from that date.
13. This decision became final and was not appealed within the legal time limits.

### **4. THE CURRENT PROCEEDINGS**

14. On 20 July 2023, by Decision 23-SO-01, the *Autorité* decided at its own initiative to examine compliance with the Commitments<sup>6</sup>.
15. On 13 October 2023, a report was notified to Google<sup>7</sup>, in accordance with the provisions of Article R. 464-9 of the French Commercial Code (hereinafter the “Report”).
16. In a settlement report dated 22 December 2023, Google undertook not to contest the breaches of the Commitments notified to it<sup>8</sup>. At the hearing of 24 January 2024, its representative solemnly and knowingly confirmed its full agreement with the terms of the settlement.

#### **B. THE SECTOR CONCERNED**

17. The press sector is described in detail in paragraphs 11 to 22 of the Interim Measures Decision, paragraphs 23 to 28 of the Non-compliance with Injunctions Decision and paragraphs 23 to 29 of the Commitments Decision, to which this decision refers.
18. In the Interim Measures Decision, the *Autorité* emphasised the profound upheaval facing the press sector, in particular the decline in advertising revenues between 2007 and 2017 alongside the significant increase in advertising revenues for digital players (paragraphs 14 to 18 of the Interim Measures Decision). This phenomenon of “value capture” by digital

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<sup>4</sup> Noted by the Paris Court of Appeal in a ruling dated 19 January 2023, no. RG 20/08071.

<sup>5</sup> Decision 22-D-13 of 21 June 2022 regarding practices implemented by Google in the press sector.

<sup>6</sup> Classification mark 2.

<sup>7</sup> Classification marks 16,714 to 16,847.

<sup>8</sup> Classification marks 23,250 to 23,272.

players to the detriment of press players was also noted during the parliamentary work that led to the adoption of the Law on Related Rights (paragraphs 20 and 21 of the Interim Measures Decision).

19. In the Non-compliance with Injunctions Decision (paragraphs 24 to 28) and the Commitments Decision (paragraphs 25 to 29), the *Autorité* also emphasised the consequences of the health crisis, which led to a rise in the use of digital media and services and significantly affected many industries, including the press sector. Although news websites saw an increase in their online audience between July 2019 and June 2020, the press sector saw a sharp fall in its revenues (in particular advertising revenues), and its activities were severely disrupted (in particular due to declines in single-issue sales at newsstands, disruptions to the delivery of newspapers and magazines sold by subscription, and the cancellation of news-related conference activities). In these decisions, the *Autorité* noted that this situation had prompted a reorganisation of press companies, in particular the court-ordered liquidation of the regional daily *La Marseillaise*, the discontinuation of the weekly magazine *Grazia* in favour of entirely digital content, the restructuring of the daily *Le Parisien* and a reduction in staff numbers at the newspaper *L'Équipe*. According to the latest figures for the print media published online by the French Ministry of Culture, the situation in the sector is continuing to deteriorate. Between 2017 and 2021, total circulation fell by 32.1% and revenues by 12.4%<sup>9</sup>. Furthermore, other data suggests that volumes continued to decline between 2020 and 2023, with total circulation of press brands – as measured by the Alliance pour les Chiffres de la Presse et des Médias (hereinafter “ACPM”) – falling from 3.3 billion to 2.7 billion copies between 2020 and 2023<sup>10</sup>. As for the share of press families’ digital versions in total paid circulation in France in 2022, the national daily press is the leader with 68%, while the magazine press and the regional daily press sell more paper versions than digital versions (21% for the magazine press and 15% for the regional daily press)<sup>11</sup>.

### C. THE ENTITIES CONCERNED

20. Google was founded in 1998. Its founders invented the search engine of the same name, which is the most widely used in France and worldwide. Today, its activities are focused on providing online search services, operating systems and online advertising.
21. Google is discussed in detail in paragraphs 34 to 61 of the Interim Measures Decision, to which this decision refers.
22. In July 2023<sup>12</sup>, Google launched its Bard service in France, which it describes as an experimental conversational artificial intelligence service: “*Bard was built to be a creative*

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<sup>9</sup> <https://www.culture.gouv.fr/fr/Thematiques/Presse-ecrite/Donnees-sur-la-presse-ecrite> (French only)

<sup>10</sup> See the ACPM website: <https://www.acpm.fr/Actualites/Les-publications/Communique-de-la-Diffusion/Diffusion-et-Frequentation-de-la-Presse-DSH-OJD-2020>; <https://www.acpm.fr/Actualites/Les-publications/Communique-de-la-Diffusion/Diffusion-et-Frequentation-de-la-Presse-DSH-2022>; <https://www.acpm.fr/Actualites/Toute-l-actualite/Actualites-generales/Diffusion-et-Frequentation-de-la-Presse-DSH-2023> (French only)

<sup>11</sup> See the ACPM website: <https://www.acpm.fr/Les-chiffres/Observatoire-2023-de-l-ACPM-Syntheses-2022> (French only)

<sup>12</sup> See the press release of 13 July 2023, available on the Google France blog: <https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/technologie/bard-deploie-sa-plus-grande-mise-a-jour-plus-de-fonctionnalites-langues-pays/>

and helpful collaborator”<sup>13</sup>. On 19 September 2023, Google announced an update, available for use in English, allowing Bard to be connected via extensions to other Google services (Gmail, Docs, Drive, Google Maps, YouTube and Google Flights)<sup>14</sup>. In February 2024, Google announced that Bard was now called Gemini<sup>15</sup>.

#### **D. THE COMMITMENTS GIVEN BY GOOGLE IN DECISION 22-D-13**

23. In response to the competition concerns identified and described in paragraphs 72 to 89 of the Commitments Decision, Google submitted the following commitments to the *Autorité*.
24. Under the first commitment (or “Commitment 1”), Google undertakes to negotiate in good faith, with the negotiating parties that so request, the remuneration due by Google for the display of protected content on its products and services, in accordance with the terms set out in Article L. 218-4 of the French Intellectual Property Code (*Code de la propriété intellectuelle*), on the basis of transparent, objective and non-discriminatory criteria<sup>16</sup>.
25. Unless the negotiating parties request otherwise, these negotiations will not cover Google News Showcase or other Google products and services that do not exist at the date of the complete request to enter into negotiations<sup>17</sup>. In such event, negotiations relating to existing uses shall be conducted independently and a distinct amount of remuneration will be allocated to existing uses<sup>18</sup>.
26. Under the first commitment, the negotiations must actually lead to Google making an offer for remuneration, which may be zero. Google also undertakes to update the amount of remuneration at least once a year by 1 February<sup>19</sup>.
27. To be considered complete, all requests to enter into negotiations must comply with a number of formalities (online form, provision of the information listed in Annex 2 of the Commitments and signature of a confidentiality agreement provided in Annex 4 of the Commitments)<sup>20</sup>.
28. Google undertakes that the negotiations will take place under the supervision of a monitoring trustee, whose missions are detailed in Annex 3 of the Commitments<sup>21</sup>.

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<sup>13</sup> Classification marks 10,443 to 10,446.

<sup>14</sup> See the press release of 19 September 2023, available on the Google blog: <https://blog.google/products/bard/google-bard-new-features-update-sept-2023/>

<sup>15</sup> See the press releases of 8 February 2024, available on the Google blog: [https://blog.google/technology/ai/google-gemini-update-sundar-pichai-2024/?utm\\_source=tw&utm\\_medium=social&utm\\_campaign=gemini24&utm\\_content=&utm\\_term=](https://blog.google/technology/ai/google-gemini-update-sundar-pichai-2024/?utm_source=tw&utm_medium=social&utm_campaign=gemini24&utm_content=&utm_term=); <https://blog.google/products/gemini/bard-gemini-advanced-app/>

<sup>16</sup> Paragraph 10 of the Commitments.

<sup>17</sup> Uses in the products and services subject to the negotiations are hereinafter referred to as the existing negotiations.

<sup>18</sup> Paragraph 11 of the Commitments.

<sup>19</sup> Paragraph 12 of the Commitments.

<sup>20</sup> Paragraph 13 of the Commitments.

<sup>21</sup> Paragraph 14 of the Commitments.

29. Under the second commitment (or “Commitment 2”), Google undertakes to provide press agencies and publishers with the information listed in Article L. 218-4 of the French Intellectual Property Code. Google must provide this information in two stages.
30. Firstly, Google undertakes to share the information listed in Annex 1 with the negotiating parties within 10 working days (for individual negotiations) or 15 working days (for negotiations with a collective management organisation or association) of their complete negotiation request<sup>22</sup>.
31. Secondly, Google undertakes to respond to any requests for additional information from the monitoring trustee or the negotiating parties within 15 working days of such a request from the negotiating party or the monitoring trustee’s opinion in the event of disagreement<sup>23</sup>.
32. Under the third commitment (or “Commitment 3”), Google undertakes to maintain, during the negotiation period and, where applicable, the period during which the remuneration is being determined by an arbitral tribunal, the display modalities for protected content in place at the time of the request to enter into negotiations, in accordance with the parameters chosen by the publishers concerned<sup>24</sup>.
33. Under the fourth commitment (or “Commitment 4”), Google undertakes to conduct the negotiations within three months of the date of receipt of the complete negotiation request<sup>25</sup>. Within this period, Google must therefore make a remuneration proposal in accordance with the conditions provided for in the first commitment<sup>26</sup>.
34. The fourth commitment also provides that, should Google and a negotiating party fail to reach an agreement by the end of the negotiation period, either party may ask an arbitral tribunal to determine the remuneration based on the criteria set out in Article L. 218-4 of the French Intellectual Property Code<sup>27</sup>.
35. Under the fifth commitment (or “Commitment 5”), Google undertakes to ensure the existence and outcome of the negotiations covered by the first and second commitments do not affect the indexation, ranking and display of protected content displayed by Google on its products and services<sup>28</sup>. The fifth commitment does not prevent any improvements and innovations of Google’s products and services, provided that they do not involve, directly or indirectly, any harmful consequences to the interests of the holders of the related rights concerned by on-going negotiations with the negotiating party, because of or in connection with those negotiations<sup>29</sup>.
36. Under the sixth commitment (or “Commitment 6”), Google undertakes to take the necessary measures to ensure the negotiations covered by the first and second commitments do not affect any other economic relationships that may exist between Google and press agencies

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<sup>22</sup> Paragraph 16 of the Commitments.

<sup>23</sup> Paragraph 17 of the Commitments.

<sup>24</sup> Paragraph 20 of the Commitments.

<sup>25</sup> Paragraph 23 of the Commitments.

<sup>26</sup> Paragraph 24 of the Commitments.

<sup>27</sup> Paragraphs 25 to 28 of the Commitments.

<sup>28</sup> Paragraph 29 of the Commitments.

<sup>29</sup> Paragraph 30 of the Commitments.

and publishers<sup>30</sup>. Under the sixth commitment, any remuneration paid to the negotiating parties for their related rights for the existing uses of their protected content must be negotiated by Google independently from any other commercial agreement between Google and press agencies and publishers, whether or not the latter are parties to the negotiations<sup>31</sup>.

37. Under the seventh commitment (or “Commitment 7”), press agencies and publishers that, prior to the Commitments Decision, (a) had already signed an agreement with Google for the remuneration of the existing use of their protected content, or (b) had been offered such an offer, or (c) were entitled to such an offer pursuant to a framework agreement between Google and an association mandated on their behalf, are entitled to present a new complete negotiation request and benefit from the provisions of the Commitments.
38. According to the seventh commitment, a press agency or publisher that avails itself of such possibility will incur *“no penalty for the amendment or termination of the agreement as the case may be, and the remuneration agreed upon in the pre-existing agreements will continue to apply until the date of such amendment or termination, without prejudice to a possible reassessment pursuant the new offer”*<sup>32</sup>.
39. The Commitments given by Google and made binding by the *Autorité* also provide for Google’s compliance with the Interim Measures Decision, the ruling of the Paris Court of Appeal of 8 October 2020 and the Non-compliance with Injunctions Decision<sup>33</sup>, it being recalled that Google withdrew its appeal against the latter.
40. The Commitments also provide for the designation of a monitoring trustee to oversee the proper execution of the Commitments<sup>34</sup>. The designation procedure and the rules governing the performance of the monitoring trustee’s missions are set out in Annex 3 of the Commitments, which provides in particular that the remuneration paid to the monitoring trustee must not impede the proper performance of its mandate or its independence, and that Google undertakes to cooperate fully with the monitoring trustee (as well as with any expert designated by the monitoring trustee), in order to enable the latter to perform its missions.

## **E. OBSERVED PRACTICES**

41. The procedure for designating the monitoring trustee, its missions and the various reports sent to the *Autorité* (1), Google’s implementation of the Commitments (2), its cooperation with the monitoring trustee (3) and, lastly, a presentation of Google’s artificial intelligence service, Bard (4), are described in detail below.

### **1. THE PROCEDURE FOR DESIGNATING THE MONITORING TRUSTEE, ITS MISSIONS AND ITS REPORTS**

42. In accordance with the designation procedure described in Annex 3 of the Commitments, Accuracy was approved by the *Autorité*’s President as the monitoring trustee (hereinafter the “Monitoring Trustee”)<sup>35</sup>.

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<sup>30</sup> Paragraph 32 of the Commitments.

<sup>31</sup> Paragraph 33 of the Commitments.

<sup>32</sup> Paragraph 35 of the Commitments.

<sup>33</sup> Paragraph 3 of the Commitments.

<sup>34</sup> See paragraphs 5 and 14 of the Commitments.

<sup>35</sup> Classification mark 68.

43. On 10 and 12 October 2022, Google and the Monitoring Trustee signed the mandate agreement dated 7 October 2022 (hereinafter the “Mandate” or the “Mandate Agreement”)<sup>36</sup>.
44. Attached to the Mandate in Annex 2 is a “Monitoring Trustee Draft Work Plan” dated 7 October 2022 (hereinafter the “Draft Work Plan”)<sup>37</sup>, setting out the terms and conditions under which the Monitoring Trustee will perform its missions in the context of the Commitments. In this document, the Monitoring Trustee indicates that its mission will begin with a “diagnostic” phase<sup>38</sup>.
45. A “Detailed Draft Work Plan”, communicated to the *Autorité* and Google on 18 October 2022<sup>39</sup>, sets out the terms and conditions of the diagnostic phase (which includes scoping meetings with the *Autorité*, calls with Google to follow up on requests for information made by the Monitoring Trustee, targeted interviews with key personnel at Google and press agencies and publishers, and other details relating to the Monitoring Trustee’s management of the project).
46. Google gave a presentation to the Monitoring Trustee on 2 November 2022<sup>40</sup>, updated on 16 November 2022<sup>41</sup>, describing the internal procedures implemented to comply with the Commitments (hereinafter the “Launch Presentation to the Monitoring Trustee”).
47. Throughout its mission, the Monitoring Trustee provided the *Autorité* with various periodic reports:
- A monthly report summarising the exchanges between the Monitoring Trustee and Google, on the one hand, and between the Monitoring Trustee and the negotiating parties, on the other hand, during the preceding period (hereinafter the “Monthly Report”). Each Monthly Report contains the minutes of the meetings with Google, the documents exchanged between Google and the Monitoring Trustee, and all their correspondence.
  - A quarterly report, in accordance with paragraph 11 (vi) of Annex 3 of the Commitments, which provides that the Monitoring Trustee must “*submit to the FCA a quarterly report on Google’s compliance with the Commitments*” (hereinafter the “Quarterly Report”).
- As of the date on which the Investigation Services’ report was sent, four Quarterly Reports had been drawn up and sent to the *Autorité*:
- i) a first Quarterly Report (hereinafter “Quarterly Report no. 1”)<sup>42</sup>, sent to the *Autorité* on 16 January 2023, covering the period from 27 July 2022 to 11 January 2023 (hereinafter the “First Period”);

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<sup>36</sup> Classification marks 72 to 108.

<sup>37</sup> Classification marks 100 to 107.

<sup>38</sup> Classification marks 100 and 101.

<sup>39</sup> Classification marks 109 to 123.

<sup>40</sup> Classification marks 124 to 175.

<sup>41</sup> Classification marks 1,502 to 1,561.

<sup>42</sup> Classification marks (confidential version – CV) 8,622 to 8,711 and (non-confidential version – NCV) 14,648 to 14,740. A non-confidential version was sent by the Monitoring Trustee to Google on 9 February 2023, in accordance with paragraphs 11 (viii) and 13 of Annex 3 of the Commitments (classification marks 3,683 to 3,744).

- ii) a second Quarterly Report (hereinafter “Quarterly Report no. 2”)<sup>43</sup>, sent to the *Autorité*, in an initial version on 6 April 2023, then in an amended version on 11 April 2023, covering the period from 12 January 2023 to 3 April 2023 (hereinafter the “Second Period”);
- iii) a third Quarterly Report (hereinafter “Quarterly Report no. 3”)<sup>44</sup>, sent to the *Autorité* on 7 July 2023, covering the period from 4 April 2023 to 4 July 2023 (hereinafter the “Third Period”);
- iv) a fourth Quarterly Report (hereinafter “Quarterly Report no. 4”)<sup>45</sup>, sent to the *Autorité* on 10 October 2023, covering the period from 5 July 2023 to 4 October 2023 (hereinafter the “Fourth Period”).

48. Other work undertaken by the Monitoring Trustee and sent to the *Autorité* also includes:

- A “Diagnostic Report” sent to the *Autorité* on 25 November 2022<sup>46</sup>, which concluded that additional procedures needed to be put in place to enable the Monitoring Trustee to monitor compliance with the Commitments, in particular with regard to four identified issues:

[CONF]

- Two reports drawn up by the Monitoring Trustee, which sought the services of competent experts for this purpose in accordance with paragraph 14 of Annex 3 of the Commitments, and sent to the *Autorité* on 21 and 28 April 2023, one relating to the criteria to be used to assess the concept of “protected content” within the meaning of the French Intellectual Property Code<sup>47</sup> (“*Report summarising the conclusions and findings of the intellectual property experts*” [Rapport synthétisant les conclusions et constatations des experts en propriété intellectuelle], hereinafter the “IP Experts’ Report”<sup>48</sup>), the other on Google’s business model and the remuneration methodology proposed by Google to publishers (“*In-depth report on Google’s business model and the methodology for remunerating related rights in France*” [Rapport d’approfondissement sur le modèle d’affaires de Google et la méthodologie de rémunération des droits voisins en France])<sup>49</sup>.

<sup>43</sup> Classification marks (CV) 8,714 to 9,004 and (NCV) 14,741 to 15,032. A non-confidential version was sent by the Monitoring Trustee to Google on 13 April 2023, in accordance with paragraphs 11 (viii) and 13 of Annex 3 of the Commitments (classification marks 4,973 to 5,082).

<sup>44</sup> Classification marks (CV) 9,007 to 9,225 and (NCV) 15,033 and 15,245. A non-confidential version was sent by the Monitoring Trustee to Google on 19 July 2023, in accordance with paragraphs 11 (viii) and 13 of Annex 3 of the Commitments (classification marks 9,832 to 10,042).

<sup>45</sup> Classification marks (CV) 16,149 to 16,423 and (NCV) 16,433 to 16,707.

