



**ONLY THE FRENCH VERSION IS AUTHENTIC AND IT PREVAILS
IN THE EVENT OF ITS DIFFERING FROM THE TRANSLATED VERSION**

**Decision 22-D-13 of 21 June 2022
regarding practices implemented in the press sector**

The *Autorité de la concurrence* (section 1B),

Having regard to the letters registered on 15 and 19 November 2019 under numbers 19/0074 F, 19/0075 M, 19/0078 F, 19/0079 M, 19/0080 F and 19/0081 M by which the *Syndicat des Éditeurs de la Presse Magazine* (hereinafter "SEPM"), the *Alliance de la Presse d'Information Générale*, the *Syndicat de la presse quotidienne nationale*, the *Syndicat de la presse quotidienne régionale*, the *Syndicat de la presse quotidienne départementale* and the *Syndicat de la presse hebdomadaire régionale* (hereinafter jointly referred to as "APIG"), and *Agence France-Presse* (hereinafter "AFP") lodged a complaint with the *Autorité de la concurrence* regarding practices applied by Google LLC, Google Ireland Ltd. and Google France in the press, online public communication and online advertising sectors, and, furthermore, requested the ordering of interim measures;

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 102;

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

Having regard to Decision 20-MC-01 of 9 April 2020 on the requests for interim measures presented by SEPM, APIG and AFP;

Having regard to Decision 21-D-17 of 12 July 2021 on Google's compliance with the injunctions issued in Decision 20-MC-01;

Having regard to Decision 21-DE-01 of 1 December 2021 on *Agence France-Presse's* withdrawal;

Having regard to Decision 22-DE-01 of 16 May 2022 on the withdrawal of 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*;

Having regard to the letter of 14 June 2022 on the *Syndicat des Éditeurs de la Presse Magazine's* withdrawal;

Having regard to the Decision of 26 November 2019, by which the Deputy General Rapporteur of the *Autorité* joined the investigation of cases 19/0074F-19/0075M, 19/0078F-19/0079M and 19/0080F-19/0081M;

Having regard to the preliminary assessment sent to the *Syndicat des Éditeurs de la Presse Magazine*, the *Alliance de la Presse d'Information Générale*, Alphabet Inc, Google LLC, Google Ireland Ltd, Google France and the Representative of the Minister of the Economy on 3 December 2021;

Having regard to the observations submitted by the *Syndicat des Éditeurs de la Presse Magazine*, the *Alliance de la Presse d'Information Générale* and others, *Agence France-Presse* and the Representative of the Minister of the Economy;

Having regard to the proposed commitments of Google LLC, Google Ireland Ltd and Google France of 9 December 2021, as amended on 11 March, 21, 26 and 29 April, and 9 May 2022;

Having regard to the observations received in the context of the market test;

Having regard to the other evidence in the case file;

The Rapporteurs, the Deputy General Rapporteur, the representatives of Google LLC, Google Ireland Ltd., Google France and Alphabet Inc., the *Syndicat des Éditeurs de la Presse Magazine*, the Representative of the Minister of the Economy heard at the hearing of the *Autorité de la concurrence* on 12 and 27 April 2022 the *Alliance de la Presse d'Information Générale* e.a. which had been duly convened;

The representatives of the French Directorate General of Media and Cultural Industries of the Ministry of Culture, the company *Droits Voisins de la Presse*, the *Syndicat de la presse indépendante d'information en ligne* and the *Fédération Française des Agences de Presse*, heard on the basis of the provisions of the second paragraph of Article L. 463-7 of the French Commercial Code (*Code de commerce*);

Adopts the following decision:

Summary¹

Under the terms of the present decision, the *Autorité de la concurrence* (hereinafter the “*Autorité*”) accepts the commitments of Alphabet Inc, Google LLC, Google Ireland Ltd and Google France (hereinafter “Google”) and closes the proceedings on the merits initiated in November 2019 by SEPM, APIG and AFP, which denounced practices implemented by Google following the adoption of Law No. 2019-775 of 24 July 2019 to create a related right in favour of press agencies and publishers (hereinafter, the “Law on related rights”).

The investigation led to the identification of several competition concerns related to the behaviour of Google. First, Google may have imposed unfair settlement conditions on press agencies and publishers within the meaning of articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 a) of the TFUE, by refusing to negotiate and to pay for the display of protected press content on Google's existing services under related rights. Second, by imposing zero remuneration for all publishers and press agencies at the moment of the entry into force of the Law on related rights, regardless of an examination of their respective situations, Google is likely to have treated identically economic stakeholders in different situations without any objective justification, and therefore to have implemented a discriminatory practice within the meaning of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 c) of the TFEU. Lastly, Google could have abused its dominant position to circumvent the Law on related rights, in particular by using the possibility for publishers and news agencies to grant free licences to systematically impose a principle of non-remuneration for the display of protected content on its services, without any possibility of negotiation, and by refusing to communicate the information necessary to determine the remuneration.

As interim measures, the *Autorité* had issued several injunctions against Google in its Decision 20-MC-01 of 9 April 2020 (the “Decision on interim measures”), which were based on a principal obligation to negotiate in good faith, in view of formulating a financial proposal for the display of protected content on Google's services, namely the inclusion of excerpts from press articles and photos on Google's search engine, or its Google News and Discover services.

Despite these injunctions, in Decision 21-D-17 of 12 July 2021 (the “Decision on non-compliance with injunctions”), the *Autorité* found in July 2021 that Google had been able to neutralise the negotiations with news agencies and publishers on the current use of protected press content on its services.

- The *Autorité* found in particular that during almost the entire three-month negotiation period provided for in the Decision on interim measures, Google systematically directed the negotiations towards the conclusion of a global licence agreement, regarding mainly a new service, called Showcase, based on the inclusion of full-text press articles that were previously not accessible on Google's portals. As a result of this behaviour, news agencies and publishers were deprived of their ability to negotiate remuneration only for the current uses of their protected content during almost the entire negotiation period, even though they had clearly expressed this wish to Google on multiple occasions.

¹ This summary is for information purposes only. Only the following numbered paragraphs for the decision are authentic.