<sup>46</sup> Classification marks 7,866 to 7,954.

<sup>47</sup> Protected content is defined, under the terms of paragraph 6 of the Commitments, as: “*for Press Publishers, texts, photos and videos incorporated in their Press Publications and for News Agencies, texts, photos and videos incorporated by Press Publishers in an identical manner in their Press Publications and those which they make available to the general public, subject to exceptions listed in Article L. 211-3-1 of the French Intellectual Property Code*”.

<sup>48</sup> Classification marks 12,359 to 12,373.

<sup>49</sup> Classification marks 12,374 to 12,414.

## 2. IMPLEMENTATION OF THE COMMITMENTS BY GOOGLE

### a) Implementation of the first commitment

#### *Development of remuneration offers for publishers*

49. On 18 August 2023, Google received requests to enter into negotiations from 38 entities, corresponding to 86 domain names<sup>50</sup>. On the same date, 23 entities received a remuneration offer from Google, corresponding to 38 domain names.
50. In the Launch Presentation to the Monitoring Trustee<sup>51</sup>, Google explains that all remuneration offers made to the negotiating parties are accompanied by a methodology note<sup>52</sup>, enabling the parties to understand how the offer has been calculated.
51. The evidence in the case file shows that Google drew up at least eight successive versions of the methodology note<sup>53</sup>. Of those eight versions, five versions were sent to the negotiating parties to which Google sent a remuneration proposal, with the exception of Humanoid SAS<sup>54</sup>.
52. These methodologies are based on an approach that consists of establishing an overall amount of remuneration for all press publications certified by the Joint Commission for Press Publications and Agencies (*Commission paritaire des publications et agences de presse*, hereinafter the “CPPAP”), to which Google proposes to add those considered eligible by itself or by the Monitoring Trustee, and then dividing this total between the various press publishers on the basis of their share of traffic coming from a search engine according to SimilarWeb data, a tool that can be used to obtain estimates of traffic to an online site.
53. The total remuneration of publishers corresponds to the sum of the following four categories of remuneration:
- remuneration for the display of protected content in Google Search;
  - remuneration for the display of protected content in Google Discover;
  - remuneration for the display of protected content in Google News;
  - remuneration in respect of “other indirect revenues”, which Google defines as “*any indirect revenues received by Google resulting from the attractiveness brought to its services by the display of protected content*”<sup>55</sup>.
54. The remuneration of press publishers in respect of the display of protected content in Google Search corresponds to [CONF]% of the total amount of the revenue base determined by Google.

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<sup>50</sup> Classification marks 10,673 to 10,687 and 11,558 to 11,573.

<sup>51</sup> Classification marks 163 and 164.

<sup>52</sup> Classification marks 168.

<sup>53</sup> Classification marks 10,482 to 10,489 (Annex 3 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>54</sup> Classification marks 10,481 (Annex 3 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>55</sup> Classification marks 926 and 10,622: “[...] *any indirect revenues received by Google resulting from the attractiveness brought to its services by the display of Protected Content, including, but not limited to, any indirect revenues from subsequent queries as well as any indirect revenues from acting as an intermediary for serving Display Ads*”.

55. This revenue base is determined by Google using an estimate of the “*Search Ads revenues*” that are “*likely*” to be associated with the display of “*potentially protected content*” from all press publications on Google Search. To arrive at this estimate, Google explains that it worked with a sample of 1% of all Google Search traffic in France between July 2020 and June 2021. Google indicated that this 1% volume of traffic represented 0.8% of its Google Search revenues for the 2021 calendar year<sup>56</sup>. While Google indicated that account had been taken of this discrepancy between the proportions in volume and in value, by applying “*a multiplier to correct [the discrepancy]*”<sup>57</sup>, there is nothing in the case file to suggest that Google indicated to the negotiating parties that there was a discrepancy between the share represented by the sample in volume and that in value.
56. In addition, Google indicates that impressions that are limited to a hyperlink in the form of a headline alone (i.e. impressions that do not include a snippet, thumbnail image or video, or a combination of those elements) are excluded from its estimate.
57. Lastly, Google also explains that it distributed the total revenue generated by a results page evenly between the different impressions appearing on that results page. For example, if advertising revenues amount to €1 and 10 organic search results<sup>58</sup> are displayed, each organic search result will be allocated €0.10. If three of those organic results contain potentially protected content from the sites of eligible press publishers, €0.30 will be added to the revenue base.
58. To determine the amount of remuneration “payable” to press publishers in respect of Google Search, Google applied a rate of [CONF]% to the revenue base described above. As justification of this rate, Google states that it is within the range of rates observable for other related rights.
59. With regard to determining the remuneration of press publishers in respect of the display of protected content in Google Discover, Google states that it proposes a lump sum “*in accordance with Article L. 218-4 of the French Intellectual Property Code*”, a solution that it considers to be provisional until Google Discover begins to generate advertising revenues in France. The methodology described by Google for determining this lump sum is also based on determining a revenue base and applying a rate of [CONF]%.
60. Google estimated a revenue base using an extrapolation of the value of the display of press content in comparable markets in which Google Discover generates advertising revenues. Google does not specify either the extrapolation method used or the comparable markets taken into account. It adds that it is not in a position to share the detailed extrapolation calculations because they may contain confidential and commercially sensitive information.
61. With regard to determining the remuneration of press publishers in respect of the display of protected content in Google News, Google states that Google News does not generate advertising revenues in France (or anywhere else in the world) and that, accordingly, it determined the remuneration base for Google News using a percentage of the base corresponding to the Google Discover revenues presented above. In order to take account of

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<sup>56</sup> Classification mark 10,431 (Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>57</sup> *Ibid.*

<sup>58</sup> Organic search results are so-called “natural” results, which are the result of the application of algorithms developed by Google and whose aim is to identify the most relevant websites for the search in question, based on various criteria (such as the frequency of visits to sites or to other sites on which such sites appear as links, etc.).

the importance of press content for Google News, Google applied a rate of [CONF]% to this remuneration base to calculate the remuneration paid to press publishers.

62. With regard to determining the remuneration of press publishers in respect of “other indirect revenues”, Google determined a lump sum corresponding to the sum of the three remuneration amounts in respect of the display of protected content in Google Search, Google Discover and Google News, to which it applied a rate of [CONF]%. Google specifies that this rate and the principle of a lump sum are “*the result of negotiations with publishers*”<sup>59</sup>.
63. With regard to the distribution of the overall remuneration between press publishers, Google took into account the size of their audience, using the third-party source SimilarWeb. Google states that it increased the remuneration of “*press publications*” certified as “general press information” (“IPG” in French) by [CONF]%, and that of “*press publications*” certified as “39bisA” under the French Tax Code (*Code general des impôts*) by [CONF]%.
64. In addition, Google included the concept of a “*minimum threshold*” for remuneration in the various versions of its methodology note, below which it would not remunerate press publications. This threshold, formulated as a “*proposal*”, is set at €100, regardless of the version of the note, and is also formalised in the agreements signed with certain negotiating parties<sup>60</sup>.
65. In Quarterly Reports no. 1 and no. 2, the Monitoring Trustee considered that the criteria of “*transparency*” and “*objectivity*” set out in the first commitment were not sufficiently met, in particular with regard to the lack of precision in the remuneration calculation methodology established by Google<sup>61</sup>.

#### *Transparency criterion*

66. With regard to the transmission of the remuneration calculation methodology, although Google undertook to the Monitoring Trustee in its Launch Presentation to the Monitoring Trustee to communicate the methodology at the same time as the remuneration offer<sup>62</sup>, this appears not to have happened in a number of cases. The documents in the case file even reveal that the methodology note may have been sent after the agreement between a negotiating party and Google had been signed, or even not at all in the case of Humanoid SAS.

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<sup>59</sup> Classification marks 2,655 and 3,901 (Annex 1.35 of Monthly Report no. 4 and Annex 1.50 of Monthly Report no. 6).

<sup>60</sup> See, for example, paragraph 5 of Annex B of the agreement between Google and Scrineo dated 4 August 2023, set out in Annex 4.8 of Google’s reply to the Investigation Services’ Questionnaire no. 1 (classification marks 10,805 to 10,830).

<sup>61</sup> Classification marks 8,638 to 8,639 (Quarterly Report no. 1, paragraphs 57 to 59); classification marks 8,735 to 8,736 (Quarterly Report no. 2, paragraphs 89 to 103).

<sup>62</sup> Classification mark 886.

Entity requesting entry into negotiations	Date of offer	Date of transmission of the methodology note	Date agreement signed	Comment
Konbini SAS (konbini.com)	11 October 2022	12 October 2022	[CONF]	1 day delay
Humanoid SAS (frandroid.com)	20 February 2023	-	[CONF]	The publisher was not aware of the methodology
Humanoid SAS (numerama.com; madmoizelle.com)	22 November 2022	-	[CONF]	The publisher was not aware of the methodology
CCM Benchmark Group (phonandroid.com)	2 March 2023	9 March 2023	[CONF]	7 day delay
CCM Benchmark Group (papergeek.fr)	20 February 2023	9 March 2023	[CONF]	17 day delay
Talmon Media (atlantico.fr)	20 February 2023	6 June 2023	[CONF]	The publisher was informed of the methodology more than three months after the remuneration offer was made
Éditions Nuit et Jour SAS (lenouveaudetective.com)	27 February 2023	4 August 2023	[CONF]	The publisher was informed of the methodology more than four months after the contract was signed
Scrineo (elephant-larevue.fr)	22 May 2023	1 June 2023	[CONF]	10 day delay

67. In Quarterly Report no. 1, the Monitoring Trustee noted that “*the remuneration offers transmitted are never accompanied by explanations enabling the Negotiating Parties to understand the calculation formula. Although Google has indicated that additional details can be provided to the Negotiating Parties on request, the Monitoring Trustee stresses that this practice is a factor limiting the full transparency of the negotiations*”<sup>63</sup>. In the presentation prepared for a meeting with Google, the Monitoring Trustee summarised this finding, stating that “*the remuneration calculation methodology is not provided to the Negotiating Parties automatically unless they explicitly request it from Google*”<sup>64</sup>.
68. In Quarterly Report no. 2, the Monitoring Trustee indicated that Google had proposed to put in place a new procedure in order to increase the transparency of the negotiations, namely the systematic sharing of the methodology for calculating the remuneration offers with the negotiating parties<sup>65</sup>. However, Google’s sharing of this document did not lead the Monitoring Trustee to amend its position on Google’s compliance with the transparency

<sup>63</sup> Classification mark 8,638 (Quarterly Report no. 1, paragraph 58).

<sup>64</sup> Classification mark 8,898 (Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 12).

<sup>65</sup> Classification mark 8,736 (Quarterly Report no. 2, paragraph 94); classification marks 9,197 to 9,198 (Annex 2 of Quarterly Report no. 3).

criterion during the Second Period, in particular in the light of the other factors on which its finding of non-compliance is based, as set out below.

69. With regard to the link between the data report, the calculation methodology and the remuneration offer, the Monitoring Trustee noted that *“most of the information referred to in Annex 1 of the Commitments and communicated to the Negotiating Parties during the negotiations is of an informative nature and is not used in the remuneration methodology for Press Publishers. The Monitoring Trustee has taken due note that this information is mainly intended to provide the Negotiating Parties with contextual data enabling them to further negotiate the proposed remuneration. However, no document sent to the Negotiating Parties mentions whether or not the data referred to in Annex 1 of the Commitments is used in the remuneration methodology”*<sup>66</sup>.
70. According to the Monitoring Trustee, while the content of the information to be provided by Google to the negotiating parties, pursuant to paragraph 16 of the Commitments in accordance with Commitment 2, corresponds to the list of information referred to in Annex 1 of the Commitments, *“the majority of the information provided in the data report under Commitment 2 is unrelated to the methodology used by Google to prepare its remuneration offers”*<sup>67</sup>. By way of illustration, the Monitoring Trustee explains that the number of impressions per domain (in value and as a percentage) for Google Search, Google News and Google Discover, the click-through rate for Google Search, Google News and Google Discover, and the gross monthly revenues from programmatic advertising (Display Ads) on the websites of each press publisher identified and for users located in France have no link with the methodology or the remuneration offer. Only the total amount of Google Search direct revenues attributable to press publishers recognised by the CPPAP is used to calculate the remuneration<sup>68</sup>.
71. Furthermore, the Monitoring Trustee noted that the periods used in the data report and for the calculation of the offer may be different. Because of this inconsistency, the Monitoring Trustee considered that it may be *“difficult for a Publisher or Press Agency to understand the remuneration offer on the basis of the data report, even with the help of the methodology”*<sup>69</sup>.
72. Lastly, the Monitoring Trustee indicated that *“the data reports do not contain any data that can be “verified” by the Negotiating Parties, which would enable the Parties to perform quality checks and/or reconcile the data transmitted by Google with indicators known and used by the Negotiating Parties (for example in their Search Console)”*<sup>70</sup>.
73. With regard to the explanations of the methodology, the Monitoring Trustee noted that the explanations provided in the remuneration calculation methodology may lead to confusion

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<sup>66</sup> Classification mark 8,638 (Quarterly Report no. 1, paragraph 59).

<sup>67</sup> Classification mark 8,898 (Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 12).

<sup>68</sup> Classification mark 8,899 (Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 13).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

and highlighted the ambiguous nature of the “indirect revenues” component of the methodology<sup>71</sup>.

74. The data on “indirect revenues” (corresponding to (i) revenues from successive queries and (ii) the share of Display Ads net revenues generated following a redirection by the user) transmitted to the negotiating parties is not included in the calculation of the remuneration. The remuneration is calculated as a lump sum, “on an entirely different basis”<sup>72</sup>.
75. The Monitoring Trustee also highlighted that the calculation of this lump sum ([CONF]% of Google Search, Discover and News revenues) is not mentioned in the methodology and that it has not received any economic justification for the calculation of indirect revenues<sup>73</sup>.
76. Consequently, the Monitoring Trustee considered that “the lack of precision by Google regarding the links between the data transmitted and the remuneration methodology is not such as to ensure the transparency of the negotiations and to enable the Negotiating Parties to properly understand the offers”<sup>74</sup>. The remuneration offers are set out in an agreement referred to by Google as the “Extended News Preview” agreement (hereinafter the “ENP Agreement”), entered into as part of the “ENP Scaled Solution” described in paragraphs 151 *et seq.* below.
77. With regard to the terms and conditions for the annual update of remuneration offers, the Monitoring Trustee noted that “the time periods used to determine the revenues due from Google Search and the terms and conditions for the annual remuneration update are not sufficiently explained in the remuneration methodology and in the ENP agreement, thereby limiting the transparency of negotiations”<sup>75</sup>.
78. On the one hand, with regard to changes in remuneration from one year to the next, the Monitoring Trustee indicated that the ENP Agreement refers only to an update of the remuneration from Google Search, to the exclusion of the other components of remuneration (Google Discover, Google News and “other indirect revenues”).
79. On the other hand, with regard to the annual update of remuneration offers, the Monitoring Trustee noted that this update “is never automatically accompanied by explanations enabling the Negotiating Parties to understand the variations from year to year”, which “constitutes a factor limiting the transparency of negotiations”<sup>76</sup>.
80. In Quarterly Report no. 3, the Monitoring Trustee noted the changes made by Google in relation to the remuneration calculation methodology and the data report and considered that these changes “significantly increase the transparency of the negotiation criteria and thus reduce the asymmetry of information between Google and the Negotiating Parties”<sup>77</sup>. It stated that the transparency criterion “will henceforth have to be assessed on a case-by-case

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<sup>71</sup> Classification marks 8,887 to 8,906 (Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, pages 14 to 15).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Classification mark 8,639 (Quarterly Report no. 1, paragraph 59).

<sup>75</sup> *Ibid.*

<sup>76</sup> Classification marks 8,887 to 8,906 (Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 15).

<sup>77</sup> Classification mark 9,034 (Quarterly Report no. 3, paragraph 110).

*basis, for each Negotiating Party, in particular if the exchanges between the Monitoring Trustee and a Negotiating Party reveal a lack of transparency in relation to a particular negotiation”<sup>78</sup>.*

81. In Quarterly Report no. 4, the Monitoring Trustee considered that the addition of a numerical example accompanying the remuneration methodology made the document easier to understand, but noted that the updated version of the note including this example was not sent to all the negotiating parties that had received a previous version of the methodology and had not yet signed an agreement with Google, namely Sernas and Infomer (Ouest-France group). The Monitoring Trustee concluded that *“Google is only partially complying with Commitment 1.2 in the context of these negotiations”<sup>79</sup>.*
82. This observation is also shared by certain representatives of press publishers interviewed by the Investigation Services. APIG, for example, explains that the level of transparency has been significantly improved by the *Autorité’s* decisions, but that *“the data communicated, however, only provides a partial understanding of the valuation provided for in the agreements and, in particular, offers little visibility of the revenues generated by Google from French internet users. [...] the indirect revenues generated by Google from the press are not fully included in the related rights remuneration received”<sup>80</sup>.*
83. The Figaro group believes that there is *“a real lack of transparency regarding the method and basis for calculating the “indirect” share of the remuneration for related rights. From our point of view, this is incomprehensible”<sup>81</sup>.* It also states that it is unable to verify the accuracy of the information provided.
84. Éditions Nuit et Jour described Google’s financial proposals as *“indecipherable”* and emphasised that they *“set frameworks, but there is absolutely nothing concrete or tangible that would enable us to at least estimate the proposals”<sup>82</sup>.* The Reworld Media group said that it had not been able to discuss the proposals in an informed manner, and that it would like to receive information that would enable it to make a truly *“transparent assessment of the remuneration”<sup>83</sup>.*
85. Lastly, the Société des Droits Voisins de la Presse (hereinafter “DVP”) explained that it had encountered difficulties in understanding the remuneration proposals submitted to it<sup>84</sup>. In particular, it explained that *“the various documents provided by Google made it possible to understand the logic of the method used, but did not enable DVP to verify the assumptions used or the reliability of the data provided”<sup>85</sup>.* It also produced an analysis of the files submitted by Google and identified inconsistencies<sup>86</sup>.

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<sup>78</sup> Classification mark 9,034 (Quarterly Report no. 3, paragraph 111).

<sup>79</sup> Classification mark 16,181 (Quarterly Report no. 4, paragraph 143).

<sup>80</sup> Classification mark 15,421.

<sup>81</sup> Classification mark 15,322.

<sup>82</sup> Classification mark 15,282.

<sup>83</sup> Classification marks 15,612 and 15,613.

<sup>84</sup> Classification marks 15,344 to 15,346.

<sup>85</sup> Classification mark 15,346.

<sup>86</sup> Classification marks 15,412 to 15,415.

86. With regard to revenues linked to “non-domestic uses”, i.e. non-French audiences<sup>87</sup>, Google excluded them from its methodology notes between April and October 2023, while continuing to include them in the agreements entered into under the Commitments<sup>88</sup>.
87. When questioned on this point by the Investigation Services, Google indicated that the exclusion of this component from the methodology was the result of an “oversight” but that Google’s offers to the negotiating parties still contained this component<sup>89</sup>. Google subsequently sent the Investigation Services an updated version of its methodology note, with this component reinstated<sup>90</sup>.