- The *Autorité* also found that Google had significantly reduced the scope of application of the Law on related rights by excluding the principle of remuneration for press content from titles that do not have "Political and General Information" (or PGI) certification, and by denying news agencies a remuneration for their content reused by press publishers.
- The *Autorité* also found that Google had expressed an excessively restrictive conception of the notion of revenues derived from the display of press content under Article L. 218-4 of the Intellectual Property Code ("IPC"), by only considering, in this respect, the advertising revenues of the Google Search pages on which protected content was displayed. In fact, Google excluded the indirect revenue from the attractiveness provided to its services through the display of protected content, which on the one hand increases the amount of data it collects and improves its ability to deliver targeted advertising, and on the other hand increases the likelihood that the user will access paid sponsored links on its online search site.

Under the terms of the Decision on non-compliance with injunctions, the *Autorité* imposed a 500 million euros financial penalty on Google, and ordered Google to comply with the Decision on interim measures.

As a result of the preliminary assessment within the context of the investigation into the merits of the case, Google submitted a set of commitments on 9 December 2021. These commitments were the subject of a market test and were discussed during a hearing before the *Autorité*, leading to the proposal of new commitments. Google presented a final version of its commitments on 9 May 2022. As part of its final offer:

- Google extended the scope of application of its commitments to all publishers covered by Article L. 218-1 of the Intellectual Property Code, whether or not they have PGI certification. The same applies to the ownership of related rights to news agencies whose content is integrated into third-party publications.
- Google undertakes to "negotiate in good faith" with press publishers and news agencies that so request, the remuneration for any reproduction of protected content on its services in accordance with the modalities laid down in Article L.218-4 of the IPC and according to transparent, objective and non-discriminatory criteria. Google expressly agrees to conduct separate and independent negotiations regarding the Showcase service or any other new Google service, and on the existing use of protected content.
- Google undertakes to communicate the information necessary for a transparent evaluation of the proposed remuneration to news agencies and publishers, as provided for in Article L. 218-4 of the IPC. To this end, Google has planned to communicate, as a first step, a minimum set of information, described in Appendix 1 of the commitments, to each negotiating party within ten workdays for individual negotiations and 15 workdays for collective negotiations. As a second step, Google commits to provide the additional relevant information requested by the negotiating parties within 15 workdays, under the supervision of an independent monitoring trustee. The trustee may also make proposals on how to transmit the additional information requested by the negotiating parties, including, if necessary, measures to preserve the confidentiality of Google's information. This mechanism will reconcile Google's legitimate request to protect its business secrets with the need for news agencies and publishers to obtain the information necessary to assess Google's direct and indirect revenues from the display of their protected content.

- Google undertakes to make a proposal for remuneration within three months of the start of negotiations. In the event that the parties are unable to reach an agreement at the end of this period, the negotiating parties will have the option of referring the matter to an arbitration tribunal to determine the amount of remuneration. To take into account the limited financial resources of news agencies and publishers, they may ask Google to pay the arbitrators' fees in full, including in any appeal proceedings.
- Google undertakes to take the necessary steps to ensure that the negotiations do not affect the crawling, ranking or presentation of the protected content and do not affect any other economic relationship that may exist between Google and the news agencies and press publishers;
- Google offers to extend the provisions of these commitments to news agencies and publishers that have already entered into negotiations or concluded a contract with Google for related rights, either directly or through a professional association. News agencies and publishers with existing agreements will be able to amend or terminate those agreements at no cost so they can engage in new negotiations with Google, with the understanding that the compensation agreed to under their pre-existing agreements will continue to apply until the date of the amendment or termination.
- An independent monitoring trustee approved by the *Autorité* will ensure the implementation of the commitments made and may, if necessary, receive the support of technical, financial or intellectual property experts. They will supervise the progress of the negotiations between Google and the news agencies and publishers and will also be involved in the review and annual update of the minimum base of information that Google will have to provide to the news agencies and publishers. The trustee will, where appropriate, play an active role in resolving any points of disagreement that may arise between the parties in the course of their negotiations, by issuing opinions or making proposals to the *Autorité* on any dispute related to the certification of a press publisher or agency, on whether a press publisher's domain contains protected content, on the technical feasibility or appropriateness of a request for additional information, and on the manner in which responses to requests for additional information should be communicated to press publishers and news agencies. Google has committed to comply with these opinions and proposals, which are not binding on press publishers and news agencies. This mechanism provides a prompt way to resolve disputes that, while binding on Google, preserve the freedom of news agencies and publishers to pursue their claims through other legal avenues if they see fit.
- The commitments will apply for a period of five years and are renewable for an additional period of five years by a reasoned decision of the *Autorité*.
- Google undertakes to withdraw its appeal against the Decision on non-compliance with injunctions.

The *Autorité* considers that the commitments proposed by Google, in their final version of

9 May 2022, put an end to the competition concerns expressed in the preliminary assessment of the investigation services and are substantial, credible and verifiable. The *Autorité* has therefore decided to accept them and make them binding.

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I. Findings

A. PROCEDURE

1. REFERRALS

1. By letters registered on 15 and 19 November 2019 under numbers 19/0078 F and 19/0080 F, the *Syndicat des Éditeurs de la Presse Magazine* (hereinafter "SEPM"), the *Alliance de la Presse d'Information Générale*, the *Syndicat de la presse quotidienne nationale*, the *Syndicat de la presse quotidienne régionale*, the *Syndicat de la presse quotidienne départementale* and the *Syndicat de la presse hebdomadaire régionale* (hereinafter jointly referred to as the "APIG"), and *Agence France-Presse* (hereinafter "AFP") lodged a complaint with the *Autorité* regarding practices implemented by Google LLC, Google Ireland Ltd and Google France (hereinafter "Google").
2. The complainants denounced a potential abuse of Google's dominant position, in the form of circumventing the purpose of Law 2019-775 of 24 July 2019, which aims to create a related right for news agencies and publishers (hereinafter, the "Law on related rights"), and the imposition of unfair settlement conditions. For the same reasons, the complainants also accused Google of having abused the complainants' situation of economic dependency vis-à-vis Google.
3. 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 N, that interim measures be issued pursuant to Article L. 464-1 of the French Commercial Code (*Code de commerce*).
4. By decision of 26 November 2019, the Deputy General Rapporteur of the *Autorité* joined the investigation of cases 19/0074 F - 19/0075 M, 19/0078 F - 19/0079 M and 19/0080 F - 19/0081 M. The reference numbers for the handling of these cases following this decision to join the cases are 19/0074 F - 19/0075 M.