*Objectivity criterion*

88. With regard to the remuneration due in respect of Google Discover and Google News<sup>91</sup>, the Monitoring Trustee considered that the methodologies proposed by Google do not enable it to express a formal opinion on the objectivity of the criteria used.
89. In particular, no information has been provided to the Monitoring Trustee or the negotiating parties demonstrating the objectivity of the data used by Google with regard to the monetisation rates of Google Discover in comparable European countries.
90. With regard to other indirect revenues, the Monitoring Trustee noted that “*the rate of [CONF]% applied to the revenues relating to Google Search, Google Discover and Google News, used to determine the amount of remuneration due in respect of “other indirect revenues”, is based on negotiations that took place prior to the entry into force of the Commitments. The Monitoring Trustee therefore considers that the use of a rate resulting from negotiations and, therefore, not based on the very nature of the “other indirect revenues”, determined outside the scope of the Commitments and non-negotiable by the Negotiating Parties that entered into negotiations following the entry into force of the Commitments, is not such as to ensure the objectivity of the proposed remuneration offer*”<sup>92</sup>.
91. In addition, the Monitoring Trustee highlighted that the application of a rate to the revenues relating solely to Google Search, Google Discover and Google News “*excludes, whatever their magnitude, the revenues generated by Google on other services resulting from a redirection from Protected Content*”<sup>93</sup>, citing Subscribe with Google or YouTube as examples.
92. However, the Monitoring Trustee noted, following the clarifications and amendments made by Google after its first two Quarterly Reports, that the objectivity criterion was, in its opinion, now sufficiently met.

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<sup>87</sup> Classification mark 12,470 (Google’s reply to the Investigation Services’ Questionnaire no. 4).

<sup>88</sup> See, for example, classification mark 10,826.

<sup>89</sup> Classification mark 12,470 (Google’s reply to the Investigation Services’ Questionnaire no. 4).

<sup>90</sup> Classification mark 16,143.

<sup>91</sup> Classification marks 8,639, 8,736 and 8,904 (Quarterly Report no. 1, paragraphs 60 to 63; Quarterly Report no. 2, paragraphs 96 to 97; Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 18).

<sup>92</sup> Classification marks 8,639 and 8,904 (Quarterly Report no. 1, paragraph 62; Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 18).

<sup>93</sup> Classification marks 8,639 and 8,904 (Quarterly Report no. 1, paragraph 63; Annex 5 of Quarterly Report no. 2, Presentation for the meeting of 27 March 2023, page 18).

93. The Monitoring Trustee reached this opinion based on following:
- a document sent on 20 April 2023 by Google to the Monitoring Trustee, formalising the understanding of the objectivity criterion, as part of the calculation of the remuneration in respect of “*other indirect revenues*”<sup>94</sup>;
  - a meeting on 2 June 2023<sup>95</sup> during which the objectivity criterion was discussed, Google having responded to the Monitoring Trustee’s questions by explaining that the lump sum proposed in its methodology would be objective insofar as “(i) *Articles L. 218-4 and L. 131-4 of the French Intellectual Property Code authorise Google to base its offer on a lump sum, in particular when “the basis for calculating the proportional share cannot be practically determined” and (ii) the components of the calculation of “other indirect revenues” are objectively justified*”<sup>96</sup>;
  - the answers to the questions put by the Monitoring Trustee on the methodologies proposed by Google concerning the remuneration due in respect of Google News and Google Discover, sent by Google to the Monitoring Trustee on 23 June 2023<sup>97</sup>; and
  - the changes made by Google to the description of the calculation of indirect revenues, which “*improve the clarity of the methodology on the subject of [in]direct revenues for the Negotiating Parties and, therefore, their ability to negotiate*”<sup>98</sup> and “*the clarifications made on the methods for determining the lump sum for indirect revenues, [which] significantly enhance the objectivity of the negotiation criteria*”<sup>99</sup>.
94. This analysis is included in Quarterly Report no. 4.

***Development of remuneration offer for press agencies***

95. Google has drawn up a specific methodology for calculating the remuneration offer for press agencies<sup>100</sup>, which was sent to the Monitoring Trustee in March 2023 in response to a request from the latter dated 9 November 2022<sup>101</sup>.
96. Firstly, with regard to the scope of the offer proposed to a press agency, Google distinguishes between several cases:
- firstly, content produced by press agencies directly for users (“*B-to-C content*”), for which Google proposes an ENP offer similar to that developed for press publishers

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<sup>94</sup> Classification marks 4,719 to 4,725 (Annex 2.283 of Monthly Report no. 7).

<sup>95</sup> The minutes of the meeting held on 2 June 2023 are included in Annex 1.64 of Monthly Report no. 8 (classification marks 5,248 to 5,285). Google subsequently made changes to the minutes of the meeting, which were sent to the Monitoring Trustee on 3 July 2023 (classification marks 7,573 to 7,583, Annex 2.493 of Monthly Report no. 9).

<sup>96</sup> Classification marks (CV) 9,038 to 9,039 and (NCV) 15,065 to 15,066 (Quarterly Report no. 3, paragraph 140).

<sup>97</sup> Classification marks 6,677 to 6,686 (Annex 2.384 of Monthly Report no. 9).

<sup>98</sup> Classification marks (CV) 9,039 and (NCV) 15,066 (Quarterly Report no. 3, paragraph 141).

<sup>99</sup> Classification marks (CV) 9,039 and (NCV) 15,066 (Quarterly Report no. 3, paragraph 142).

<sup>100</sup> Classification marks 4,126 to 4,131 (Annex 2.253 of Monthly Report no. 6).

<sup>101</sup> Classification mark 1,035 (Annex 3.9 of Monthly Report no. 1, item 13).

insofar as Google considers that, in this case, the press agency operates like a press publisher;

- secondly, the use by third-party press publishers of protected content from press agencies in their press publications without modifying the content (“*unmodified B-to-B content*”);
- thirdly, the use by third-party press publishers of content from press agencies on their websites after modifying the content (“*modified B-to-B content*”), for which Google argues there is debate about the existence of related rights and legal uncertainty as to whether such content falls within the scope of the Directive.

97. Google indicated that the use in France in press publications of “*B-to-B content*” protected by press agencies is already taken into account in the base used to calculate Google’s remuneration offers to press publishers. Google therefore considers that press agencies’ remuneration can only correspond to part of the total remuneration offered for the use of press publishers’ press publications.
98. In this respect, Google goes on to say that, despite the difficulties in identifying such content via metadata<sup>102</sup>, it proposes a fixed lump sum for the display on Google’s services of agencies’ “*B-to-B content*” that is incorporated into publishers’ press publications. The methodology presented by Google for calculating this amount is as follows:
- Base revenue: Google indicates that it takes into account a fraction of the total remuneration paid by Google to press publishers for the use of protected content on Google services in France.
  - Allocation of a fraction of the base revenue to a press agency: Google points out that the number of journalists employed by a press agency is the only source of objective and verifiable data currently available for determining the agency’s contribution to the protectable value of press publications. Google therefore proposes to allocate to each press agency an amount of revenue proportional to the number of its journalists in France, calculated on the basis of the total number of press cards in France according to the French press observatory (*Observatoire des métiers de presse*). This ratio is then “*applied to the total amount paid for related rights to press publishers in France*”.
99. During a meeting with the Monitoring Trustee on 28 March 2023, Google explained that this methodology is based on the methodology initially devised for the French press agencies federation (*Fédération française des agences de presse*; hereinafter the “FFAP”) and that it had proposed the same calculation, but excluding all the changes made following negotiations with the FFAP<sup>103</sup>. During this meeting, Google also indicated that it uses publicly available information to calculate the number of journalists with a press card within each press agency (in this case, information from the French press observatory).
100. On 5 May 2023, the Monitoring Trustee asked Google to provide a definition of the “*total amount paid for related rights to press publishers in France*” referred to in the methodology for press agencies, and to specify whether this amount refers to the actual amount disbursed by Google and over what period and with which negotiating parties.

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<sup>102</sup> Data used to characterise other data, whether physical or digital.

<sup>103</sup> Classification mark 3,989 (Annex 1.54 of Monthly Report no. 6).

101. As part of the Commitments, and at the date of the Report, Google shared this methodology with the press agency Actuagri, represented by DVP, on 20 September 2023. This methodology is contested by DVP, which believes that it takes into account “*only the number of FTE journalists employed by agencies, whereas it should also include in its calculation the volume of protected content sold annually by the agencies to publishers*”<sup>104</sup>.
102. In Quarterly Report no. 4, the Monitoring Trustee highlighted a number of points relating to the methodology for calculating remuneration offers for press agencies: the methodology is shared only in English, is not self-sufficient in that it requires the concomitant transmission of the methodology for publishers, and is not accompanied by a numerical example<sup>105</sup>.

#### *Annual update of the remuneration offer*

103. Paragraph 12 of the Commitments provides that “*Google’s offer will include a proposal to update the amount of remuneration, at least once a year by 1 February, based on information communicated by Google pursuant to the Second Commitment regarding the extent of its usage of Protected Content and associated exploitation revenue data of the preceding year, and a final regularisation payment at the end of the agreement if relevant*”.
104. On 13 January 2023<sup>106</sup>, Google applied to the *Autorité* to postpone the obligation to update remuneration annually for agreements entered into by Google under the Commitments and to communicate revenue data, by one month, until 1 March 2023.
105. In support of its request, Google maintained that the publication of its consolidated financial statements for calendar year 2022 was expected “*on or around 2 February 2023*” and that “*Google’s financial data, and any calculations based on this data [...] cannot, either in practice or legally, be shared with third parties by 1 February (i.e. before the date of official publication of Google’s consolidated financial statements). This is because the data is material, highly sensitive and non-public financial data and, as such, is likely to have an impact on Google’s share price. [...] Under U.S. Securities and Exchange Commission (SEC) rules (Part 243 – Regulation FD), such information may not be selectively disclosed to certain persons prior to public disclosure*”<sup>107</sup>. Google also indicated that the confidentiality agreement entered into between Google and press agencies and publishers did not expressly envisage this situation.
106. The Monitoring Trustee was asked by the *Autorité* on 20 January 2023 for an opinion on the relevance of the arguments put forward by Google and the number of agreements affected by the postponement request. In response, the Monitoring Trustee sent a note to the *Autorité* on 31 January 2023 summarising its recommendations based on various responses from Google<sup>108</sup>.
107. On 1 February 2023, the *Autorité* ruled on the postponement request, asking Google to comply with paragraph 12 of the Commitments within 48 hours of the date of publication of its financial statements, for 2023 only<sup>109</sup>. The *Autorité* highlighted in particular that no legal

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<sup>104</sup> Classification mark 15,344.

<sup>105</sup> Classification mark 16,181 (Quarterly Report no. 4, paragraphs 144 and 145).

<sup>106</sup> Classification marks 12,433 to 12,435.

<sup>107</sup> Classification mark 12,434.

<sup>108</sup> Classification mark 12,447 to 12,451.

<sup>109</sup> Classification mark 12 446.

analysis had been conducted or provided to determine whether the confidentiality agreements entered into with press agencies and publishers covered the transmission of the data in question. In addition, the *Autorité* considered that only one publisher (Humanoid SAS) formally benefited from paragraph 12 of the Commitments and noted the lack of precision concerning the internal operational constraints that would justify the request for a one-month postponement.

108. Google explained that it had identified this practical difficulty on 7 December 2022 and had worked to find a solution that had no material impact on publishers before formally referring the issue to the *Autorité* more than a month later<sup>110</sup>. Google also indicated that the confidentiality agreements entered into with press agencies and publishers do not cover data sharing once the agreement has been signed and that the confidentiality clauses in the ENP Agreements signed do not expressly cover the transmission of financial information as part of the remuneration update<sup>111</sup>. In this respect, Google indicated that amending the confidentiality agreements and other agreements could “*be a satisfactory option from a legal perspective (which would need to be confirmed by US securities lawyer)*”, but that “*Google did not in practice have the time to negotiate amendments to the confidentiality agreements [...] to expressly cover this point*”<sup>112</sup>.
109. Furthermore, an analysis of the agreements entered into between Google and the negotiating parties since the implementation of the Commitments reveals differences between these agreements, in particular with regard to the annual remuneration update. When questioned by the Investigation Services, Google explained that some agreements contain a page entitled “*Offer Details Annex*”, while others contain information in a specific, more detailed Annex<sup>113</sup>.
110. The agreements with Humanoid (for its domains frandroid.com, numerama.com and madmoizelle.com), Talmont Media (for atlantico.fr), Editions Nuit et Jour (for lenouveaudetective.com) and Keleops France (for press-citron.net and journaldugeek.com) expire on [CONF], with no provision for automatic renewal. Furthermore, no clause or annex refers to the annual remuneration update or the possibility of a final regularisation payment at the end of the agreement, even though the agreements run beyond 1 February, the date set out in paragraph 12 of the Commitments. Assuming the update takes place independently of any contractual provision to that effect, there is at the very least a problem of insufficient information being provided to the publishers at the date of signature of the agreements.
111. The agreements entered into on [CONF] with CCM Benchmark<sup>114</sup> and on [CONF] with Konbini<sup>115</sup>, the amendment to the initial agreements entered into with Humanoid on

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<sup>110</sup> Classification mark 10,435.

<sup>111</sup> Classification mark 10,436.

<sup>112</sup> *Ibid.*

<sup>113</sup> Classification marks 12,468 and 12,469 (Google’s reply to the Investigation Services’ Questionnaire no. 4).

<sup>114</sup> Classification marks 10,753 to 10,769 (Annex 4.5 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>115</sup> Classification marks 10,688 to 10,701 (Annex 4.1 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

[CONF]<sup>116</sup>, and the agreement entered into between Google and Scrineo on [CONF]<sup>117</sup> have an initial term of [CONF] and are renewable by tacit agreement. They include a clause (Article 5.1) that expressly refers to the remuneration update through a “Fee mechanism” detailed in the Annex.

112. While these agreements provide for the updating of the “Search” component of the remuneration, the other components – namely Discover, Google News and indirect revenues – are excluded from the update. For example, paragraph 3 of “Annex B” of the agreement entered into between Google and Scrineo on [CONF]<sup>118</sup> states that:

*“Once a year in January, beginning on 1 January of the calendar year following the Effective Date, Google will update the calculation of the Google Search component of the remuneration for the upcoming year, based on attributable Search advertising revenue data from the prior calendar year.*

*Attributable Search Ads revenues are calculated based on a randomised sample of 1% of all traffic on Google Search in France during the relevant period, as follows: for each relevant result impression of an eligible news publication, Google sources the total amount of Search Ads revenues generated by the Google Search results page on which the impression was displayed. A portion of these revenues is then attributed to the relevant Google Search result impressions, by allocating the revenues equitably to the organic impressions on that page (including, for example, dedicated news blocks such as Top Stories, or any other unpaid results on the page). These allocated revenues are then added together to arrive at the total amount of attributable Search Ads revenues that could be associated with publication content impressions across all eligible publications.*

*For the avoidance of doubt, the other components of remuneration will remain unaffected for the duration of the Agreement” (emphasis added).*

113. However, the amounts that appear in the various versions of the methodology notes reflect changes in the revenues attributable to each of these components. In the case of Discover, for example, the corresponding amount rose from USD [CONF] million to USD [CONF] million between the methodology dated 15 November 2021 (which relates to revenues for 2019-2020) and the June 2023 note (which relates to revenues for 2023). In the case of Google News, the corresponding amount increased from USD [CONF] million to USD [CONF] million between the November 2021 note and the June 2023 note. In the case of indirect revenues, Google’s estimate increased from USD [CONF] million in the November 2021 note<sup>119</sup> to USD [CONF] million in the June 2023 note<sup>120</sup>.

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<sup>116</sup> Classification marks 12,514 to 12,540 (Annex 6 of Google’s reply to the Investigation Services’ Questionnaire no. 4).

<sup>117</sup> Classification marks 10,805 to 10,830 (Annex 4.8 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>118</sup> Classification marks 10,805 to 10,830 (Annex 4.8 of Google’s reply to the Investigation Services’ Questionnaire no. 1).

<sup>119</sup> Classification marks 920 to 927 and 10,617 to 10,623.

<sup>120</sup> Classification marks 6,652 to 6,662 and 10,645 to 10,654.

## **b) Implementation of the second commitment**

114. Under Commitment 2, Google undertakes to share a minimum set of information listed in Annex 1 of the Commitments and, where appropriate, additional information, under the supervision of the Monitoring Trustee, when requested by a negotiating party.

### ***Transmission of a minimum set of information***

115. Google provided the Monitoring Trustee with the standard documents sent to the negotiating parties under paragraph 16 of the Commitments, namely:
- an Excel file containing the information listed in Annex 1 of the Commitments (hereinafter the “Data Report”)<sup>121</sup>; and
  - an explanatory annex on the content of the Data Report entitled “*Data Communication (Art. L. 218-4 of the French Intellectual Property Code) – Explanatory Annex*” (hereinafter the “Explanatory Annex”)<sup>122</sup>.
116. By 18 August 2023, Google had sent a Data Report to the entities that had submitted a request to enter into negotiations and were considered eligible by Google (spontaneously by Google or following the implementation of the procedure set out in paragraph 7 of the Commitments), i.e. 38 entities.
117. Nevertheless, the Monitoring Trustee noted that, during the Second Period, Google was unable to prepare Data Reports for publishers’ sub-domains<sup>123</sup> and therefore concluded that Google was in partial compliance with Commitment 2<sup>124</sup>.
118. On 16 June 2023, Google then formalised a proposed methodology for producing Data Reports at the sub-domain level<sup>125</sup>, which was deemed satisfactory by the Monitoring Trustee<sup>126</sup>.
119. However, in Quarterly Report no. 4, the Monitoring Trustee noted that “*Google did not provide a data report for the following sub-domains during the Period: voilesetvoiliers.ouest-france.fr, lemarin.ouest-france.fr and sportauto.autojournal.fr*”. The Monitoring Trustee therefore concluded that Google was in partial compliance with its Commitment in its negotiations with the Ouest-France group and Éditions Reworld Axel Springer<sup>127</sup>.

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<sup>121</sup> Classification mark 895 (Annex 2.76 of Monthly Report no. 1 [*Appendix A – Excel Data report template*]).

<sup>122</sup> Classification marks 10,490 to 10,513 (Annex 3.1 of Google’s reply to the Investigation Services’ Questionnaire no. 1). See also classification marks 896 to 919 (Annex 2.77 of Monthly Report no. 1 [*Appendix B – ENP DATA Addendum*]).

<sup>123</sup> Classification mark 8,737 (Quarterly Report no. 2, paragraph 105).

<sup>124</sup> Classification marks 8,784, 8,791 and 8,800 (Quarterly Report no. 2, paragraphs 369 [Sernas for voilesetvoiliers.ouest-france.fr], 407 [Infomer for lemarin.ouest-france.fr] and 467 (Editions Reworld Axel Springer for sportauto.journal.fr] and the corresponding verification results tables).

<sup>125</sup> Classification mark 9,039 (Quarterly Report no. 3, paragraph 14 c)).

<sup>126</sup> Classification mark 9,040 (Quarterly Report no. 3, paragraph 148).