2. DECISION 20-MC-01

5. On 9 April 2020, the *Autorité* adopted Decision 20-MC-01 (hereinafter "the Decision on interim measures") regarding requests for interim measures by SEPM, APIG and AFP, and issued the following interim measures against Google in the form of seven injunctions (hereinafter the "Injunctions" and, individually, "the Injunction"):

"Article 1: " Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to negotiate in good faith with any publishers and news agencies or collective management bodies that so request the remuneration payable by Google to the latter for any reuse of protected content within its services, in accordance with the provisions laid down in Article L. 218-4 of the French Intellectual Property Code and transparent, objective and non-discriminatory criteria. This negotiation will have to cover the period of content reuse since 24 October 2019.

Article 2: Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to communicate to news publishers

and press agencies the information provided for in Article L. 218-4 of the French Intellectual Property Code.

Article 3: Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to continue, during the negotiation period, to apply the terms and conditions of display in place since entry into force of Law 2019-775 in accordance with the parameters chosen by the publishers. Google LLC, Google Ireland Ltd and Google France are ordered to allow news publishers and news agencies that have not granted Google permission to reuse their protected content since 24 October 2019 but wish to enter into negotiations pursuant to Articles 1 and 2 of this Decision not to object to the display of their protected content within its services under the terms and conditions chosen by those news publishers and news agencies during the negotiation period.

Article 4: Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to conduct the negotiations referred to in Articles 1 and 2 of this Decision within three months of the request to open negotiations made by a news publisher, a news agency or a collective management body.

Article 5: Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to take the necessary measures to ensure that the existence and outcome of the negotiations provided for in Articles 1 and 2 of this Decision do not affect the indexing, classification and presentation of the protected content reused by Google within its services.

Article 6: Google LLC, Google Ireland Ltd and Google France are ordered, as an interim measure and pending a decision on the merits of the case, to take the necessary measures to ensure that the negotiations provided for in Articles 1 and 2 of this Decision do not affect other economic relations between Google and news publishers and news agencies.

Article 7: Google LLC, Google Ireland Ltd and Google France shall, within four weeks of the opening of negotiations with one or more news publishers, news agencies or collective management bodies, send an initial report on their compliance with Articles 1 to 6 of this Decision. The subsequent reports shall be communicated to the Autorité on the 5th of each month up until publication of the decision of the Autorité on the merits of the case.

6. The *Autorité* considered that these injunctions should remain in force until the publication of its decision on the merits of the case (Article 8 of the provisions of the Decision on interim measures) and that the investigation should continue on the merits of the case for all practices (Article 9 of the provisions of the Decision on interim measures).
7. The *Cour d'appel de Paris* (Paris Court of Appeal), hearing an appeal brought by the Google companies against the Decision on interim measures, rejected all the grounds for annulment in a judgement dated 8 October 2020². However, the Court amended Article 5 of the Decision, considering its scope too general and not strictly necessary to deal with the emergency, by completing it as follows

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

² Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020, 20/08071.

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

3. DECISION 21-D-17

9. By letters registered on 31 August 2020 and 2 September 2020 under numbers 20/0083 F, 20/0084 F and 20/0085 F, the APIG, the SEPM and the AFP lodged a complaint with the *Autorité* regarding Google's failure to comply with the injunctions issued in the Decision on interim measures.
10. In Decision 21-D-17 of 12 July 2021 regarding compliance with the injunctions issued against Google in the Decision on interim measures (the "Decision on non-compliance with injunctions"), the *Autorité* found that Google had failed to comply with Articles 1 and 2 of the Decision on interim measures (Injunctions 1 and 2) relating to the obligation to negotiate in good faith and to communicate the information provided for in Article L. 218-4 of the IPC, within the three-month period provided for in Article 4 of the Decision on interim measures (Injunction 4).
11. The *Autorité* also found that Google had failed to comply with Article 5 of the Decision on Interim Measures (Injunction 5), relating to the obligation of neutrality in the way in which protected content is indexed, classified and, more generally, presented on its services, and with Article 6 of the Decision on interim measures (Injunction 6), related to the obligation of neutrality in the negotiations on related rights in any other economic relationship that Google may have with publishers and news agencies.
12. As a result, it imposed a financial penalty on Google in the amount of €500 million and ordered Google³:

"[...] As regards the enforcement of Injunction 1, order Google to make an offer of remuneration that meets the requirements of the Law and the Decision for the current use of protected content on Google's services to those complainants who so request. Google shall comply with such a request within two months of receipt of any request to reopen negotiations made by the complainants by registered letter with acknowledgement of receipt after notification of the present decision";

"[...] As regards the enforcement of Injunction 2, order Google to include in this offer the information provided for in Article L. 218-4 of the Intellectual Property Code. This information must include an estimate of the total revenue it generates in France by displaying protected content on its services, indicating the share of revenue generated by the publisher or news agency that has requested the offer of remuneration. This estimate must detail the following revenue items: (i) the advertising revenues that Google generates on the pages of its online search engine on which protected content is displayed; (ii) the revenues that Google earns as an online advertising intermediary, in respect of targeted ads generated on publishers' sites to which the search engine user is redirected and for which Google earns a commission ; and (iii) the indirect revenues earned by Google on account of the attractiveness of its services by its displaying of protected content, which may play a role both in the initiation of a search and in the time spent by the user on the search engine and all of Google's services and the personal data derived from them."

³ Decision on non-compliance with injunctions, paragraph 560.

13. To ensure the enforcement of these Injunctions, the *Autorité* imposed a periodic penalty payment of €300,000 per day's delay, upon expiry of the two-month period from the formal request for the reopening of negotiations, where appropriate, by each of the complainants.
14. Google is currently appealing the Decision on non-compliance with injunctions. In accordance with the final commitments it submitted on 9 May 2022, Google has committed to withdrawing this appeal.

4. THE WITHDRAWAL OF APIG AND AFP

15. By letter dated 24 November 2021, the AFP informed the *Autorité* of its withdrawal from the merits. By Decision 21-DE-01 of 1 December 2021, the *Autorité* took note of this withdrawal and decided to pursue the case and to start proceedings ex officio in the case registered under number 19/0080 F⁴.
16. Similarly, by letter dated 15 April 2022, the APIG informed the *Autorité* of its withdrawal from the merits. By Decision 22-DE-01 of 16 May 2022, the *Autorité* took note of this withdrawal and decided to pursue the case and to start proceedings ex officio in the case registered under number 19/0078 F⁵.