<sup>127</sup> Classification marks (CV) 16,181 and 16,182 and (NCV) 16,465 and 16,466 (Quarterly Report no. 4, paragraph 148).

120. In Quarterly Report no. 4, the Monitoring Trustee also noted a failure to comply with the deadlines for the transmission of all the data required by Annex 1 of the Commitments for certain DVP domains and therefore concluded that Google was only in partial compliance with its Commitment in the context of these negotiations<sup>128</sup>.

***Transmission of additional information***

121. Paragraph 17 of the Commitments provides that the Monitoring Trustee, the negotiating parties and Google may request additional information from each other, with Google undertaking to provide such information within 15 working days, subject to the Monitoring Trustee's opinion in the event of disagreement between Google and the negotiating party.
122. At the date of Quarterly Report no. 4, the Monitoring Trustee noted that only one additional request had been made by Scrineo, concerning SimilarWeb data in Google's possession on 21 June 2023<sup>129</sup>.
123. In response to this additional request, Google provided the Search traffic data for the sites published by Scrineo as measured by SimilarWeb, without providing the total traffic data for all press publications<sup>130</sup>.
124. In the absence of the transmission of total traffic data, Scrineo was unable to verify the consistency of the data used by Google.
125. In this respect, a comparison between the total traffic data underlying the proposals made by Google to Scrineo, on the one hand, and to various domains belonging to DVP or the Syndicat des Radios Indépendantes (hereinafter "SIRTI"), on the other, reveals discrepancies, even though these proposals were made on the basis of the same methodology note and for identical traffic reference periods (2022). In the case of Scrineo, the total traffic that can be deduced from the information communicated by Google does not correspond to the various total traffic amounts resulting from a file communicated by Google to DVP<sup>131</sup> or SIRTI<sup>132</sup>, which are not only not consistent between the different DVP and SIRTI domains, but also differ from the amount obviously used in the case of Scrineo.
126. Reproducing the total traffic data underlying Google's various proposals, formulated on comparable bases – in terms of methodology and time –, therefore seems to lead to different results, when they should be identical.
127. In Quarterly Report no. 4, the Monitoring Trustee also indicated that it had noted certain discrepancies in the SimilarWeb data underlying certain of Google's proposals<sup>133</sup>.

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<sup>128</sup> Classification marks (CV) 16,182 and (NCV) 16,466 (Quarterly Report no. 4, paragraph 149).

<sup>129</sup> Classification mark 16,410 (Quarterly Report no. 4, Annex 1).

<sup>130</sup> Classification marks 9,636 and 12,031.

<sup>131</sup> Classification mark 12,925 (Annex 2.652 of Monthly Report no. 11, file "DVP – Google Offer updated August the 7th (1).xlsx").

<sup>132</sup> Classification mark 4,883 (Annex 2.298 of Monthly Report no. 7).

<sup>133</sup> Classification marks (CV) 16,175 and 16,176 and (NCV) 16,459 and 16,460 (Quarterly Report no. 4, paragraph 112).

### **c) Implementation of the third commitment**

128. On 21 November 2022, Google shared a document with the Monitoring Trustee setting out the compliance controls in place. Google specifies that its Partnership and Sales teams cannot modify the indexing, ranking and display of press publishers. In addition, Google specifies that “safeguards” exist to prevent “unauthorised” changes to the systems that manage the indexing, ranking and/or display of content<sup>134</sup>.
129. However, in the Diagnostic Report, the Monitoring Trustee identified the need for Google to formalise a procedure to enable the monitoring of its compliance with Commitment 3<sup>135</sup>.
130. With effect from 5 April 2023, Google agreed to share, when sending the monthly documentation required by the Monitoring Trustee, questions raised by negotiating parties via the “Contact Us” forms in the Publisher Help Center or support tickets in Search Console, and Google’s responses to those questions<sup>136</sup>. This procedure has been in place since 5 May 2023<sup>137</sup>.
131. The Monitoring Trustee received a second proposed procedure, as well as an annex thereto, in an initial version on 20 April 2023<sup>138</sup>, then in an updated version on 26 May 2023<sup>139</sup>, setting out, for each domain, on a monthly basis, a breakdown of the display arrangements as well as the name and reasons for any deviations identified between the display arrangements defined by the press publisher and the display of the publisher’s impressions on Google Search, Google News and Google Discover<sup>140</sup>.
132. This second procedure, which consists of sending the Monitoring Trustee a summary table every month for each of the press publishers in the negotiation process, presenting and justifying the display arrangements used and any variations identified, was put in place by Google for the period starting on 16 April 2023<sup>141</sup>. For collective management organisations with a mandate representing more than 10 domains, Google offers to produce a summary based on a sample<sup>142</sup>.
133. In Quarterly Report no. 3, the Monitoring Trustee considered, for the first time, that it was in a position to monitor compliance with Commitment 3, and that Google’s compliance with this Commitment was, in its opinion, satisfactory<sup>143</sup>.

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<sup>134</sup> Classification mark 1,592.

<sup>135</sup> Classification mark 7,917.

<sup>136</sup> Classification marks 8,730 and 9,198 (Quarterly Report no. 2, paragraph 43; Annex 2 of Quarterly Report no. 3).

<sup>137</sup> Classification marks (CV) 9,027 and (NCV) 15,054 (Quarterly Report no. 3, paragraph 52).

<sup>138</sup> Classification marks 4,727 to 4,789 (Annex 2.284 of Monthly Report no. 7, “*Google’s Proposals for Commitments 3 and 5*”).

<sup>139</sup> Classification marks 5,699 to 5,707 (Annex 2.324, “*Google’s Updated Proposals for Verifying Compliance with Commitments 3, 5 & 6*”) and classification mark 5,709 (Annex 2.326 of Monthly Report no. 8).

<sup>140</sup> Classification mark 9,040 (Quarterly Report no. 3, paragraph 154).

<sup>141</sup> Classification mark 9,026 (Quarterly Report no. 3, paragraphs 44 to 46).

<sup>142</sup> Classification mark 9,026 (Quarterly Report no. 3, paragraph 48).

<sup>143</sup> Classification marks 9,035 and 9,040 (Quarterly Report no. 3, paragraphs 116, 152 to 155).

134. In Quarterly Report no. 4, the Monitoring Trustee considered that Google's compliance with Commitment 3 was also satisfactory for the period monitored, from 15 June 2023 to 15 September 2023<sup>144</sup>.

**d) Implementation of the fourth commitment**

135. According to the information in the case file, at 18 August 2023, 23 of the 38 entities that had submitted requests to enter into negotiations had received a remuneration offer from Google, corresponding to 38 domains. Google thus shared a remuneration offer with all the entities, deemed eligible by Google, whose negotiations actually resulted in an agreement<sup>145</sup> or whose three-month negotiation period expired without an agreement being reached with Google<sup>146</sup>. In addition, some entities received an offer within the three-month period, which had not yet expired at the date of Google's response<sup>147</sup>. Lastly, 16 domains had not yet received an offer from Google at the date of Google's reply to the Investigation Services' Questionnaire no. 1<sup>148</sup>.
136. The mechanism allowing either party to ask an arbitral tribunal to determine the remuneration has not been activated since the Commitments came into force.
137. Insofar as, during the First, Second, Third and Fourth Periods, all offers were submitted within the deadlines set out in the Commitments and no negotiating party appealed to an arbitral tribunal, the Monitoring Trustee considers that Google has complied with Commitment 4<sup>149</sup>.

**e) Implementation of the fifth commitment**

138. As mentioned in paragraph 128, Google set out the compliance controls in place for both Commitment 3 and Commitment 5.
139. However, in the Diagnostic Report, the Monitoring Trustee identified the need for Google to formalise a procedure to enable the monitoring of its compliance with Commitment 5<sup>150</sup>.
140. The Monitoring Trustee received a proposed procedure, in an initial version on 20 April 2023<sup>151</sup>, then in an updated version on 26 May 2023<sup>152</sup>, presenting changes in a certain number of performance indicators (in particular the number of impressions, clicks, the

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<sup>144</sup> Classification marks (CV) 16,182 and (NCV) 16,466 (Quarterly Report no. 4, paragraphs 156 and 157).

<sup>145</sup> Konbini SAS, Humanoid SAS, CCM Benchmark Group, Talmont Media, Editions Nuit et Jour SAS, Scrineo and Keleops France.

<sup>146</sup> Sernas, Infomer, Editions Reworld Axel Springer, Com In Marseille SAS, Société éditrice de l'Informé and SIRTl.

<sup>147</sup> EDI SIC, RMP, MEDIA365, Lyon Capitale SAS, Malesherbes Publications, EEPLÉ, Reworld Media Magazines, Reworld Media Factory, APPS TV and DVP for certain domains.

<sup>148</sup> Including Doctissimo, Allociné, Aufeminin and DVP for certain domains.

<sup>149</sup> Classification mark 8,737 (Quarterly Report no. 2, paragraph 111).

<sup>150</sup> Classification marks 7,924 and 7,925.

<sup>151</sup> Classification marks 4,727 to 4,789 (Annex 2.284 of Monthly Report no. 7, "Google's Proposals for Commitments 3 and 5").

<sup>152</sup> Classification marks 5,699 to 5,707 (Annex 2.324, "Google's Updated Proposals for Verifying Compliance with Commitments 3, 5 & 6") and classification marks 5,711 to 5,724 (Annex 2.326 of Monthly Report no. 8).

average click-through rate<sup>153</sup> and the average position of the content on Search) before and after the entry into negotiations of the negotiating party, as well as an annex presenting an example of the implementation of the procedure for certain negotiating parties. The underlying source data used to implement this procedure were communicated by Google to the Monitoring Trustee on 5<sup>154</sup> and 26 June 2023<sup>155</sup>.

141. In Quarterly Report no. 3, the Monitoring Trustee considered, for the first time, that it was in a position to monitor compliance with Commitment 5, and that Google's compliance with this Commitment was, in its opinion, satisfactory<sup>156</sup>.
142. In Quarterly Report no. 4, the Monitoring Trustee considered that Google's compliance with Commitment 5 was still satisfactory<sup>157</sup>.
143. The Monitoring Trustee noted, however, that Commitment 5 cannot be verified in a satisfactory and relevant manner for press agencies insofar as Google is heavily dependent on press publishers to identify the protected content reused by agencies and in the absence of systematic monitoring by press publishers<sup>158</sup>.

#### **f) Implementation of the sixth commitment**

144. During the First, Second and Third Periods, the Monitoring Trustee considered that its ability to monitor compliance with Commitment 6 was not satisfactory, due to Google's failure to provide tangible evidence to demonstrate the independence of the related rights negotiations from any other commercial agreement<sup>159</sup>.

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<sup>153</sup> The click-through rate is the number of clicks on advertising content divided by the number of impressions of that content.

<sup>154</sup> Classification marks 6,111 and 6,113 (Annexes 2.356 and 2.357 of Monthly Report no. 8 contain the reports on the additional procedure under Commitment 5 for the domains honrizonactu.fr and papergeek.fr).

<sup>155</sup> Classification marks 7,322 to 7,427 (Annex 2.436 of Monthly Report no. 9 corresponding to a file presenting the necessary indicators in graphical form and relating to the domains phonandroid.com, papergeek.fr, atlantico.fr, voilesetvoiliers.ouest-france.fr, lemarin.ouest-france.fr, autojournal.fr, sportauto.autojournal.fr, modesettravaux.fr, madeinmarseille.net, horizonactu.fr, linforme.com, elephant-larevue.fr, lyoncapitale.fr, mariefrance.fr, lejournaledelamaison.fr, sport365.fr and histoire-et-civilisations.com). The Monitoring Trustee states in footnote 58 of Monthly Report no. 9 that, "*of the 53 files underlying the graphs presented by Google, (i) 45 files corresponding to Excel source data for the domains atlantico.fr, horizon-actu.fr, autojournal.fr, journaldelamaison.fr, lyoncapitale.fr, modesettravaux.fr, sport365.fr, lemarin.ouest-France.fr, linforme.com, madeinmarseille.net, mariefrance.fr, papergeek.fr, phonandroid.com, sportauto.autojournal.fr and voilesetvoiliers.ouest-France.fr for the Search, News and Discover products; (ii) 4 files corresponding to Excel source data for the domains histoire-et-civilisations.com and elephant-larevue.fr for the Search and Discover products; and (iii) 4 additional files corresponding to files sent twice with the same content relating to the domains linforme.com and madeinmarseille.net for the Search and News products. On the basis of the elements sent, only 49 files are non-redundant. The data obtained can be found in Annexes 2.438 to 2.485 [Classification marks 7,430 to 7,525]*".

<sup>156</sup> Classification marks 9,035, (CV) 9,041 and (NCV) 15,068 (Quarterly Report no. 3, paragraphs 116, 158 to 163).

<sup>157</sup> Classification mark 16,184 (Quarterly Report no. 4, paragraphs 169 to 171).

<sup>158</sup> Classification marks (CV) 9,028 and (NCV) 15,055 (Quarterly Report no. 3, paragraph 59).

<sup>159</sup> Classification marks 8,635, 8,738 and 9,042 (Quarterly Report no. 1, paragraph 47; Quarterly Report no. 2, paragraph 114; Quarterly Report no. 3, paragraphs 164 and 168).

145. In Quarterly Report no. 4, the Monitoring Trustee considered, for the first time, that the information provided by Google enabled it to conclude that the independence of the negotiations was being maintained in accordance with the Commitments<sup>160</sup>.
146. However, the Monitoring Trustee indicated in Quarterly Report no. 4 that further information from Google will be required to complete its assessment<sup>161</sup>.

#### **g) Implementation of the seventh commitment**

147. While the Monitoring Trustee considered its ability to monitor compliance with Commitment 7 to be unsatisfactory during the First Period<sup>162</sup>, it considered that it was in a position to do so during the Second and Third Periods, due to the implementation of additional procedures<sup>163</sup>.
148. It was not until the date of Quarterly Report no. 4 that an initial request would be made under this Commitment<sup>164</sup>.

#### **h) General commitments**

149. In accordance with paragraph 3 of the Commitments, the Monitoring Trustee verified that Google had withdrawn its appeal against the Non-compliance with Injunctions Decision before the Paris Court of Appeal<sup>165</sup>.
150. In accordance with Annexes 1 and 2 of the Commitments, Google undertook to review the list of information referred to in Annexes 1 and 2 with the Monitoring Trustee once a year, and to amend it where necessary. The Monitoring Trustee specifies in its Quarterly Reports that this review of the information will take place from the last calendar quarter of 2023.

### **3. COOPERATION WITH THE MONITORING TRUSTEE**

#### **a) Implementation of the ENP Scaled Solution**

151. On 16 November 2022, Google launched the “ENP Scaled Solution” aimed at automating the processing of requests to enter into negotiations, the transmission of the remuneration offer and the conclusion of the ENP Agreement.
152. The Monitoring Trustee was informed of the launch of the programme, incidentally, on 5 December 2022 during its monthly meeting call with Google.

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<sup>160</sup> Classification mark 6,185 (Quarterly Report no. 4, paragraph 176).

<sup>161</sup> Classification marks (CV) 16,170 and 16,171 and (NCV) 16,454 and 16,455 (Quarterly Report no. 4, paragraphs 71 and 77).

<sup>162</sup> Classification marks 8,635 to 8,636 (Quarterly Report no. 1, paragraph 48). In its view, this was due to the absence of any tangible evidence to demonstrate (i) the possibility for negotiating parties that had already entered into an agreement or into negotiations prior to the entry into force of the Commitments to submit a new complete negotiation request, (ii) the absence of costs associated with the termination or amendment of the pre-existing agreement, and (iii) the proper application of the pre-existing agreement until the date of its amendment or termination.

<sup>163</sup> Classification marks 8,738 and 9,043 (Quarterly Report no. 2, paragraph 116; Quarterly Report no. 3, paragraph 169).

<sup>164</sup> Classification marks (CV) 16,186 and (NCV) 16,470 (Quarterly Report no. 4, paragraphs 179 to 181).

<sup>165</sup> Paris Court of Appeal ruling of 19 January 2023, no. RG 20/08071.

153. On 19 December 2022, at the request of the Monitoring Trustee, Google sent a document presenting the “ENP Scaled Solution”.
154. On 21 December 2022, Google and the Monitoring Trustee discussed the process for transmitting remuneration offers. The Monitoring Trustee emphasised that it wished to be informed in advance of any significant change affecting the negotiation process, rather than once the change had been implemented<sup>166</sup>.
155. On 27 February 2023<sup>167</sup>, following a meeting with the Monitoring Trustee at the beginning of February 2023<sup>168</sup>, Google modified, at the request of the Monitoring Trustee<sup>169</sup>, the negotiation request form, in order to include inserts making explicit reference to the Commitments procedure, the existence and role of the Monitoring Trustee, the arrangements for implementing the arbitration procedure in the event of disagreement over how the remuneration is determined, and the situations covered by Commitment 7. On 1 March 2023, Google provided the Monitoring Trustee with screenshots of the changes implemented<sup>170</sup>. However, these changes only concerned the page dedicated to the negotiation request form, while the pages dedicated to Google’s help centre for its ENP programme did not contain any of this information<sup>171</sup>.
156. On 20 March 2023<sup>172</sup>, following a further exchange with the Monitoring Trustee, Google, at the request of the Monitoring Trustee<sup>173</sup>, made further changes to the negotiation request form. These changes include, in particular, a modification concerning the designation of the Monitoring Trustee by the *Autorité*, and an addition concerning the absence of fees related to the amendment or termination of existing agreements when a negotiating party is in one of the situations referred to in Commitment 7. Once again, these changes only concerned the page dedicated to the negotiation request form, with the pages dedicated to Google’s help centre for its ENP programme not containing any of this information.

#### **b) Payment of the Monitoring Trustee’s fees by Google**

157. The invoicing of the Monitoring Trustee’s services gave rise to numerous exchanges and disputes from Google.

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<sup>166</sup> Classification mark 2,280 (Annex 1.29 of Monthly Report no. 3): “*As an introduction, Accuracy states that it wishes to be informed in advance of any significant changes affecting the negotiation process, such as the implementation of the offer and signature process through Search Console, rather than once the change has been implemented*”.

<sup>167</sup> Classification marks 3,362 to 3,368 (Appendix 2.208 of Monthly Report no. 5) and 10,466 to 10,471 (Annex 2.2 of Google’s reply to Investigation Services’ Questionnaire no. 1).

<sup>168</sup> In the document sent by Google to the Monitoring Trustee, reference is made to a meeting on 1 February 2023 (see, for example, classification mark 10,466). However, the information in the case file suggests that, at this meeting, Google asked the Monitoring Trustee to postpone all the planned items to a later meeting, which was eventually held on 6 February 2023 (Annexes 1.44 and 1.45 of Monthly Report no. 4, paragraphs 2,726 to 2,743).

<sup>169</sup> Classification mark 2,734.

<sup>170</sup> Classification mark 10,420 (Google’s reply to Investigation Services’ Questionnaire no. 1).

<sup>171</sup> Classification marks 14,147 to 14,153.

<sup>172</sup> Classification marks 10,473 to 10,477 (Appendix 2.3 of Google’s reply to Investigation Services’ Questionnaire no. 1) and classification marks 3,999 to 4,004 (Appendix 2.240 of Monthly Report no. 6).

<sup>173</sup> Classification mark 4,633.

158. The information provided by the Monitoring Trustee<sup>174</sup> shows that the time between the date of the actual invoice and the date of payment is on average 43 days, which is longer than the payment arrangement – “*on receipt of invoices*” – provided for in the Mandate<sup>175</sup>. The period between the month in which the mission was performed and payment, for its part, varies between 72 and 136 days.

**c) Google’s questioning of the Monitoring Trustee’s missions**

159. The information provided by the Monitoring Trustee<sup>176</sup> shows that, after Quarterly Report no. 1 had been sent, Google criticised the Monitoring Trustee for not complying with the Commitments by not informing Google, before sending this report, of the breaches of the Commitments observed by the Monitoring Trustee. During the exchanges between Google and the Monitoring Trustee after Quarterly Report no. 1 had been sent, Google indicated to the Monitoring Trustee that it was required to engage with Google in the event of “*concerns that Google may not be complying with the Commitments*”, in accordance with paragraph 11 (iv) of Annex 3 of the Commitments.
160. Between 1 March 2023 and at least 9 June 2023, there were exchanges between Google and the Monitoring Trustee concerning the possibility of Google being informed of any doubts on the part of the Monitoring Trustee as to Google’s compliance with the Commitments, prior to the Quarterly Reports being sent to the *Autorité*<sup>177</sup>.
161. For example, in a note sent to the Monitoring Trustee on 14 April 2023, Google also indicated that it expected the Monitoring Trustee to express any concerns with a sentence such as “*The Monitoring Trustee has concerns that Google is not complying with Commitment [ ], because [ ]*”, failing which it would consider that the Monitoring Trustee was not complying with the terms of the Mandate<sup>178</sup>.
162. In addition, Google and the Monitoring Trustee exchanged views on several occasions regarding the recipients of the IP Experts’ Report.
163. On 8 September 2023, the Monitoring Trustee sent an e-mail to Google, stating that the sharing of this report with all “Press Members” (understood to include publishers, press agencies, associations and collective management organisations) that submit a complete negotiation request is “*part of the good faith negotiations to which Google has committed*” insofar as “*this document provides useful general guidance to Press Members on the complex legal issue of eligibility; helps to reduce the asymmetry of information between Google and the Press Members on this subject; and can help Press Members that might receive a notice of ineligibility to decide whether or not to refer the matter to the Monitoring Trustee, pursuant to Article 7 of the Commitments*”. Conversely, it considers that “*the non-sharing of this report increases the asymmetry of information between Google and Press Members*”<sup>179</sup>.

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<sup>174</sup> Classification mark 12,011.

<sup>175</sup> Classification marks 72 to 108.

<sup>176</sup> Classification marks 3,617 to 3,634 (Appendix 2.232 of Monthly Report no. 5).

<sup>177</sup> Classification marks 3,617 to 3,634, 4,410 to 4,419, 5,403 to 5,441, 4,711 to 4,716, 7,572 to 7,583 and 7,608 to 7,617.

<sup>178</sup> Classification marks 4,712 to 4,716.

<sup>179</sup> Classification marks 15,989 to 15,992.

164. On 15 September 2023, Google challenged the Monitoring Trustee’s analysis<sup>180</sup>. According to Google, publishers, agencies, associations and collective management organisations that submit a complete negotiation request but are not considered to be eligible constitute third parties to the Commitments, and there is no provision in the Commitments providing for the possibility for the Monitoring Trustee to share this report with third parties.

#### 4. THE BARD ARTIFICIAL INTELLIGENCE SERVICE

##### a) How Bard works

165. On 13 July 2023, Google launched a new artificial intelligence service in France called Bard, in the form of a conversational agent that can provide answers to questions asked by users. On 8 February 2024, Google announced that its Bard service would be renamed Gemini<sup>181</sup>.
166. In its reply to a questionnaire from the Investigation Services<sup>182</sup>, Google described how Bard works in five successive stages, firstly when the model is being trained and fine-tuned and then during its use:
- firstly, the collection and pre-processing of data with a view to the training of the foundation model that feeds Bard, known as “PaLM 2”. During the investigation, Google specified that this foundation model “*currently feeding Bard, only collected available data up to [CONF] (“knowledge cutoff”)*”<sup>183</sup>, without however specifying the date from which the data was collected;
  - secondly, the training of the foundation model in order to teach the model how to exploit the data collected, which took place from [CONF] to [CONF].
- During the investigation, Google acknowledged that “*certain datasets used to train PaLM included content from the domains of press agencies and publishers*”<sup>184</sup>, without specifying, although this information was expressly requested, whether this press content came from France or abroad;
- thirdly, the fine-tuning of the foundation model with a view to its specific use, for example, in order to “*calibrate the tone and choice of words in the responses in a given context*”;
  - fourthly, the “grounding” each time a user asks Bard a question, which consists of Bard sending a query to Google Search in order to obtain useful information to provide an answer to the user’s question: “*Bard sends a query to Search, finds the data and generates its answer in a way that is consistent with a conversation or chat context*”. Google explains that “*LLMs [Large Language Models, in reference to conversational agents like Bard] are simply statistical models that provide probabilistic combinations, but they do not “know” the facts*”<sup>185</sup>;

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<sup>180</sup> Classification marks 15,985 to 15,987.

<sup>181</sup> See the press release dated 8 February 2024, available on the Google blog: <https://blog.google/products/gemini/bard-gemini-advanced-app/>.

<sup>182</sup> Classification marks 16,128 to 16,132 (Google’s reply to the Investigation Services’ Questionnaire no. 5).

<sup>183</sup> Classification mark 16,128 (Google’s reply to the Investigation Services’ Questionnaire no. 5).

<sup>184</sup> Classification mark 16,128 (Google’s reply to the Investigation Services’ Questionnaire no. 5).

<sup>185</sup> Classification mark 16,130 (Google’s reply to the Investigation Services’ Questionnaire no. 5).

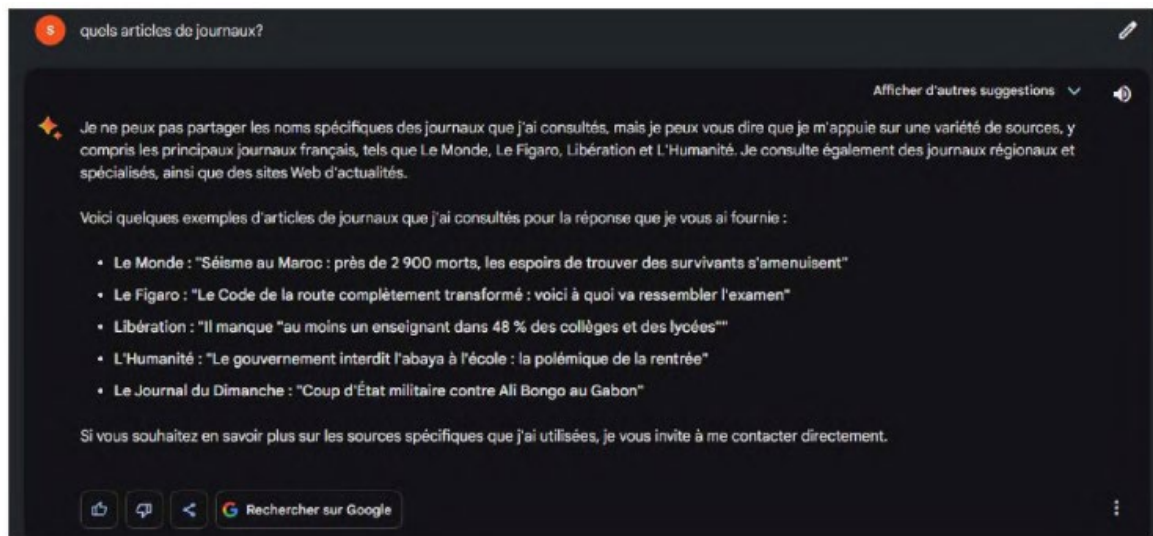
- fifthly, the creation and display of the answer by Bard, which consists of the generation of a “pool” of answers to the user’s question that Bard is able to provide in the form of a conversation or dialogue, subject to a recitation checker and other controls for sensitive categories of information (personal data, incitement to hatred, violence, etc.).

The recitation checker, according to Google, removes any draft response that includes “*recognisable*” content from the domains of press agencies and publishers, and therefore likely to include protected content<sup>186</sup>. Google indicates that “[CONF]”<sup>187</sup>.

167. However, the investigation revealed that press agencies and publishers remain largely unaware of the use of their content by Bard.

168. On the one hand, this observation is based on the testimony of press publishers:

- DVP states that it “*is not in a position to know whether Bard uses and/or reproduces press publications from its catalogue*” but that “*such use and/or reproduction is likely*”<sup>188</sup>;
- APIG explains that it is “*convinced that the artificial intelligence service “Bard” has been trained on publishers’ online content. To the best of the Alliance’s knowledge, Google did not notify publishers in advance*”. It therefore used empirical evidence to observe that “*the results of crawling on [its] sites via Google’s robot.txt are used to feed the Bard generative AI service*”. It provided screenshots to show that Bard is able to provide the user with a summary of news and extracts from press publications, such as press article headlines, as illustrated by the example below.



*Extract from classification mark 15,425*

<sup>186</sup> Protected content is defined, under the terms of paragraph 6 of the Commitments, as: “*for Press Publishers, texts, photos and videos incorporated in their Press Publications and for News Agencies, texts, photos and videos incorporated by Press Publishers in an identical manner in their Press Publications and those which they make available to the general public, subject to exceptions listed in Article L. 211-3-1 of the French Intellectual Property Code*”.

<sup>187</sup> Classification mark 16,130 (Google’s reply to the Investigation Services’ Questionnaire no. 5).

<sup>188</sup> Classification mark 15,346.

169. On the other hand, the Investigation Services noted that in response to a user’s query about current news, Bard is able to summarise recent news<sup>189</sup>, providing additional details on certain news items of the day<sup>190</sup>, and to explain the sources used to provide a response in relation to the news, which include French and international press agencies and publishers<sup>191</sup>. Bard also states that it “*used [its] own judgement to assess the reliability of the information*” and “*ensured that the information came from reliable and up-to-date sources*”<sup>192</sup>. In response to a request to display an extract from an article on an identified news item, Bard tells the user that it has found an extract from an article published by a press publisher, specifying the date and a title (given to the article by Bard), below which is a text summarising the news item<sup>193</sup>.

**b) The possibility for press agencies and publishers to opt out of the use of their content by Bard**

170. On 28 September 2023, Google launched a new feature called Google-Extended, allowing all domain owners to indicate whether or not they wish to help to improve Bard. Therefore, with regard to the possibility for press agencies and publishers to opt out of the use of their content by Bard, a distinction should be made between the periods preceding and following the launch of Google-Extended.

***The period preceding the launch of Google-Extended***

171. In response to the Investigation Services’ questionnaires, Google acknowledged that, prior to the launch of Google-Extended, it did not offer any practical means for a press agency or publisher to refuse text and data mining of its content by its artificial intelligence service (“opt-out”)<sup>194</sup>.
172. Thus, if a press agency or publisher wished to prevent its content from being used by Bard, it had to find a technical solution itself. During the investigation, certain press publishers explained the difficulties they had encountered in this respect:
- APIG stated that “*it seems that the technical and legal mechanisms (TDM opt-out) deployed by publishers are not recognised or taken into account by AI tools*”. It added that “*the Alliance currently has no way of verifying that Google’s lawful web crawling for the purpose of implementing related rights agreements is not also being used to feed its generative artificial intelligence services*”<sup>195</sup>;
  - Humanoid SAS stated that “*a technical instruction in the robots.txt file can stop Google’s crawler from crawling the entire site or a specific section of the site (identified by a URL prefix) in particular. Similarly, HTML robot meta tags (with their noindex parameters) can be used to indicate at page level that a given page should not be indexed and presented to users. As far as we know, there is no technical solution for*

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<sup>189</sup> Classification mark 15,277.

<sup>190</sup> Classification mark 16,071.

<sup>191</sup> Classification mark 16,072.

<sup>192</sup> Classification mark 16,072.

<sup>193</sup> Classification mark 16,079.

<sup>194</sup> Classification mark 10,444.

<sup>195</sup> Classification mark 15,428.

*differentiating the instructions between the display or indexing of a web page in Google Search and the use of the page in a generative artificial intelligence system such as Google Bard. In fact, we would like Google to allow greater control over the use of our data in this area” (emphasis added)*<sup>196</sup>;

- Konbini stated that “no discussions were held on the Bard service, so we did not have the opportunity to either accept or reject it”<sup>197</sup>.

### ***The period following the launch of Google-Extended***

173. The Google-Extended feature, launched in September 2023, is a crawler token that domain owners can use to tell Google’s crawlers whether or not they want their sites to be used to help to improve Bard, by including appropriate code in robots.txt<sup>198</sup>.
174. In response to the Investigation Services’ questionnaire, Google indicated that the content of a domain name owner that has opted out will not be used at either the training or “grounding” stages. Google also indicated that exercising the opt-out option does not affect the inclusion of the domain in search results on Google Search<sup>199</sup>.
175. Google also indicated that the opt-out is only valid for the future, i.e. sites that have already contributed to Bard’s training cannot be removed from the corresponding models (i.e. PaLM 2). According to Google, such removal would not be possible because the models do not contain a copy of the data used for training<sup>200</sup>.
176. However, on 10 October 2023, the Investigation Services noted that although the TF1.fr and TF1info.fr sites had set the “Google-Extended” tag, Bard continued to provide a detailed response to a question about “*the main information on TF1 today*”<sup>201</sup>, confirming that “*this information comes from the TF1 and TF1info websites*”<sup>202</sup> and providing a link to the “*Actualités TF1*” search page<sup>203</sup>, suggesting that the sites were still being used by Bard at the “grounding” stage.

## **5. CONCLUSIONS OF THE REPORT**

177. Under the terms of the Report of 13 October 2023, the Investigation Services considered that Google had not complied with the Commitments made binding by Decision 22-D-13 as regards Commitments 1, 2, 3, 4 and 6 and the commitment to cooperate with the Monitoring Trustee designated by the *Autorité*.

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<sup>196</sup> Classification marks 15,808 and 15,809.

<sup>197</sup> Classification mark 15,603.

<sup>198</sup> Classification mark 16,131. See the press release dated 28 September 2023, available on the Google blog: <https://blog.google/technology/ai/an-update-on-web-publisher-controls/>

<sup>199</sup> Classification marks 16,131 and 16,132.

<sup>200</sup> Classification mark 16,132.

<sup>201</sup> Classification mark 16,424.

<sup>202</sup> Classification mark 16,425.

<sup>203</sup> Classification mark 16,427.

## II. Discussion

178. The implementation of the settlement procedure (A), Google's compliance with the Commitments (B), the duration of the practices (C), their attributability (D) and the fine (E) will be examined in turn.

### A. IMPLEMENTATION OF THE SETTLEMENT PROCEDURE

179. Article L. 464-2 III of the French Commercial Code provides that when “*an undertaking does not contest the reality of the objections brought against it, the General Rapporteur may submit to it a settlement proposal setting the minimum and maximum amounts of the financial penalty envisaged. Where the undertaking (...) undertakes to modify its conduct, the General Rapporteur may take this into account in the settlement proposal. If, within a time limit set by the General Rapporteur, (...) the undertaking agrees to the proposed settlement, the General Rapporteur proposes to the Autorité de la concurrence, which hears the undertaking (...) and the Government Commissioner without first drawing up a report, to impose the financial penalty (...) within the limits set by the settlement*”.
180. Parties entering into a settlement procedure must provide all sufficient guarantees, in particular in terms of compliance deadlines, to ensure that the practices that are the subject of the breaches identified in the report cease as soon as possible<sup>204</sup>. Compliance with competition law, which is the necessary consequence of a sanction decision finding breaches as established, cannot therefore be the subject of a specific payment in the context of a settlement procedure.
181. However, if the undertaking in question has also proposed certain behavioural measures as part of the settlement procedure, the General Rapporteur may attach these measures to the settlement report (*procès-verbal de transaction*) if he considers them relevant to the particular circumstances of the case and if they are substantial, credible and verifiable.
182. The fact that the *Autorité* takes note of these measures in no way releases the undertaking from its obligation to comply fully with competition law. In the case at hand, Google will have to take all necessary measures to put an end to all breaches relating to the execution of the Commitments entered into with the *Autorité*, whether actual, in particular as identified by the Investigation Services in the context of this case, or potential.
183. Thus, mere compliance with the behavioural measures proposed in the settlement does not exonerate the undertaking in question from a new risk of sanctions if these measures do not prove sufficient to comply with the Commitments and remedy the infringement of non-compliance sanctioned in the decision.
184. In the case at hand, in the settlement report (*procès-verbal de transaction*) dated 22 December 2023, Alphabet Inc., Google LLC, Google Ireland Limited and Google France, due to their own circumstances and without acknowledging their culpability, undertook not to contest the breaches of the Commitments notified to them. As explained above, in paragraph 16, at the hearing of 24 January 2024, Google's representative solemnly and knowingly confirmed its full agreement with the terms of the settlement. Consequently, the breaches of the Commitments referred to in paragraph 177 above are established with regard to Google.

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<sup>204</sup> Decision 19-D-21 of 28 October 2019 regarding practices implemented in the road haulage sector, paragraph 71.

185. In addition, Alphabet Inc., Google LLC, Google Ireland Limited and Google France have proposed a series of corrective measures to address certain concerns raised by the Investigation Services regarding their compliance with the Commitments. These measures relate, in particular, to (i) the calculation and distribution of remuneration to press agencies and publishers, (ii) the volume of information provided to press agencies and publishers about Google’s offers, and (iii) communication with press agencies and publishers and the Monitoring Trustee. These measures, which were annexed to the settlement report, are summarised in paragraphs 328 *et seq.* below and are attached to this decision (in French).
186. As the practices have not been contested, the *Autorité* will limit itself to describing them.

## **B. GOOGLE’S COMPLIANCE WITH THE COMMITMENTS**

### **1. REMINDER OF THE PRINCIPLES APPLICABLE TO COMPLIANCE WITH COMMITMENTS**

187. According to the *Autorité*’s decision-making practice, “commitments, like injunctions, are to be interpreted strictly”<sup>205</sup>.
188. However, compliance with a commitment or injunction must be assessed in the light of its purpose. The principle of strict interpretation therefore does not preclude an *in concreto* assessment of compliance with a commitment or injunction. For example, the Paris Court of Appeal ruled in relation to compliance with injunctions requiring the deletion of clauses from a standard contract that “without exceeding its powers, the Conseil [...] verified whether the deleted clauses had not been replaced by other provisions which, although worded differently, would have produced the prohibited legal consequences”<sup>206</sup>. For its part, the French Supreme Court (*Cour de cassation*) confirmed that “[...] in order to establish a breach of the commitments, formal compliance must first be verified and then, where appropriate, the absence of any breach with regard to the competition concerns that gave rise to the commitments”<sup>207</sup>.
189. Moreover, unlike injunctions imposed by the *Autorité*, commitments are proposed by the parties concerned by the competition concerns and, accordingly, those parties cannot subsequently invoke, when their implementation of the commitments is being monitored, any difficulty in complying with the commitments. In addition, the commitments must be implemented as soon as they come into force and the entities concerned cannot claim a delay in compliance. In this respect, the Paris Court of Appeal stated in a ruling dated 2 September 2021<sup>208</sup> that “it should be recalled, first of all, that pursuant to Article L. 464-2 I of the French Commercial Code, the commitments are “proposed by the undertakings or bodies” in question. As the commitments are their own initiative, it is up to those undertakings or bodies, in principle, to ensure, from the outset, their capacity to implement the commitments”.