B. COMPANIES CONCERNED

1. APIG AND ITS CONSTITUENT TRADE ASSOCIATIONS

17. The APIG is a union of trade associations set up in September 2018 by the four professional trade associations of the National daily press (*Syndicat de la Presse Quotidienne Nationale*, "SPQN"), Regional daily press (*Syndicat de la Presse Quotidienne Régionale*, "SPQR") and Departmental daily press (*Syndicat de la Presse Quotidienne Départementale*, "SPQD") and the trade association of the Regional weekly press (*Syndicat de la Presse Hebdomadaire Régionale*, "SPHR"). The APIG and its constituent trade associations are discussed in detail in paragraphs 26 to 31 of the Decision on interim measures.

2. THE SEPM

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

⁴ Paragraphs 139 to 141, 19/0080 F.

⁵ Paragraphs 334 and 335, 19/0078 F.

3. THE AFP

19. The AFP is a worldwide generalist news agency, tasked with collecting, verifying, cross-checking and disseminating information in France and abroad in a neutral, reliable format that can be used directly by all types of media (radio, television, print media, websites), as well as by major companies and government agencies. The AFP was discussed in detail in paragraphs 32 and 33 of the Decision on interim measures.

4. GOOGLE

20. Google is a company created in 1998, whose founders invented the search engine of the same name, which is the most widely used in France and in the world. Today, Google's activities are focused on providing online search services, offering platforms and operating systems and on online advertising.
21. As a result of an internal reorganisation, which was completed on 2 October 2015, Alphabet Inc. replaced Google LLC (formerly Google Inc.) as the parent company of the Google Group, and Google LLC became a wholly owned subsidiary of Alphabet Inc.⁶
22. Google was discussed in detail in paragraphs 34 to 61 of the Decision on interim measures.

A. SECTOR CONCERNED

23. This case concerns the press sector, which was discussed in detail in paragraphs 11 to 22 of the Decision on interim measures.
24. In these developments, the *Autorité* underlined the profound changes which the press sector has faced, in particular, with the decline in advertising revenues between 2007 and 2017, while, at the same time, the advertising revenues of digital actors grew significantly (paragraphs 14 to 18 of the Decision on interim measures). This phenomenon of "value capture" by digital actors to the detriment of press publishers was also noted during the parliamentary work which preceded the adoption of the Law on related rights (paragraphs 20 and 21 of the Decision on interim measures).
25. The health crisis has led to a rise in the use of digital media and services and has significantly affected many industries, including the press sector. Although news websites' online audience increased between July 2019 and June 2020, the press sector's revenue sharply dropped, particularly its advertising revenue, and its activities were seriously disrupted (particularly due to declines in single-issue sales at newsstands, the disrupted deliveries of newspapers and magazines sold by subscription and the cancellation of conference activities relating to news).

⁶ See *Autorité de la concurrence* Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising, paragraph 8.

26. In fact, according to figures published by the *Alliance pour les chiffres de la presse et des médias*⁷, digital traffic on the websites of press publishers has grown for all press families between July 2019 and June 2020: +7.8% for the national daily press, +24.5% for the regional daily press and +22.8% for the magazine press. This growth in traffic was due in particular to the closure of many physical outlets during the lockdown, and to online subscriptions⁸. Between July 2020 and June 2021, digital traffic has continued to rise sharply: +40.4 % for the national daily press, +41.4% for the regional daily press and +21.1% for the magazine press⁹.
27. Nevertheless, these digital audiences have not compensated for the loss of advertising revenues and the fall in sales of paper copies, which are the main resources of the press. According to an April 2022 Ministry of Culture's study on the cultural sectors¹⁰, in 2021, the annual revenues of the press sector were 10% lower than their value in 2019, a loss of more than one billion euros compared to 2019¹¹.
28. This situation has prompted a reorganisation of press publishers. Among other things, the regional daily *La Marseillaise*¹² has been placed in compulsory liquidation, the weekly magazine *Grazia* has been discontinued in favour of entirely digital content, the daily *Le Parisien* has been restructured and the payroll of the newspaper *L'Équipe*¹³ has been reduced.
29. In order to mitigate the consequences of the crisis, on 27 August 2020 the government announced a support plan for the press industry comprising, on the one hand, emergency measures to guarantee the continuity of press distribution, amounting to €106 million, and, on the other hand, an envelope of €377 million to finance recovery measures over the period 2020-2022¹⁴.

B. IDENTIFIED PRACTICES

1. APPLICABLE LEGAL FRAMEWORK

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

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

⁹ <https://www.acpm.fr/Actualites/Toute-l-actualite/Actualites-generales/Diffusion-et-Frequentation-de-la-Presse-DSH-OJD-2020-2021>.

¹⁰ culture.gouv.fr/en/Thematiques/Etudes-et-statistiques/Publications/Collections-de-synthese/Note-de-conjoncture/Analyse-conjoncturelle-du-chiffre-d-affaires-de-la-culture-au-4e-trimestre-2021.

¹¹ The turnover of the press sector went from 11,772 million euros in 2019 to 10,634 million euros in 2021.

¹² <https://www.capital.fr/entreprises-marches/la-marseillaise-place-en-liquidation-judiciaire-1375655>.

¹³ <https://www.strategies.fr/actualites/medias/4046338W/la-presse-a-l-epreuve-du-deconfinement.html>.

¹⁴ <https://www.culture.gouv.fr/en/Presse/Communiqués-de-presse/Annonce-du-plan-de-soutien-a-la-filiere-presse>. See also Information Report 692 of 16 June 2021, prepared on behalf of the Senate Finance Committee, on aid to the written press.

30. The applicable legal framework, namely Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market (the "Directive"), as well as the Law on related rights, was presented in detail in paragraphs 64 to 89 of the Decision on interim measures.
31. Through the Directive, the European legislator pursued the objective of establishing a legal protection regime for publishers and news agencies, taking into account the specificities of the press sector and its essential role in a democratic society. To achieve this objective, Article 15 of the Directive provides for the creation of a related right for publishers and news agencies, giving them the right to authorise or prohibit the reproduction of their content by platforms, aggregators and search engines.
32. The Law on related rights implemented Article 15 of the Directive into French law. In this respect, it created a related right for news agencies and publishers, by means of provisions inserted into the French IPC. In this respect, it is specified that, by virtue of these provisions, news agencies benefit directly from the protection conferred by related rights, both for the content they publish directly and for the content reused by third-party press publishers¹⁵.
33. In addition, the Law on related rights created an Article L. 218-4 of the IPC, which states that:

" Remuneration for related rights arising from the reproduction and communication to the public of press publications in digital format shall be based on income from their use, of whatever kind, whether direct or indirect or, failing that, shall be assessed on a flat-rate basis, in particular in the cases provided for in Article L. 131-4.

The amount of this remuneration is determined by taking into account factors such as the human, material and financial investments made by publishers and news agencies, the contribution of press publications to political news and current affairs and the extent of the use of press publications by online public communication services.

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

¹⁵ Judgement of 8 October 2020, 20/08071, point 99; Decision on non-compliance with injunctions, paragraphs 397 et seq.

2. GOOGLE'S PRACTICES

a) The practices found in the Decision on interim measures

34. The practices in question originate in Google's announcement of the modification of its news content display policy, in anticipation of the entry into force of the Law on related rights. This announcement primarily took the form of a posting on Google's blog on 25 September 2019, in which it stated that "[w]hen the French law comes into force, we will not show preview in France for a European news publication unless the publisher has taken steps to tell us that's what they want."¹⁶
35. At the same time, Google indicated through various means that it does not intend to pay publishers and news agencies for including their editorial content. This position is also conveyed in an "FAQ" page published by Google for news publishers, an extract of which is included in paragraph 94 of the Decision on interim measures.
36. As a result of this new display policy, a publisher's agreement to the display of its content, including protected content, amounts to granting a free licence for Google to use the publisher's content in the various Google services (*Google Search*, *Google News* and *Discover*, in particular).
37. The evidence in the file shows that, since Google's new display policy came into force, the vast majority of publishers have allowed Google to display protected content without receiving compensation.
38. In addition, publishers that did not authorise Google to display protected content faced significant traffic losses. In this regard, the Decision on interim measures lays out the impact of content previews on the ranking and traffic redirected to the press publishers' sites in paragraphs 111 to 119.
39. Lastly, the evidence in the file, set out in paragraphs 120 to 125 of the Decision on interim measures, attests that publishers who have not taken steps to maintain the inclusion and display of protected content by Google have been exposed to sharp declines in their audience, which may have resulted in a significant drop in revenue.
40. In its Decision on interim measures, the *Autorité* thus considered that, given the state of the investigation, Google's modification of its press content display policy on its services following the entry into force of the Law on related rights was likely to be qualified as an abuse of a dominant position, contrary to Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 of the TFEU.
41. The *Autorité* therefore considered that, on the one hand, Google may have imposed unfair settlement conditions on news agencies and publishers within the meaning of articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 a) of the TFEU, by avoiding any form of negotiation and payment for the reuse and display of protected content under related rights.
42. On the other hand, the *Autorité* considered that Google was likely to have treated identically economic stakeholders placed in different situations without any objective justification, and, therefore, to have implemented a discriminatory practice within the meaning of articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 (c) of the TFEU.

¹⁶ Paragraph 106, 19/0078 F.

43. Lastly, the *Autorité* considered that Google may have abused its dominant position to circumvent the Law on related rights, in particular by using the possibility for news agencies and publishers to grant free licences to systematically impose a principle of non-remuneration for the display of protected content on its services, without any possibility of negotiation; and by refusing to communicate the information necessary for determining the remuneration; as well as by using the titles of articles in their entirety considering that in principle they were outside the scope of the Law on related rights..
44. Pending a decision on the merits, the *Autorité* issued the injunctions mentioned above, based on the main obligation to introduce negotiations in good faith, with a view to formulating a financial proposal for the display of protected content on Google's services, in particular the inclusion of excerpts from press articles and photos on its *Google Search* search engine, or its *Google News* and *Discover* extensions (see paragraphs 319 and 320 of the Decision on interim measures).

b) The practices found in the Decision on non-compliance with injunctions

45. Despite the injunctions issued by the *Autorité*, in its Decision on interim measures, the *Autorité* found that Google had been able to frustrate negotiations with news agencies and publishers on the current use of protected press content on its services.
46. First, during almost the entire three-month negotiation period provided for in the Decision on interim measures, Google systematically directed the negotiations towards the conclusion of a global licence agreement, regarding mainly a new commercial service, called *Showcase*, based on the full inclusion of text press articles that were previously not accessible on Google's services. This proposed contract included a single royalty offer, covering both new uses of news articles under the new *Showcase* service and existing uses of protected content since the Law came into force, thus failing to distinguish revenues attributable to existing use of protected content in the form of excerpts from news publications on Google's existing services.
47. As a result of this behaviour, news agencies and publishers were deprived of their ability to negotiate remuneration specifically for the current uses of their protected content during almost the entire negotiation period, even though they had clearly expressed this wish to Google on multiple occasions.
48. Google's behaviour continued after the end of the three-month period provided for in the injunctions and, in particular, after the *Cour d'appel de Paris* (Paris Court of Appeal)'s judgement of 8 October 2020, which upheld the Decision on interim measures. However, the *Cour d'appel de Paris* (Paris Court of Appeal) found that Google could not "*seriously*" use the existence of negotiations concerning the reuse of full articles on new Google services to argue that it had not objected to negotiating remuneration for related rights concerning the use of extracts of press articles or press photographs on its existing services¹⁷.
49. Under the terms of a framework agreement eventually reached with the APIG on 12 February 2021, news publishers could negotiate a specific remuneration for the current use of their protected content on Google's services, but in return they had to waive their participation in the *Showcase* programme. They would then give up both the remuneration and the exposure of their content on Google compared to their competitors who did participate in the programme, as well as the possible benefit of collective negotiation. The publishers therefore had a strong incentive to favour Google's offer of an overall remuneration for current and

¹⁷ Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020, cited above, point 102.

new uses of Google's display of protected content. Furthermore, as stated in paragraphs 346 to 352 of the Decision on non-compliance with injunctions, Google repeatedly suggested that remuneration for current uses of press content on its services was likely to be insignificant or even non-existent, thereby making the discussions on the current uses of press content ancillary to the discussions on the new *Showcase* partnership.