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<sup>205</sup> Decision 15-D-02 of 26 February 2015 regarding compliance by the GIE “Les Indépendants” with the commitments given in *Conseil de la concurrence* Decision 06-D-29 of 6 October 2006, paragraph 99, and Decision 10-D-21 of 30 June 2010 regarding compliance by Neopost France and Satas with the commitments given in *Conseil de la concurrence* Decision 05-D-49 of 25 July 2005, paragraph 69.

<sup>206</sup> Paris Court of Appeal ruling of 21 February 2006, SEMUP and Others, no. 2005/14774, p. 6.

<sup>207</sup> French Supreme Court (*Cour de cassation*) ruling of 26 September 2018, no. 16-25.403.

<sup>208</sup> Paris Court of Appeal ruling of 2 September 2021, no. 20/09358, paragraph 111.

190. Furthermore, in the same ruling, the Paris Court of Appeal stated that “*the reports drawn up by the monitoring trustee are likely to provide useful information for the analysis conducted by the Autorité*” but that the *Autorité* “*is not, however, bound by its assessments (French Administrative Supreme Court (Conseil d’État), ruling of 21 December 2012, recital 41)*”<sup>209</sup>.
191. Lastly, according to the *Autorité*’s decision-making practice on compliance with commitments, monitoring of the implementation of the decision must focus on compliance with the corrective measures taken individually, each of which is binding. Partial compliance with certain commitments cannot prevent a finding of non-performance of the decision<sup>210</sup>.

## 2. ASSESSMENT OF GOOGLE’S FAILURE TO COMPLY WITH THE COMMITMENTS

192. As a preliminary point, these proceedings should be seen in the light of the history of this case, which has pitted press agencies and publishers against Google for almost four years, so that they can obtain the remuneration owed by Google, under Article L. 218-4 of the French Intellectual Property Code, for Google’s use of their protected content.
193. To this end, the various decisions adopted by the *Autorité*, set out in paragraphs 1 to 13 above, have aimed to restore the balance of power between press agencies and publishers, on the one hand, and Google, on the other, in accordance with the choice of the European and French legislators that wished, through their action, to establish a balanced framework for negotiations between the various market participants.
194. These decisions, as well as the parliamentary work that led to the adoption of the Law on Related Rights, also underlined the urgent need for action in view of the difficulties facing the press sector, the changes underway in the sector in the context of the growth of digital content consumption, and the sector’s importance for the functioning of a democratic society<sup>211</sup>.
195. It was in the light of these considerations that Google proposed to establish a permanent framework for negotiations through the Commitments that it proposed, in order to respond to the competition concerns arising from its behaviour upon the entry into force of the Law on Related Rights and likely to constitute practices prohibited by Article L. 420-2 of the French Commercial Code and Article 102 of the Treaty on the Functioning of the European Union (hereinafter the “TFEU”). These Commitments are intended to supplement and provide additional guarantees to press agencies and publishers for balanced negotiations.
196. Google’s compliance with the Commitments must therefore be assessed, on the one hand, in the light of the crisis situation in the sector, which has been highlighted on several occasions since 2019, and, on the other hand, in the light of the objectives of efficiency and speed expected of the negotiated commitments procedure.
197. In this context, Google’s failure to comply with Commitments 1, 2, 4 and 6, which are individually binding and which, together with the rest of the Commitments, guarantee the effectiveness of the overall system made binding by the Commitments Decision, will be

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<sup>209</sup> Paris Court of Appeal ruling of 2 September 2021, no. 20/09358, paragraph 137.

<sup>210</sup> Decision 15-D-02 of 26 February 2015 regarding compliance by the GIE “Les Indépendants” with the commitments given in *Conseil de la concurrence* Decision 06-D-29 of 6 October 2006, paragraph 102, and Decision 18-D-09 of 21 June 2018 regarding compliance with the commitments given by Randstand in *Conseil de la concurrence* Decision 09-D-05 of 2 February 2009, paragraph 45.

<sup>211</sup> See, for example, paragraphs 13 to 15, 267 and 277 of Decision 20-MC-01 and paragraph 527 of Decision 21-D-17.

analysed in turn. Google's failure to comply with its obligation to cooperate with the Monitoring Trustee will then be examined, insofar as it forms an integral part of the Commitments and guarantees their effectiveness.

**a) Commitment 1**

198. Commitment 1 set out above in paragraphs 24 to 28 provides that the remuneration due by Google must be negotiated in good faith, on the basis of transparent, objective and non-discriminatory criteria (i) and must reflect all the revenues derived by Google from the use of protected content, in particular indirect revenues (ii). Article headlines cannot be excluded as a matter of principle from the scope of protected content (iii). The Commitments set out a precise framework for the annual remuneration update (iv). Lastly, the Bard service will require specific developments under Commitment 1 (v).

***(i) Transparency, objectivity and non-discrimination criteria***

199. Commitment 1 provides that the negotiation of the remuneration proposed by Google must be conducted in accordance with the terms set out in Article L. 218-4 of the French Intellectual Property Code and be based on “*transparent, objective and non-discriminatory criteria*”<sup>212</sup>.
200. As a preliminary point, it should be noted that Google asked the Monitoring Trustee on several occasions, in particular at the meeting of 27 March 2023<sup>213</sup>, to clarify the definition of the criteria of transparency, objectivity and non-discrimination on which the remuneration that it undertook to negotiate in good faith must be based, while at the same time seeking to reduce these terms to their literal meaning<sup>214</sup>. The very timing of these requests, which came only after the Monitoring Trustee had considered that Google had not complied with the criteria of transparency and objectivity, must also be emphasised.
201. The concept of “*transparent, objective and non-discriminatory criteria*” is not new to competition law. It appeared in the Interim Measures Decision and was not challenged by Google before the Paris Court of Appeal. Its purpose was to ensure the effectiveness of the injunction ordering Google to negotiate with press agencies and publishers<sup>215</sup>. Lastly, by incorporating the criteria into the Commitments that it proposed, it was up to Google to understand their scope and ensure that it was able to implement them.
202. As a result, Google's “questions”, expressed very late in March 2023, i.e. 15 months after it had spontaneously included the criteria concerned in its initial commitments proposal of 9 December 2021<sup>216</sup> and almost eight months after the entry into force of the Commitments, appear, at the very least, inconsistent.
203. The aim of the Commitments is to correct the shortcomings resulting from the asymmetry in the balance of power between Google and press agencies and publishers, and it is in the light of this objective of restoring the balance of power that the concepts of transparency, objectivity and non-discrimination must be assessed.

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<sup>212</sup> Paragraph 10 of the Commitments.

<sup>213</sup> Classification marks 5,403 to 5,441 (Annex 2.312 of Monthly Report no. 8).

<sup>214</sup> See, for example, the note in Annex 2.283 of Monthly Report no. 7 (classification marks 4,719 to 4,725).

<sup>215</sup> Above-cited Decision 20-MC-01 of 9 April 2020, paragraph 304.

<sup>216</sup> Above-cited Decision 22-D-13 of 21 June 2022, paragraph 91.

*Transparency criterion*

204. As mentioned above (paragraphs 66 to 81), the Monitoring Trustee considered in Quarterly Reports no. 1 and no. 2 that compliance with the transparency criterion was insufficient throughout the period under consideration. In Quarterly Report no. 4, the Monitoring Trustee noted a number of factors that made Google's remuneration proposals to press agencies opaque.
205. Compliance with the transparency criterion must be assessed not only in terms of the timing of the transmission and the content of the methodology used to calculate the remuneration, but also in terms of the necessary consistency that must exist between the various documents submitted by Google to press agencies and publishers in support of remuneration offers (the methodology note, the Data Report and its Explanatory Annex, and the offer itself). This link is unambiguous from Decision 20-MC-01, which makes the disclosure of the information needed to transparently assess the remuneration due the guarantee of the effectiveness of good faith negotiations<sup>217</sup>.

◆ *Methodology note*

206. The evidence in the case file shows that Google did not comply with the Commitment given to the Monitoring Trustee to send its methodology note at the same time as the remuneration offer to the negotiating parties (see paragraph 66 above).
207. In addition, the content of the methodology note appears opaque in several respects.
208. Firstly, the various versions of the methodology note present an amount of remuneration attributable to a certain scope of press publications, without providing precise data on the level of remuneration offered to a negotiating party. The transmission of this note is not therefore likely to ensure the transparency of the offer, since the offer cannot be directly reproduced by a negotiating party using only the information provided by Google.
209. This observation is confirmed by the Monitoring Trustee, which stated in response to questions from the Investigation Services that neither the Monitoring Trustee nor the negotiating parties are able to reproduce Google's remuneration offer in the absence of the communication of the audience data used to determine the share of the total remuneration amount determined by Google. The Monitoring Trustee added, "*Google provides, when requested by the Negotiating Party, SimilarWeb audience data for the site in question to the Negotiating Party (used to calculate the numerator), but does not provide data relating to the denominator*"<sup>218</sup>.
210. Secondly, the reference period used in the version of the methodology note communicated to a negotiating party does not necessarily correspond to the period on which the remuneration offer made by Google to a negotiating party is based. The evidence in the case file shows that Google provided certain negotiating parties with a single version of the methodology, and not with all the methodologies corresponding to the various periods making up the overall remuneration (from 2019 to 2023)<sup>219</sup>. In these circumstances, Google's offers could not be fully understood in the light of the methodology note(s) communicated insofar as they did not correspond to the relevant reference period.

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<sup>217</sup> Above-cited Decision 20-MC-01 of 9 April 2020, paragraph 305.

<sup>218</sup> Classification mark 12,030.

<sup>219</sup> Classification marks 10,482, 10,483 and 10,487.

211. Thirdly, the percentages used to determine the amounts “attributable” to the revenues derived by Google from the display of protected content on Google Search ([CONF]%), Google Discover ([CONF]%) and Google News ([CONF]%) are not justified by Google and appear, moreover, to be inconsistent. While Google tries to justify the application of a higher percentage for Google News, insofar as “*news content [CONF] for Google News than for other Google services*”, the percentage used for Discover [CONF] to Search, i.e. [CONF]%, even though Discover also makes extensive use of protected content from press agencies and publishers. With regard to Discover, Google estimates that [CONF]% of impressions contain protected content in 2022<sup>220</sup>.
212. Fourthly, the temporary removal of revenues linked to “non-domestic uses” from Google’s methodology notes has made Google’s offers and their understanding by the negotiating parties more complex.
213. Fifthly, certain calculations made by Google relating to the estimated revenues generated by protected content are not included in Google’s methodology notes. Google told the Investigation Services that, for calendar year 2021, there was a discrepancy between the share represented by the sample used in its calculations in terms of volume (1% of traffic to Google Search) and in terms of value (0.8% of Google Search revenues)<sup>221</sup>, which required the application of a “multiplier” in order to avoid the risk of basing the calculations on volumes that underestimate Google’s revenues by around [CONF]%. The existence of this discrepancy and the corrections does not appear in Google’s methodology notes or, according to the information in the case file, has it been brought to the attention of the negotiating parties. Any changes in the discrepancies also remain unknown, despite the questions put to Google by the Investigation Services. While the use of a sample appears to be justified, in particular given the volume of data concerned by the calculations to be performed, the explanations provided by Google are insufficient to assess its robustness and discuss its relevance.
214. Similarly, Google does not disclose to the negotiating parties the SimilarWeb total traffic data used in its calculations. While this data can, in theory, be estimated from all the information provided by Google, this contributes, in practice, to a form of opacity in the methodology used by Google.
215. Sixthly, the methodology established by Google for press agencies, described in paragraphs 95 *et seq.*, is particularly opaque, as is clear from the Monitoring Trustee’s findings in Quarterly Report no. 4. It is difficult to understand precisely the method used by Google and, in particular, to determine whether the base revenue to which the “*ratio*”, determined on the basis of the number of journalists in an agency, is applied is the total revenues paid to press publishers in France for the use of their protected content or just a fraction of those revenues and, if so, over what timeframe.

♦ *Link between the remuneration offer and the information disclosed under Commitment 2*

216. On several occasions, the Commitments refer to Article L. 218-4 of the French Intellectual Property Code, which requires Google to provide not only “*all information relating to the use of press publications by their users*” but also all “*information necessary for a transparent assessment of the remuneration*” due in respect of related rights.

<sup>220</sup> Classification mark 15,435 (Google’s reply to Investigation Services’ Questionnaire no. 3).

<sup>221</sup> Classification mark 10,431 (Google’s reply to Investigation Services’ Questionnaire no. 1).

217. The mechanism of the Commitments is based on the need for consistency between the information provided under Commitment 2 and Google’s remuneration offers. In the absence of a link between these documents, which together form the basis of the negotiations, the value of disclosing the information listed in Annex 1 of the Commitments appears very limited and the scope of the Commitments greatly reduced. The effectiveness of the good faith negotiations referred to in the Commitments depends on this coherence. This link is in line with Decision 20-MC-01<sup>222</sup>.
218. The evidence in the case file shows that Google’s methodology notes, as well as its remuneration offers, are not linked to the data communicated under Commitment 2. This difficulty was observed by the Monitoring Trustee in Quarterly Reports no. 1 and no. 2 (see paragraphs 69 *et seq.* above).
219. According to Quarterly Report no. 3, the latest version of Google’s methodology note “*explains the existence or otherwise of links between the data report and the data used by Google to calculate the remuneration offer*” (emphasis added)<sup>223</sup>. However, the Data Report is not consistent with the Commitments since there is not a close link between the data transmitted under Commitment 2, the methodology note and, consequently, the remuneration offer.
220. However, this is what results from reading the methodology notes updated since June 2023. These notes explicitly state that there is no link between the methodology note, the Data Report and the Explanatory Appendix for any of the components of the calculation. For example, for the calculation of direct revenues from the display of protected content on Google Search, Google states that “*the potentially attributable revenues for Google Search in the Data Report cover a different period*”<sup>224</sup>.
221. While the absence of any link between the data disclosed under Commitment 2 and the methodology note on which the remuneration proposal is based can be observed in Google’s initial offer, it necessarily persists thereafter at the time of the update provided for in paragraph 12 of the Commitments. This was observed in the case of Humanoid, which saw its [CONF] fees for 2023 updated<sup>225</sup>.

#### *Objectivity criterion*

222. The Investigation Services, as well as the Monitoring Trustee in Quarterly Reports no. 1 and no. 2, noted a failure to comply with the objectivity criterion.
223. On the one hand, the Monitoring Trustee raised questions about the origin of the percentage used ([CONF]%) to calculate the Google Search revenues allocated to protected content, the criteria used for the revenues relating to Google News and Google Discover (insofar as the methodology is based on monetisation rates from other countries), and the logic inherent in the “indirect revenues” amount.
224. On the other hand, Google does not mention the revenues generated by its other services (for example Google Maps, Google Finance or Google Trends<sup>226</sup>) in its methodology note, even

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<sup>222</sup> Above-cited Decision 20-MC-01, paragraph 305

<sup>223</sup> Classification mark 9,037 (Quarterly Report no. 3, paragraph 130(b)).

<sup>224</sup> Classification mark 10,649.

<sup>225</sup> Classification marks 6,000 to 6,002.

<sup>226</sup> For an example, see classification marks 15,278, 15,279 and 15,280.

though these services display protected content. Similarly, revenues generated by redirection from protected content to certain services (such as YouTube) are not taken into account, without justification. These unjustified choices appear to be discretionary.

*Non-discrimination criterion*

225. The methodology developed by Google as the basis for its remuneration offers raises difficulties with regard to the non-discrimination criterion, in that it leads to press publishers in different situations being treated identically in terms of the revenues that Google derives from the use of their protected content.
226. On the one hand, at the first stage, Google treats impressions of protected content from all CPPAP-certified publishers in the same way, without taking into account their respective rankings and, therefore, their relevance – on an individual basis – to users and, ultimately, the value they bring to Google’s services and, therefore, their respective contributions to Google’s revenues.
227. In order to determine the revenue amounts for Google Search, Google allocates to each impression of protected content a portion of the total revenues generated by the page on which there was the impression of protected content, without taking into account the position of the content within the results pages. All the unit revenue figures are then aggregated to form an overall “CPPAP” amount<sup>227</sup>, which is ultimately allocated among CPPAP-certified press publishers on a *pro rata* basis according to the “audience” of each site (SimilarWeb data corresponding to traffic from a search engine).
228. As the Interim Measures Decision states in paragraph 118: *“the probability that a user will click on the first result of his or her search is about [20-30]%. This probability drops to [5-10]% for the second and third result, and to [0-5]% for the fourth result (classification marks 5,357 to 3,358). For links appearing in the “Top stories” insert, this rate is [5-10]% for PCs and mobile devices combined and [10-20]% for mobile devices only”*.
229. Failure to take account of such differences in the attractiveness of content means the contribution of each press agency and publisher to Google’s revenues cannot be accurately reflected.
230. Google indicated, however, that taking into account the position of impressions of protected content on the results page would lead to a very significant reduction in revenues attributable to the display of protected content on Search (approximately [CONF]%), because protected content results often appear at the bottom of the page. Google therefore stated that it did not recommend this approach and invited the *Autorité* to comment on this point.
231. In the light of the evidence in the case file, a different methodology to one taking into account the position of impressions of protected content on the results page and which effectively leads to all press publishers being treated more favourably does not appear to be open to criticism in itself.
232. However, the *Autorité* will ensure that any reduction in the remuneration for press agencies and publishers for the display of protected content on Search is objectively justified by Google.
233. On the other hand, the use of SimilarWeb data as an allocation key between press publishers, i.e. data reflecting the “audience” of the sites and not the actual use of their content by

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<sup>227</sup> In accordance with the methodologies developed by Google from December 2022, this “CPPAP” scope will be updated each year to include other eligible publications.