50. Second, Google significantly reduced the scope of application of the Law on related rights, by excluding the principle of remuneration for press content originating from titles that did not have "Political and General Information" (or "IPG") certification¹⁸, contrary to the provisions of the Law on related rights, even though, according to its own evaluations, the revenues derived from "non-IPG" content are greater than those derived from "IPG" content.
51. Third, Google denied news agencies the benefit of remuneration for their content reused by press publishers, again in breach of the Decision on interim measures and the judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020. In this judgement, the Court explicitly confirmed the existence of a related right for news agencies, stating that (translated) "*the law of 2019 is aimed at 'press publishers and news agencies', meaning that it is pointless to claim, as Google does, that the AFP cannot directly claim related rights, all the more so as a large majority of the AFP content reproduced by the search engine corresponds to images*"¹⁹ (emphasis added).
52. Fourth, Google has taken an excessively restrictive approach to the revenues it receives from the display of press content on its services.
53. In the context of the implementation of the Decision on interim measures, Google indicated that the only revenue that could be associated with the use of protected content was the advertising revenue that Google generates on the pages on which this content appears²⁰. Google excluded taking into account any other form of indirect revenue generated by the presence of protected content on *Google Search* or on other Google services such as *Google News* or *Discover*.
54. However, paragraph 210 of the Decision on interim measures underlines that Google earns other forms of revenue from displaying protected content on its services. Displaying diversified and attractive press content on its various services allows Google to encourage users to visit these services regularly and remain in Google's environment for longer than would be the case without such content. In so doing, Google both increases the amount of data it collects and improves its ability to deliver targeted advertising, and thus increases the likelihood that the user will access paid sponsored links on its online search engine.

¹⁸ IPG certification is issued by the Commission paritaire des publications et agences de presse (Joint Commission for Publications and Press Agencies) ("CPPAP"), an independent body made up of equal numbers of representatives of the State administration and press professionals. The certification of online press services is based on articles 1 and 2 of the Decree of 29 October 2009, which states (translated): "*Online press services whose main purpose is to provide, on a permanent and continuous basis, information, analysis and commentary on local, national or international political and general news likely to enlighten the judgement of citizens, are of a political and general information nature. The information must be of interest beyond the concerns of any one category of reader. The editorial team must include at least one professional journalist, within the meaning of Article L. 7111-3 of the Labour Code (Code du travail)*" (emphasis added). More information is available at: <http://www.cppap.fr/>.

¹⁹ Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020, cited above, point 99.

²⁰ See paragraph 18 of Google's note, quotation VC 528, 20/0083 F.

55. In its judgement of 8 October 2020, the *Cour d'appel de Paris* (Paris Court of Appeal) confirmed the existence of these two sources of revenue, stating that Google, (translated) "*derives a clear economic benefit from displaying these press publication on account of:*

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

While this attractiveness also indirectly benefits the press publishers, it represents a major interest for Google, given that the collection of its users' personal data is one of the two pillars of its business model"²¹ (emphasis added).

56. In the context of the Decision on non-compliance with injunctions, the *Autorité* considered that the method of valuing protected content proposed by Google in its negotiations with the APIG, the SEPM and the AFP was particularly simplistic and inconsistent with both the intention of the legislator and the positions expressed by the *Autorité* and then the *Cour d'appel de Paris* (Paris Court of Appeal).

57. Fifth, the *Autorité* found that the data provided by Google during most of the negotiation period was limited to the online search engine *Google Search*, to the exclusion of other Google services and any other indirect revenues that Google earns from the exploitation of such content. The *Autorité* found that these disclosures were insufficient to allow the publisher or news agency to understand the connection between Google's use of protected content, the revenue it earned from it, and its financial proposal.

58. Sixth, by linking the negotiations on the remuneration of related rights for current uses to the negotiations and the remuneration of new partnerships such as *Showcase*, Google did not respect the obligation of neutrality of the negotiations on the display of protected press content on its services and on other economic relations that Google could have with news agencies and publishers.

59. In this respect, the *Autorité* found that access to the *Showcase* programme had significant consequences in terms of visibility for news agencies and publishers and considered that the mechanism put in place by Google was therefore likely to give these publishers and news agencies a strong incentive to accept the conditions imposed by Google or else have their conditions of visibility impaired compared to other publishers and news agencies that had agreed to take part in the programme.

²¹ Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020, cited above, points 105 and 106.

II. Implementation of the commitment procedure

A. PRELIMINARY ASSESSMENT

1. APPLICABILITY OF EU LAW

60. Article 102 TFEU states that, "*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*".
61. In its guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJEU 2004, C 101, p. 81), the European Commission (hereinafter the "Commission") recalls that Articles 81 and 82 of the EC Treaty, now Articles 101 and 102 of the TFEU, apply to horizontal and vertical agreements, as well as to abusive practices by companies, which are "*capable of appreciably affecting trade between Member States*".
62. In this case, the reported practices relate to Google's conduct following the creation by the Directive of a related right for publishers and news agencies established within the European Union. In addition, Google is an international stakeholder, as are certain press publishers that belong to European or even global groups. Lastly, both Google's services and the websites of the publishers and news agencies concerned cover the whole of France and, as an online activity, are by their very nature open to cross-border trade. For example, French users can access the websites of press publishers located in other Member States than France²². In this respect, Google itself refers to the publishers affected by its new policy of reusing and displaying protected content as "*European press publication*" (paragraph 23, 19/0074 F).
63. Therefore, the reported practices are likely to significantly affect trade between Member States and qualify under Article 102 TFEU.

²² Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal), 16 October 2007, Bijourama, 2006/17900.

2. THE RELEVANT MARKETS AND GOOGLE'S POSITION

a) The market for generalist search services

64. In their decision-making practice²³, the Commission and the *Autorité* considered that the provision of generalist (or general) search services constitutes a relevant market. Furthermore, they considered that the market for generalist search services was national in scope.
65. In the Decision on interim measures, the *Autorité* considered that the French market for generalist search services should be retained.
66. Since that decision, there have been no new developments that would alter the *Autorité's* analysis of this issue. This definition should therefore be retained for the purposes of this decision.

b) Google's position in the French generalist search market

67. Article 102 of the TFUE concerns a position of "*economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*"²⁴.
68. The assessment of a company's dominant position is therefore based on a body of evidence that takes into account structural factors, such as the company's market share and that of its main competitors, as well as elements that are likely to give the company concerned a competitive advantage, such as belonging to a powerful group or having a technological lead.
69. As regards market shares in particular, the Court of Justice considers that a significant market share presumes the existence of a dominant position, "*As regards market shares, the Court has held (Judgement of 13 February 1979, Hoffmann La Roche point 41, 85/76, Rec. p. 461) that extremely large shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. This is the case with a market share of 50%, such as that found in this case*"²⁵.
70. In light of these criteria and based on the evidence in the file, Google has a dominant position on the French market for generalist search services. Its market share is very high, at around 90%, while those of its competitors remain very limited. Google's dominant position is also strengthened by the existence of strong barriers to entry into the generalist search services market. In this regard, reference is made to paragraphs 153 to 171 of the Decision on interim measures.

²³ See *Autorité* Decision 20-MC-01 of 9 April 2020 regarding requests for interim measures submitted by SEPM, APIG and Agence France-Presse, paragraphs 137 et seq. and the European Commission's decisions of 27 June 2017, Google Search (Shopping), AT.39740, paragraphs 155 et seq. and of 18 July 2018, Google Android, AT.40099, paragraphs 323 et seq.

²⁴ Judgements of the Court of 14 February 1978, United Brands and United Brands Continentaal BV/Commission, 27/76, point 65.

²⁵ Judgement of the Court of 3 July 1991, AKZO v. Commission, C-62/86, REc. P. I-3359, point 60.

71. In conclusion, it can be considered that Google holds a dominant position on the French market for generalist search services. Moreover, as noted in paragraph 172 of the Decision on interim measures, in many respects, Google's dominant position is likely to have the "extraordinary" or exceptional aspect noted by the Commission in the Microsoft case²⁶, and more recently by the *Autorité* in its Decision 19-D-26²⁷.

3. THE COMPETITION-RELATED CONCERNS

72. Article L. 420-2 of the French Commercial Code (*Code de commerce*) sets out a non-exhaustive list of abusive practices when implemented by an operator in a dominant position. Similarly, according to Article 102 TFEU:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,*
- b) limiting production, markets or technical development to the prejudice of consumers,*
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

73. More specifically, with regard to a) of the second paragraph of Article 102 TFEU, its application is not limited to cases where the dominant stakeholder imposes unfair or excessive prices, but also, as the article expressly mentions, covers cases in which that stakeholder directly or indirectly imposes "*other unfair trading conditions*".
74. In this case, the Law on related rights - which transposes the Directive - created a related right to copyright for the benefit of press publishers and news agencies. The creation of this related right, which is a property right, was intended to enable its beneficiaries to receive remuneration in return for the use of their protected content by the operators of online public communication services. This right was introduced in order to rebalance the sharing of the value created by editorial content on these services, to the benefit of press publishers and news agencies.
75. Notwithstanding the entry into force of the Law on related rights, on 24 October 2019, Google has, as of September 2019, unilaterally amended its display policy, by requiring press publishers to forego any form of financial remuneration for the reuse of their news content on Google's existing services, or risk a downgrade in the display of their news content on Google's online search services.

²⁶ Commission decision of 24 March 2004, Microsoft, COMP/C-3/37, points 429, 472 and 560; judgement of the Court of 17 September 2007, T-201/04, point 387.

²⁷ Decision 19-D-26 of 19 December 2019 of the *Autorité de la concurrence* regarding practices implemented in the sector of online search advertising, paragraph 321.

76. Under the terms of the Decision on interim measures, the *Autorité* considered that the conditions for display imposed by Google allowed the latter to avoid any form of negotiation and remuneration for their reuse of protected content, of whatever nature, whereas the related rights created by the law gave press publishers and news agencies the possibility to negotiate for the valuation of their content, according to the criteria laid down in the Law on related rights.
77. Consistent with the *Autorité's* findings in the Decision on interim measures, the Investigation Services notified Google of a number of competition concerns.
78. First, Google may have imposed unfair settlement conditions on news agencies and publishers within the meaning of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 a) of the TFEU, by unilaterally and without any negotiation imposing non-payment for the reuse and display of protected content under related rights (see paragraphs 190 to 237 of the Decision on interim measures).
79. The imposition of unfair trading terms may not be limited to Google's ability to impose a "zero" price, as the Decision on non-compliance with injunctions also highlighted Google's ability to offer a remuneration that does not or only marginally values existing uses of protected content, and to tie this remuneration to the publisher's or agency's use of new Google services (see paragraphs 325 to 419 and 460 to 505 of the Decision on non-compliance with injunctions).
80. Despite the injunctions in the Decision on interim measures, Google did not include in its remuneration proposals the period from the date of entry into force of the Law on related rights (see paragraphs 366-370 of the Decision on non-compliance with injunctions).
81. Similarly, Google was in a position to impede good faith negotiations through the partial and late disclosure of the information that would have made Google's remuneration proposals transparent (see paragraphs 420 to 459 of the Decision on non-compliance with injunctions).
82. These elements show that Google may have used its dominant position to impose unfair trading conditions, both in terms of the level of remuneration and the information provided and used to determine that level.
83. Secondly, according to European case law and doctrine to date, the principle of equal treatment requires comparable situations to not be treated differently and different situations to not be treated equally, unless such treatment is objectively justified²⁸. By imposing zero remuneration for all news agencies and publishers when the Law on related rights entered into force, independently of an examination of their respective situations, Google is likely to have treated identically economic stakeholders placed in different situations without any objective justification, and, therefore, to have implemented a discriminatory practice within the meaning of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 (c) TFEU (see paragraphs 238 to 241 of the Decision on interim measures).
84. Lastly, by initially using the possibility given to publishers and news agencies to grant free licences to systematically impose a principle of zero remuneration for the display of protected content on its services, Google may have abused its dominant position to

²⁸ Judgements of the Court of 14 December 2004, *Arnold André GmbH v. Landrat des Kreises Herford*, C-434/02, point 68; of 12 July 2005, *Egon Schempp v. Finanzamt München*, C-403/03, point 28; of 14 December 2004, *Swedish Match AB, Swedish Match UK Ltd v. Secretary of State for Health*, C-210/03, point 70; of 14 April 2005, *Belgium v. Commission*, C-110/03, point 71; of 6 December 2005, *ABNA Ltd and others v. Secretary of State for Health and Food Standards Agency*, C-453/03, C-11/04, C-12/04 and C-194/04, point 63.

circumvent the Law on related rights, which aimed to create a property right for publishers and news agencies in return for the display of their protected content by online public communication services (see paragraphs 255 to 268 of the Decision on interim measures). Similarly, Google's behaviour after the Decision on interim measures, consisting in substituting a negotiation on the provision of new services, such as *Showcase*, for the negotiation of the remuneration due for the current uses of protected content, raises concerns both under competition law and with regard to compliance with the Law on related rights.