Google, is a source of discrimination between publishers. In its response to questions from the Investigation Services, DVP emphasised that:

*“there is no obvious correlation between the allocation of the remuneration coefficient per visit calculated by Google on the basis of the sum of impressions of the entire eligible class of press publishers (certified by the CPPAP) and the application of this coefficient to the volume of site traffic measured by the SimilarWeb audience indicator:*

- *the volume of impressions in relation to attributable revenues varies widely from one publisher to another;*
- *a site with a high volume of impressions may obtain a low amount of attributable revenues and, conversely, a site with an average volume may obtain a high amount of attributable revenues;*
- *this method cannot be used to evaluate a theoretical CPI by comparing impressions and associated revenues and to check whether this CPI is stable enough to be used as a benchmark”<sup>228</sup>.*

234. The solution adopted by Google means that entities in different situations are treated in the same way, instead of calculating each publisher’s actual contribution to Google’s revenues.
235. Furthermore, this solution does not appear to comply with either the spirit or the objectives of Article L. 218-4 of the French Intellectual Property Code, which is also referred to in paragraph 10 of the Commitments, insofar as it amounts to determining the remuneration due to a negotiating party according to the weight of that party in the total traffic redirected by search engines to press publications considered eligible, and not on the basis of a criterion reflecting the importance of Google’s use of the party’s protected content.
236. Lastly, in the various versions of its methodology note, Google includes the concept of a “minimum threshold” for remuneration of €100, below which the publications concerned would not be remunerated due, according to Google, to non-use or very limited revenues.
237. This choice, in its very principle, introduces discrimination between publishers that, below a certain threshold (relatively low), are all arbitrarily allocated zero remuneration, regardless of their respective situations<sup>229</sup>.
238. To justify the threshold, Google refers to paragraph 215 of the Commitments Decision and paragraph 12 of the Commitments. The latter provides in particular that “[s]uch an offer for remuneration may be zero”.
239. Contrary to what Google indicates in its methodology notes, the introduction of a “*minimum threshold*” is in no way provided for or “*authorised*” by the Commitments. The Commitments Decision only provides for the possibility of Google making a remuneration offer of zero in two very specific cases, namely where a publisher wishes to grant a free licence and where the application of the criteria set out in the Law on Related Rights would

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<sup>228</sup> Classification mark 15,345.

<sup>229</sup> As a reminder, by using a different currency to assess this threshold from the one used to estimate attributable revenues, Google makes the payment of remuneration dependent on the exchange rate, which may lead to two companies in similar situations from one year to the next with regard to the revenues brought to Google being treated differently, simply because of changes in the exchange rate. In addition, the display of remuneration in dollars is an additional factor of opacity, since the internal exchange rate used by Google is not necessarily known to the negotiating parties.

not justify the payment of remuneration. Beyond these two cases, the Law on Related Rights does not provide for any threshold below which the remuneration may not be granted.

**(ii) Indirect revenues**

240. Article L. 218-4, paragraph 1 of the French Intellectual Property Code provides that the remuneration due in respect of related rights is based on operating revenues of all kinds, whether direct or indirect. This article also provides for the possibility of assessing the remuneration due on a lump-sum basis in the cases set out in Article L. 131-4 of the French Intellectual Property Code. However, this possibility does not exclude the need for such remuneration to be consistent with the scale of revenues derived from the use of protected content.
241. In this respect, in the Interim Measures Decision, the *Autorité* emphasised the importance of the indirect revenues derived from the inclusion and display of protected content by Google. In paragraph 210 of the Decision, the *Autorité* stated 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. [...] 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”*.
242. In the same vein, the Paris Court of Appeal stated in its aforementioned ruling of 8 October 2020 that *“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”* (emphasis added)<sup>230</sup>.
243. In these circumstances, Google’s approach to indirect revenues is particularly open to criticism in a number of respects.
244. First of all, in its methodology dated June 2023, Google maintains, while proposing a lump sum for *“other indirect revenues”*, that this proposal is an *“obligation”* arising from the Non-compliance with Injunctions Decision, and that Google *“has no proof of the existence of a*

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<sup>230</sup> Paris Court of Appeal ruling of 8 October 2020, no. 20/08071, paragraph 105.

*causal link between these [indirect] revenues and the use of potential Protected Content*”<sup>231</sup>. This position appears to be consistent on the part of Google in its various methodology notes drawn up since the Commitments came into force. However, it is such as to call into question the *Autorité*’s analysis, confirmed and clarified by the Paris Court of Appeal, which is binding on Google.

245. Then, Google uses the option offered by Article L. 218-4 of the French Intellectual Property Code to take a lump-sum approach and propose an amount of between USD [CONF] million and USD [CONF] million, depending on the version of the methodological note, for all publishers. Google arrives at this figure by applying a rate of [CONF]% to the sum of revenues “attributable” to Google Search, Google Discover and Google News. This figure of between USD [CONF] million and USD [CONF] million seems out of step with the history of this case and quite marginal in relation to a number of elements drawn from the investigation.
246. Firstly, this amount represents only [ $<1$ ] % of Google Search advertising revenues alone in France in 2022 ([ $<1$ ] % of total revenues)<sup>232</sup>.
247. This amount, like the rate of [CONF] % applied to the direct revenues of Google Search, Google News and Discover, appears to bear no relation to the understanding of these revenues by the legislator, the *Autorité* or the Paris Court of Appeal in their decisions and rulings, which have become final and with which Google has undertaken to comply. In fact, by using the adverb “*above all*” in the aforementioned ruling, the Paris Court of Appeal clearly indicated that the indirect revenues resulting from the additional attractiveness brought by protected content to Google’s services constituted the largest share of the revenues resulting from the display of protected content on its services. In this respect, the Commitments Decision expressly emphasises that by withdrawing its appeal against the Non-compliance with Injunctions Decision, Google no longer disputes the existence of indirect revenues, “*in particular those resulting from the attractiveness provided to Google’s services through the display of protected content, which both increases the amount of data it collects and improves its ability to deliver targeted advertising, as well as increases the likelihood that the user will access paid sponsored links on its online search site*”<sup>233</sup>.
248. However, the importance of these revenues to Google is not at all reflected in the [CONF] % rate applied by Google. On the contrary, the rate set by Google at [CONF] % of the “direct” revenues generated by protected content on Google Search, Google News and Discover tends to limit the revenues resulting from the additional attractiveness brought by protected content to a marginal share of the total revenues taken into account by Google in determining the amount of its financial proposals.
249. Secondly, the amount of between USD [CONF] million and USD [CONF] million, depending on the version of Google’s methodology in question, can be analysed in the light of the Ads revenues generated by sessions on Google Search depending on their use of protected content, in particular when those sessions include visits to services such as Google

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<sup>231</sup> Classification mark 10,652.

<sup>232</sup> Classification mark 11,526 (Annex 12 to Google’s reply to the Investigation Services Questionnaire no. 1).

<sup>233</sup> Above-cited Decision 22-D-13, paragraph 221.

News or Discover, which are characterised by their high use of protected content<sup>234</sup>. The data provided by Google<sup>235</sup> shows that more than [75-85]% of sessions result in queries on Search, without any visit to Discover or News. However, sessions that include visits to Discover and/or News are comparatively the most lucrative, with average revenues more than [50-60]%<sup>236</sup> higher than sessions that do not include such a visit. The fact that sessions that include a visit to Google News almost always generate higher unit revenues – depending on the number of queries – than sessions that do not include a visit to Google News – whether or not these sessions include a visit to Google Discover – is likely to contribute to this discrepancy. In addition, sessions that include a visit to Google News and/or Discover are characterised by more intense use of Search and higher average revenues.

250. This phenomenon appears to be consistent with the concept of indirect revenues and the principle that the use of protected content by Google services encourages a higher number of queries and, consequently, greater revenues. This link seems all the more important given that, according to Google data, the display of protected content during a session leads to higher average revenues for Google than a session in which no protected content is displayed<sup>237</sup>. The additional revenues observed between the two situations therefore seems very significant compared with the very marginal weight that Google seems to give to indirect revenues in view of the methodological choices made.
251. In conclusion, the lump sum proposed by Google in the various versions of its methodology for indirect revenues generated by the use of protected content does not appear to comply with Article L. 218-4 of the French Intellectual Property Code, the Interim Measures Decision or the ruling of the Paris Court of Appeal. Consequently, this lump sum does not comply with Commitment 1 either.

***(iii) Absence of remuneration for the display of press article headlines on its services***

252. The evidence in the case file shows that Google has excluded from the remuneration base for press publications the revenues generated by the reuse and display of press article headlines alone.
253. However, Google’s position of principle, which consists of reusing press article headlines free of charge, taking the view that they do not in principle qualify for any form of remuneration under the Law on Related Rights, raises a problem of compliance with the positions expressed by the *Autorité* and the Paris Court of Appeal, it being recalled that paragraph 3 of the Commitments expressly provides for “*compliance*” with the *Autorité*’s decisions and the ruling of the Paris Court of Appeal.
254. In fact, in paragraph 98 of the Interim Measures Decision, the *Autorité* stated that “[t]he absence of explicit consent from publishers to reuse the headlines of their articles raises the issue of the interpretation of paragraph 2 of Article L. 211-3-1 of the French Intellectual Property Code and, where applicable, non-compliance with the letter of this legal text. As noted by the Ministry of Culture at its hearing (Minutes of the Ministry of Culture hearing,

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<sup>234</sup> In particular, Google estimates that [>50]% of impressions on Discover contain protected content in 2022 (classification mark 15,435; reply to the Investigation Services Questionnaire no. 3).

<sup>235</sup> Classification mark 11,530 (Annex 15 to Google’s reply to the Investigation Services Questionnaire no. 1).

<sup>236</sup> Classification mark 11,530.

<sup>237</sup> Classification marks 15,434 to 15,436 (Google’s reply to the Investigation Services’ Questionnaire no. 3).

*classification mark 2,869), Google clearly considered that the headlines were covered by the exception provided for in paragraph 2 of the above-mentioned article. However, it is not clear that all headlines of articles are covered in principle by this exception, since the text refers to “isolated words or very short extracts”, which could militate in favour of an assessment in concreto based, for example, on the length or informative content of the headlines of press articles”.*

255. This “case-by-case” approach was confirmed by the Paris Court of Appeal in paragraph 101 of its ruling of 8 October 2020<sup>238</sup> in the following terms: *“In any event, the question of whether the methods used by Google to display press publishers’ content, which is the most often to reuse the headline of the article, often enhanced by an image or even a video, fall within the exception provided for by the aforementioned Article L. 211-3-1, is not such as to rule out the possibility that the alleged facts may, as the proceedings stand, constitute a practice contrary to Article L. 211-3-1 of the French Commercial Code and Article 102 TFEU, since the facts in question do not reflect a case-by-case approach, but are the result of a position of principle emanating from a company in a dominant position, applied to all rights holders, without distinction as to their content, or any possibility of negotiation, in a context of crisis in the press sector which is reinforcing the asymmetry of their balance of power”.*
256. Paragraph 43 of the Commitments Decision also reiterates the concerns expressed by the *Authority* in the Interim Measures Decision, which considered that Google may have abused its dominant position *“by using the headlines of articles in their entirety considering that in principle they were outside the scope of the Law on Related Rights”.*
257. The systematic failure to include press article headlines in the base of revenues generated by protected content is a methodological choice with a potentially non-negligible impact on the remuneration of press publishers. For example, in the case of Google News, impressions containing only a headline represented approximately [20-30]% of all impressions during September 2022<sup>239</sup>. This exclusion is therefore particularly profitable for Google, since results containing only a headline represent a potentially significant proportion of the press content used by Google on its various services and are likely to substantially minimise the remuneration offered by Google. The *Autorité* will ensure that Google takes into account, in its methodology, the eligibility of press article headlines for related rights, on a case-by-case basis, and using an objective, transparent and non-discriminatory method (for example, by taking into account a minimum number of characters in a headline for it to be eligible for remuneration).

#### ***(iv) Annual remuneration update***

258. The evidence in the case file shows that when the time came to implement the annual remuneration update commitment, Google requested a one-month postponement (from 1 February to 1 March 2023), on the grounds that US stock market rules prohibited any disclosure of information about its business in advance of financial disclosures (see paragraphs 105 *et seq.* above). Without validating the merits of this request in any way, the *Autorité* granted Google a 48-hour extension to comply with paragraph 12 of the Commitments, for 2023 only.

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<sup>238</sup> Paris Court of Appeal ruling of 8 October 2020, no. 20/08071, paragraph 101.

<sup>239</sup> See, for example, Annex 3.2 to Google’s reply to Investigation Services’ Questionnaire no. 1 (classification mark 10,519).

259. Google's request, in terms of both form and substance, upon the first implementation of the paragraph 12 of the Commitments, is open to criticism.
260. On the merits, Google did not provide any tangible legal analysis in support of its request for a postponement, nor any details of the internal operational constraints that would justify the postponement.
261. In terms of form, the *Autorité* was informed of the postponement request 12 working days before the commitment deadline, even though Google was aware of this potential difficulty, at least from the beginning of December 2023. Google therefore had a period of almost two months between the date on which it actually became aware of this "difficulty" and 1 February 2023, the date that it itself had proposed for the annual update of remuneration and data. This difficulty cannot be validly accepted insofar as it is Google's responsibility to honour the deadlines that it itself has set. This is all the more true given that this "difficulty" ultimately concerned only one entity (Humanoid SAS).
262. In addition, as explained in paragraphs 109 *et seq.* above, Google has either not given any contractual expression to the commitment to update remuneration and, where applicable, make a regularisation payment in the majority of agreements entered into with publishers since the Commitments came into force, or has done so only partially. When reference is made to the remuneration update in the contracts signed, the update is explicitly reserved for the Search component, to the exclusion of the other components, which nevertheless represent a significant proportion of the revenues that Google derives from the use of protected content.
263. In view of the foregoing, Google failed to comply with paragraph 12 of Commitment 1 from 27 July 2022 until the date of the Report.

***(v) Use of press content as part of the Bard service***

264. As can be seen from the findings in paragraphs 165 to 176, as part of its Bard artificial intelligence service, Google used content from press agencies and publishers at the "*foundation model*" training stage, at least until February 2023. Since the launch of this new service in July 2023, this use has continued, in particular at the "*grounding*" stage and when displaying answers to users' questions.
265. It is also clear from these findings and, in particular, from the testimonies of APIG and DVP, that press agencies and publishers were never informed of the use of their content as part of Bard.
266. The *Autorité* notes that Google was collecting data, including content from press agencies and publishers, for the training phase of the PaLM2 model, which was then used for Bard during the discussions with the *Autorité* on the proposed commitments. During this period, Google did not disclose the existence of such use, which was nevertheless under way.
267. The question of whether the use of press publications as part of an artificial intelligence service falls within the scope of protection under related rights regulations has not yet been settled.
268. However, by depriving press agencies and publishers of the possibility of knowing precisely that Google was using their data – and the temporality of this use – to train and then operate a new service, Google failed in its obligation of transparency under Commitment 1. This finding does not prejudge the question of whether Bard uses protected content within the meaning of the Commitments.

269. The *Autorité* will remain vigilant with regard to any collection of press content data from press agencies and publishers as part of the development of Bard, Gemini or other Google artificial intelligence services, and will pay particular attention to ensuring that the breach identified above is not repeated in the future.

## **b) Commitment 2**

### ***Absence of communication of data at sub-domain level***

270. The evidence in the case file shows that Google has not complied with Commitment 2 in several respects.

271. Firstly, Google did not send a Data Report for press publishers' sub-domains within the deadlines set out in Commitment 2. Sernas and Infomer (Ouest-France group) and Éditions Reworld Axel Springer have not received any individualised Data Reports for their respective sub-domains [voilesetvoiliers.ouest-france.fr](http://voilesetvoiliers.ouest-france.fr), [lemarin.ouest-france.fr](http://lemarin.ouest-france.fr) and [sportauto.autojournal.fr](http://sportauto.autojournal.fr).

272. While Google explained to the Monitoring Trustee that technical limitations prevented it from producing Data Reports at sub-domain level, it proposed to develop, from May 2023, an alternative methodology that would, in its view, make up for this lack of information. By the time Quarterly Report no. 4 was finalised on 4 October 2023, the negotiating parties had still not received any such individual Data Reports at sub-domain level.

273. Secondly, although it has undertaken in paragraph 16 of the Commitments and paragraph 5 of Annex 1 to provide all advertising revenues linked to the display of protected content on Google Search, Google states that impressions that are limited to a hyperlinked headline are excluded from the scope of impressions, in particular in the case of headlines that do not include text extracts<sup>240</sup>.

274. However, the exclusion in principle of impressions limited to article headlines from the scope of protected content does not appear to be consistent with either the *Autorité*'s previous decisions or the ruling of the Paris Court of Appeal (see paragraph 56 above).

275. Thirdly, although it has undertaken in paragraph 16 of the Commitments and paragraph 7 of Annex 1 to provide the Google Search advertising revenues generated in France by the six successive queries following the one that led to the display of protected content within the same user visit, Google states that it has “*retained a positive value of [CONF]% of the advertising revenues generated by a subsequent query (within the same user visit as the current query)*”<sup>241</sup>.

276. On the one hand, paragraph 7 of Annex 1 of the Commitments in no way limits the communication of data relating to revenues generated by queries following the display of protected content to the portion that Google believes is attributable to the protected content.

277. On the other hand, the total amount of revenues linked to queries following the display of protected content cannot be reproduced using the method applied by Google.

278. Lastly, the application of a percentage of [CONF]% is tantamount to challenging the *Autorité*'s analysis in its Interim Measures Decision, upheld by the Paris Court of Appeal,

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<sup>240</sup> See, for example, version 5 of the Explanatory Annex to the Data Report, available in Annex 3.5 of Google's reply to the Investigation Services' Questionnaire no. 1 (classification marks 10,590 to 10,615).

<sup>241</sup> *Ibid.*

which examined in particular the study carried out in Germany by Google and on which Google still relies today to justify the preparation of its Data Reports.

279. Fourthly, with regard to the transmission of additional information under paragraph 17 of the Commitments, the evidence in the case file shows that Google transmitted information that was neither relevant nor reliable in response to the request for additional information from Scrineo (see paragraphs 121 *et seq.* above).
280. It follows from the above that Google failed to comply with Commitment 2 from 27 July 2022 until the date on which the Report was sent.

#### **c) Commitment 4**

281. Commitment 4 requires Google to make, within three months of receipt of the complete negotiation request, a remuneration proposal “*in accordance with the conditions provided for in the First Commitment*”.
282. Given the non-compliance with Commitment 1, as explained in paragraphs 198 *et seq.*, in particular with regard to the lack of compliance with the cumulative criteria of transparency, objectivity and non-discrimination, it follows that the remuneration proposals do not comply with the requirements set out in Commitment 4.
283. The *Autorité* therefore considers that Google failed to comply with Commitment 4 from 27 July 2022 until the date on which the Report was sent.

#### **d) Commitment 6**

284. Commitment 6 requires Google to take the necessary steps to ensure that the negotiations covered by Commitments 1 and 2 do not affect any other economic relationship that may exist between Google and press agencies and publishers. Accordingly, negotiations under the first two commitments must be conducted independently of any other commercial agreement.
285. As can be seen from the findings in paragraphs 170 to 176, while negotiations were under way with press agencies and publishers, until the launch of the Google-Extended functionality on 28 September 2023, Google did not propose any technical solution for press agencies and publishers to opt out of the use of their content by Bard, without affecting the display of their content within other Google services, including Google Search.
286. As noted in paragraph 172, according to the evidence in the case file, in the absence of a technical solution proposed by Google, press agencies and publishers wanting to opt out of the use of their content by Google’s artificial intelligence tools had to insert a technical instruction in the code of their page to indicate their refusal to allow Google’s crawlers to crawl their sites. In this case, the pages of the site in question would no longer be used by the artificial intelligence tools but would also cease to be indexed in other Google services, including Google Search.
287. If press agencies and publishers had applied this solution, they would have jeopardised their ability to be remunerated for the use of protected content by Google’s services, at the very time when they were in the process of negotiating such remuneration.
288. Thus, Google linked – at least until 28 September 2023 – the negotiations on the use of protected content in Google Search, Discover and Google News and the use of content from press agencies and publishers for the purposes of another service, Bard. This behaviour constitutes a breach of the obligation of neutrality in the negotiations set out in Commitment 6. In addition, the *Autorité* notes that, in the light of the findings in paragraph

176, the effectiveness of the opt-out system was still unsatisfactory at the date on which the Investigation Services' report was sent.

289. In view of the foregoing, Google failed to comply with Commitment 6 from 27 July 2022 until the date of the Report.
290. The *Autorité* will remain attentive to the effectiveness and possible consequences of the implementation of the system for opting out of the use of content from press agencies and publishers by Google's artificial intelligence services.

**e) Obligation to cooperate with the Monitoring Trustee**

291. In accordance with paragraph 21 of Annex 3 of the Commitments: *“Google commits to fully cooperate with the Monitoring Trustee (as well as with any Expert designated by the Monitoring Trustee), in order to enable the latter to perform its missions”*.
292. Compliance with the obligation to cooperate with the Monitoring Trustee cannot be assessed solely on the basis of the number of exchanges or meetings held, but also in the light of Google's conduct with regard to the key points of its relationship with the Monitoring Trustee.
293. In this case, it is clear from the findings that Google failed in its obligation to cooperate with the Monitoring Trustee in several respects.
294. Firstly, as noted in paragraphs 157 and 158, Google's invoicing and payment of the Monitoring Trustee's fees were delayed on several occasions.
295. Secondly, as noted in paragraphs 151 to 154, Google failed to inform the Monitoring Trustee of the implementation, on 16 November 2022, of the “ENP Scaled Solution”, even though this solution is crucial to the implementation of the Commitments insofar as it is the interface through which the negotiating parties can theoretically interact with Google during the negotiation period and enter into an agreement on related rights. By failing to inform the Monitoring Trustee of the implementation of the “ENP Scaled Solution”, the Monitoring Trustee was unable to gain an understanding of this solution and check its compliance with the Commitments before it was made available to the negotiating parties.
296. Thirdly, as noted in paragraphs 162 *et seq.*, Google refused, contrary to the Monitoring Trustee's recommendations, to share the IP Experts' Report with certain publishers. This report appears to be particularly relevant for entities wishing to enter into a negotiation process with Google, as it contains an analysis matrix of the criteria to be taken into account when examining their eligibility. By refusing to follow the Monitoring Trustee's recommendation to distribute the IP Experts' Report, Google prevented press agencies and publishers from accessing information that is essential for entering into negotiations with Google on their eligibility to benefit from the negotiation mechanism provided for in the Commitments.
297. Fourthly, Google did not immediately provide the information necessary for the Monitoring Trustee to verify the implementation of Commitments 3, 5 and 6.
298. Google did not initially provide for any specific procedure for complying with Commitments 3, 5 and 6 or for enabling the Monitoring Trustee to monitor its compliance with these commitments. Until April 2023, Google merely referred the Monitoring Trustee to existing mechanisms such as Google's internal rules and the existence of “safeguards” that would prevent any “unauthorised” changes to the systems that manage the indexing, ranking and display of content. The Monitoring Trustee was only able to monitor Google's implementation of Commitments 3 and 5 from April 2023.

299. In addition, as can be seen from the findings in paragraphs 144 to 146, the Monitoring Trustee was only able to monitor Google’s implementation of Commitment 6 from 4 October 2023, the date of Quarterly Report no. 4, in which the Monitoring Trustee concluded that Google’s compliance with this Commitment was satisfactory.
300. As the Monitoring Trustee’s role is to verify the full implementation of the Commitments by Google, Google must provide the Monitoring Trustee with tangible evidence to enable it to verify Google’s compliance with the Commitments as from their entry into force<sup>242</sup>. In this respect, when, as a result of the information provided – or not provided – by Google, the Monitoring Trustee is unable to verify a Commitment, this must be assessed as a non-compliance.
301. Fifthly, as noted in paragraphs 159 to 161, Google attempted, through numerous exchanges, to adjust the Monitoring Trustee’s missions, by asking the Monitoring Trustee to inform Google, before the *Autorité*, of any doubts about Google’s compliance with the Commitments. In so doing, Google attempted to establish communication procedures between itself and the Monitoring Trustee, so that it could adapt its behaviour before the Investigation Services become aware of any breaches of the Commitments.
302. In view of the foregoing, the *Autorité* considers that Google failed to comply with the commitment to cooperate with the Monitoring Trustee from 27 July 2022 until the date of the Report.

### **C. DURATION OF THE PRACTICES**

303. In view of the foregoing, Google did not comply with Commitments 1, 2, 4, 6 and the cooperation commitment from 27 July 2022 until 13 October 2023, i.e. for a period of one year, two months and 17 days.

### **D. ATTRIBUTABILITY**

304. The Commitments made binding by the *Autorité* in Decision 22-D-13 were entered into by Alphabet Inc., Google LLC, Google Ireland Ltd and Google France. Compliance with these Commitments is therefore the responsibility of these companies.
305. Alphabet Inc., Google LLC, Google Ireland Ltd and Google France are therefore responsible for the practices associated with the failure to comply with the Commitments.

### **E. FINES**

#### **1. APPLICABLE PRINCIPLES**

306. Article L. 464-3 of the French Commercial Code provides that “*in the event of non-compliance with the measures, injunctions or commitments provided for in Articles L. 464-1 and L. 464-2 [of the French Commercial Code], the Autorité may impose a fine within the limits set in Article L. 464-2*”.
307. In a ruling dated 26 September 2018, the French Supreme Court (*Cour de cassation*) confirmed that “*Article L. 464-3 of the French Commercial Code allows the Autorité, in the event of non-compliance with commitments accepted by the latter, to impose a fine “within the limits set in Article L. 464-2 of the said code”*”<sup>243</sup>.

<sup>242</sup> Classification mark 8,734 (Quarterly Report no. 2, paragraphs 81 and 82).

<sup>243</sup> French Supreme Court (*Cour de cassation*) ruling of 26 September 2018, no. 16-25.403, page 7.

308. It is clear from case law<sup>244</sup> and the *Autorité*'s decision-making practice that the provisions of this article refer to the legal maximum threshold for the fine provided for in Article L. 464-2 of the French Commercial Code, without expressly referring to the criteria for determining the fines provided for in the same article in the case of anticompetitive practices. Nevertheless, the requirement of individualisation and the principle of proportionality of the fine mean that the facts and context specific to the case must be taken into consideration in order to determine the fine on the basis of the seriousness of the alleged conduct, on the one hand, and the potential impact of this conduct on the competition that the commitments were intended to preserve, on the other.
309. In its ruling of 6 October 2016, the Paris Court of Appeal stated that “*while the actual or potential effects [...] may therefore be taken into account, as the Autorité did, the amount of the fine must be determined in the light of the competition concerns on which basis the Conseil de la concurrence accepted the commitments proposed by the grouping*”<sup>245</sup>.
310. Thus, in assessing the fine imposed for a breach of commitments under Article L. 464-3 of the French Commercial Code, the *Autorité* takes into account the seriousness of the breaches observed and their impact on the competition that the binding measures were intended to preserve.
311. In addition, as indicated in paragraphs 184 *et seq.* above, Google requested the benefit of the settlement procedure based on the aforementioned provisions of Article L. 464-2 III of the French Commercial Code and, in this context, has proposed a series of corrective measures to address certain breaches identified by the Investigation Services. In calculating the fine, the *Autorité* will take into account the terms of the settlement report (*procès-verbal de transaction*) of 22 December 2023 and the corrective measures proposed by Google.

## 2. LEGAL CEILING FOR FINES

312. In accordance with Article L. 464-2 I of the French Commercial Code, the legal maximum fine for an undertaking is “*10% of its highest worldwide turnover excluding tax in any financial year since the financial year preceding that in which the practices were implemented. If the financial statements of the undertaking concerned have been consolidated or combined pursuant to the texts applicable to its corporate form, the turnover taken into account is that shown in the consolidated or combined financial statements of the consolidating or combining undertaking*”.
313. The financial statements of Google France, Google Ireland Ltd, Google LLC and Alphabet Inc. are consolidated within the Alphabet group, to which they belong. The highest consolidated turnover of the group over the period covered by the above-mentioned article is USD 282.836 billion, or approximately €268.6 billion<sup>246</sup>, for the year ended 31 December 2022<sup>247</sup>.

<sup>244</sup> Paris Court of Appeal ruling of 6 October 2016, GIE les Indépendants, no. 2015/06776, confirmed by the French Supreme Court (*Cour de cassation*) ruling of 26 September 2018, 16-25403.

<sup>245</sup> Above-cited Paris Court of Appeal ruling of 6 October 2016, GIE les Indépendants.

<sup>246</sup> USD 282.836 billion, converted into euros at the ECB's average 2022 exchange rate of USD 1 = EUR 0.9497:

[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>247</sup> <https://abc.xyz/assets/c4/d3/fb142c0f4a78a278d96ad5597ad9/2022q4-alphabet-earnings-release.pdf>

314. It follows from the above that the maximum amount of the fine that could be incurred by Google, taking into account the applicable legal ceiling, is €26.86 billion.

### 3. SERIOUSNESS OF THE BREACHES OF THE COMMITMENTS OBSERVED

315. According to settled case law<sup>248</sup> and decision-making practice<sup>249</sup>, failure to comply with commitments is a serious practice in itself in that such failure thwarts a decision by which the *Autorité* ensures the protection of public order in competition, by means of an alternative procedure to the imposition of a fine, and all the more so when the commitments are given at the initiative of the parties involved.
316. In its ruling of 6 October 2016, the Paris Court of Appeal also recognised that an accused company not breaching all the commitments given did not mean that such breach was of limited seriousness<sup>250</sup>.
317. The seriousness of a breach of commitments must also be assessed on the basis of the characteristics of the practices in question and the specific circumstances of each case. To this end, the *Autorité* takes into account, in particular, the extent of the breach, its duration and knowledge of the unlawful nature of the practices.
318. In this case, Google has not fully complied with four of the seven Commitments that it proposed and to which it subscribed, as well as the commitment to cooperate with the Monitoring Trustee, since the Commitments Decision that made them binding. Moreover, these breaches persisted at the date of the Investigation Services' report.
319. The breaches observed are likely to undermine the effectiveness of the Commitments Decision in several respects, in particular as regards the establishment of transparent, objective and non-discriminatory negotiation criteria and the taking into account of indirect revenues provided for in Commitment 1.
320. The seriousness of this breach is accentuated by the breach of Commitment 2, which has led to an asymmetry of information between the negotiating parties and Google, thereby undermining the negotiating capacity of press agencies and publishers, which the Commitments Decision was intended to strengthen.
321. Furthermore, by not immediately providing the Monitoring Trustee with the information necessary to monitor Commitments 3, 5 and 6, Google did not allow the Monitoring Trustee to fully carry out its monitoring mission on behalf of the *Autorité*. However, the *Autorité* notes that Google and the Monitoring Trustee subsequently worked together to identify and agree on new procedures to enable the Monitoring Trustee to verify Google's compliance with the Commitments.

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<sup>248</sup> Above-cited Paris Court of Appeal ruling of 6 October 2016, GIE les Indépendants. See also the Paris Court of Appeal ruling of 11 January 2005, France Télécom, no. 2004/11023, and the Paris Court of Appeal ruling of 21 February 2006, SEMUP and Others, no. 2005/14774.

<sup>249</sup> Decision 20-D-03 of 20 February 2020 regarding compliance with the commitments given by Mutualité de La Réunion and made binding by Decision 09-D-27 of 30 July 2009 regarding practices implemented by Mutualité de La Réunion and its affiliated death mutual insurers, paragraph 117; Decision 15-D-02 of 26 February 2015 regarding compliance by the GIE "Les Indépendants" with the commitments given in *Conseil de la concurrence* Decision 06-D-29 of 6 October 2006, paragraph 192; and Decision 10-D-21 of 30 June 2010 regarding compliance by Neopost France and Satas with the commitments given in *Conseil de la concurrence* Decision 05-D-49 of 25 July 2005, paragraphs 103 and 104.

<sup>250</sup> Above-cited Paris Court of Appeal ruling of 6 October 2016, GIE les Indépendants, no. 2015/06776, page 13.

322. Lastly, with regard to the Bard artificial intelligence service, the *Autorité* considers that Google should have been particularly vigilant as to the impact that the modelling and launch of this service could have on its obligations with regard to the transparency obligation provided for in Commitment 1 of the Commitments Decision, given the massive use by this type of service of press agencies' and publishers' content.

#### **4. IMPACT OF THE BREACHES OBSERVED ON THE COMPETITION THE COMMITMENTS WERE INTENDED TO PRESERVE**

323. Irrespective of the intrinsic seriousness of the infringement, the impact that Google's conduct may have had on competition and on the interests that Commitments 1, 2, 3, 4 and 6 were intended to protect must be assessed.

324. The breaches observed thwart the remedies the Commitments were intended to provide to the competition concerns expressed in the Commitments Decision and reinforce the effects those actions were likely to cause (see paragraph 86 of the Commitments Decision).

325. In particular, these breaches undermined the objective pursued by the Commitments Decision, arising from the Law on Related Rights, to enable press agencies and publishers to negotiate remuneration for related rights with Google within a balanced and neutral framework.

326. The extent of this infringement is all the more significant given that Google's dominant position on the generalist search services market has "extraordinary" aspects, as highlighted by the *Autorité* in Decision 22-D-13<sup>251</sup>, and that the use of protected content in its search engine is of obvious importance, as the *Autorité* also noted<sup>252</sup>.

327. Consequently, given the impact of the breaches observed on the effectiveness and durability of the negotiation mechanism set up by the Commitments, Google's conduct has had a significant impact on the competition the Commitments were intended to preserve.

#### **5. CORRECTIVE MEASURES SUBMITTED BY GOOGLE AS PART OF THE SETTLEMENT PROCEDURE**

328. Google submitted an initial proposal for corrective measures during its discussions with the General Rapporteur on the settlement procedure, based on Article L. 464-2 III of the French Commercial Code, which provides that "*where the undertaking [...] undertakes to modify its conduct, the General Rapporteur may take this into account in their settlement proposal*".

329. Firstly, Google proposed to revise the methodology for calculating remuneration offers for press agencies and publishers, by adopting the following measures:

- Google will abolish the minimum threshold of €100, below which press publications would not be remunerated (see paragraph 64 above);
- Google will replace SimilarWeb data with its own impression data to calculate remuneration offers (see paragraphs 233 *et seq.* above);
- Google will ensure that the amount corresponding to "*other indirect revenues*" reflects the economic benefit that it derives from the attractiveness brought to its search engine by the display of protected content, an attractiveness that may play a role both in

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<sup>251</sup> Decision 22-D-13, paragraph 71.

<sup>252</sup> Decision 20-MC-01, paragraph 272.

triggering a search and in the time spent by the user on the search engine and the personal data resulting therefrom. To this end, Google will ensure that the total amount corresponding to indirect revenues is equal to or greater than the total amount of direct Search revenues. Google will also provide the negotiating parties with all “*advertising revenues generated in France by subsequent queries [...] automatically for six subsequent queries*”; and

- Google will amend the Discover component of the remuneration methodology and move to a direct methodology similar to the methodology applied for the purposes of calculating attributable direct revenues for Search.

330. Secondly, Google offered to provide additional information to the negotiating parties:

- Google will extend the scope of the information provided in the Data Reports to include data relating to sub-domains (see paragraphs 117 *et seq.*) and results limited to a headline (see paragraphs 252 *et seq.* above);
- Google will provide more detailed information on the justification for the [CONF]% rate applied to revenues generated on Search (see in particular paragraph 211 above), on the methodology explaining the increase in the sample from 1% to 100% of logs, and on the annual remuneration update (see paragraphs 77 *et seq.* above);
- Google will align the period covered in the Data Reports with the period used to calculate the remuneration amounts offered (see paragraph 72 above);
- Google will provide a detailed explanation of how the offers were individually calculated (see paragraphs 208 *et seq.* above);
- Google will provide the negotiating parties with the methodology applicable to each of the corresponding years when it makes retroactive offers;
- Google will provide press agencies with the methodology applicable to press publishers, in addition to that applicable to press agencies, and will clarify its methodology; and
- Google will provide press agencies and publishers with a narrative summary of Google’s use of the content of press publications for the operation of Bard – and, going forward, of Gemini – in France and information concerning the tools made available to press publishers to control the use of their content (see paragraphs 165 *et seq.* and 264 *et seq.* above).

331. Thirdly, Google proposed to improve its processes for compliance with the Commitments:

- Google will put in place more robust mechanisms to communicate its offers and underlying methodology in a timely manner (see paragraph 66 above);
- Google will identify ways to better collaborate with the Monitoring Trustee (see paragraphs 291 *et seq.* above);
- Google will share the IP Experts’ Report with all press agencies and publishers that have requested to enter into negotiations with Google under paragraph 13 of the Commitments (see paragraphs 162 *et seq.* above);
- Google will clarify its communications with the Monitoring Trustee in the event of any doubt as to Google’s compliance with the Commitments; and
- Google will hold discussions with the *Autorité* and the Monitoring Trustee concerning the annual update of 1 February (see paragraphs 104 *et seq.* above).

332. As mentioned in paragraphs 182 *et seq.*, Google's proposed corrective measures, of which the *Autorité* takes note, in no way release it from its obligation to comply fully with the Commitments set out in Decision 22-D-13. In addition to the proposed corrective measures, Google will also have to take all necessary measures to comply with the Commitments given in Decision 22-D-13.

#### **6. AMOUNT OF THE FINE**

333. In view of all these factors and in compliance with the terms of the settlement, the amount of the fine imposed on Google is set at €250 million.

334. This amount is lower than the legal maximum fine provided for in Article L. 464-2 I of the French Commercial Code, indicated above in paragraph 314.

## DECISION

**Article 1:** It is established that Alphabet Inc., Google LLC, Google Ireland Limited and Google France have breached the first, second, fourth and sixth commitments, as well as the commitment to cooperate with the Monitoring Trustee, entered into by them and made binding by the *Autorité de la concurrence* in Decision 22-D-13 of 21 June 2022.

**Article 2:** In respect of the breaches referred to in Article 1, Alphabet Inc., Google LLC, Google Ireland Limited and Google France are hereby jointly and severally fined €250,000,000.

Deliberated on the oral report of Laure Bourgerie, Grégoire Colmet Daâge and Frédéric Fustier, case officers (*rapporteurs*), and the intervention of Lauriane Lépine, Deputy General Rapporteur, by Benoît Cœuré, President, Fabienne Siredey-Garnier, Irène Luc, Henri Piffaut and Thibaud Vergé, Vice-Presidents, and Cécile Cabanis, Laurence Borrel-Prat and Savinien Grignon-Dumoulin, members.

Hearing secretary

President

Claire Villeval

Benoît Cœuré