85. In view of the elements in the file, no objective justification seems to be required for the practices in question.
86. These practices are likely to have had an impact on publishers and news agencies, depriving them of resources that are essential for the sustainability of their activities and the quality of information. These practices may also have had an impact on other generalist search services, which may have incurred costs that their main competitor, Google, could avoid due to its dominant position (see paragraphs 242 to 254 of the Decision on interim measures).
87. The practices at issue are therefore likely to constitute abuses of a dominant position contrary to Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 TFEU and thus raise competition concerns.
88. They are being implemented by the companies Google France, Google Ireland and Google LLC. In addition, Alphabet Inc., as the parent company²⁹, may also be liable for the actions of its subsidiaries. In any case, the evidence in the file tends to demonstrate its active participation in the practices³⁰.
89. These concerns therefore involve, on the one hand, Google France, Google Ireland Ltd, Google LLC and Alphabet Inc. due to their direct participation in the practices in question, and on the other hand, Alphabet Inc. as the parent company.

B. THE COMMITMENTS PROPOSED BY GOOGLE

1. THE COMMITMENTS PROPOSED BY GOOGLE ON 9 DECEMBER 2021

90. Following the release of the preliminary assessment, Google transmitted proposed commitments on 9 December 2021, which included the following six remedies.
91. First, Google undertook to "negotiate in good faith" with news agencies and online press services recognised by the Joint Commission for Publications and Press Agencies (*Commission Paritaire des Publications et Agences de Presse*, "CPPAP") that so request, the remuneration for any reproduction of protected content on its services in accordance with the modalities laid down in Article L. 218-4 of the IPC and according to transparent, objective and non-discriminatory criteria. In addition, Google committed that these negotiations covered the period of the reuse of protected content since 24 October 2019, the date of entry into force of the Law on related rights, for any negotiation requests made before the date on which the commitments came into force.

²⁹ Paragraphs 4934 and VC 2784 VNC 4361, 19/0075 M.

³⁰ Paragraphs VC 4420 VNC 4471, 19/0075 M.

92. The proposed commitments stated that, "*The Negotiating Parties may, if they wish, require that such negotiations address remuneration only for existing uses of their protected content on Google's services as of the date of their request to enter into negotiations. If the negotiations cover both existing uses of protected content on Google's services on the date of entry into negotiations, and new uses, the existing uses must be subject to specific remuneration.*"
93. Second, Google undertook to communicate the information necessary for a transparent evaluation of the proposed remuneration, as provided for in Article L. 218-4 of the IPC.
94. The proposed commitments included an appendix containing a specific list of information that Google undertook to provide within 21 workdays of receiving a negotiating party's request for negotiations. Publishers or news agencies in negotiations with Google could make requests for additional information under the supervision of an independent trustee.
95. Third, Google committed, during the period of negotiations with the negotiating parties, to maintain the display arrangements in place on the date of the request to enter into negotiations, according to the parameters agreed upon by the negotiating parties.
96. Fourth, Google committed to making a remuneration proposal within three months of the date of receipt of the request for negotiations from the negotiating party.
97. In the event that the parties were unable to reach an agreement, the negotiating parties had the option of referring the matter to an arbitration tribunal to determine the amount of remuneration. The arbitration procedure would be governed by the Rules of Arbitration of the International Chamber of Commerce ("ICC"), under an accelerated six-month procedure, with the possibility of an appeal to an arbitration tribunal composed otherwise. Under this arrangement, Google committed to bearing the costs of the arbitration (excluding the negotiating party's attorney fees) in first instance only.
98. The proposed commitments, however, stated that the arbitral award did not impose any obligation on Google to enter into paid licences to take over the negotiating party's protected content. Google therefore reserved the right to no longer reproduce the protected press content of the publisher or agency concerned on its services. The proposed commitments provided, however, that in the event that Google decided to reuse the content that was the subject of the arbitration decision, the remuneration could not be less than that fixed by the arbitration tribunal.
99. Fifth, Google undertook to take the necessary steps to ensure that the negotiations do not affect the indexation, ranking or the display of protected content.
100. Sixth, Google undertook to take the necessary steps to ensure that the negotiations do not affect any other economic relationship that may exist between Google and the news publishers and news agencies with which Google is in negotiations.
101. The proposed commitments provided for the appointment of a trustee, approved by the *Autorité*, to monitor the implementation of Google's commitments. The commitments also provided that the trustee could seek the services of one or more experts approved by the *Autorité* to assist them with their analyses.
102. These commitments were proposed for a period of five years.

2. THE OBSERVATIONS RECEIVED DURING THE MARKET TEST

103. In accordance with Article R. 464-2 of the French Commercial Code (*Code de commerce*), the initial proposed commitments were communicated to the parties to the procedure and to the Government Commissioner, as well as to third parties.
104. In the context of these proceedings and after recalling that the identified competition concerns could be considered as constituting practices contrary to Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 of the TFEU, the *Autorité* submitted for comment, between 15 December 2021 and 31 January 2022, the proposed commitments to the parties and third parties concerned.
105. Google's initial proposed commitments were the subject of comments from the complainants, the representative of the Minister of the Economy, several professional associations and publishers and news agencies.

a) On the use of the commitment procedure

106. Several respondents to the market test³¹ questioned the appropriateness of using a commitment procedure.
107. First, they argued that a commitment procedure was not appropriate in this case, given the seriousness of the practices of which Google was accused and the damage to the economy that would result from them. In this respect, they indicated that the *Autorité* generally reserved the use of a commitment procedure for cases in which the harm to competition was not very serious and that this procedure was excluded in the case of "*certain abuses of a dominant position that had already caused significant damage to the economy*"³². In this case, Google's behaviour was described by the *Autorité* as being exceptionally serious in the context of the Decision on non-compliance with injunctions. Moreover, according to the respondents to the market test, the practices implemented by Google, which lasted more than two years, would have already caused significant damage to the economy.
108. Second, some respondents to the market test argued that Google's proposed commitments were very general in scope and only repeated the terms of the Law on related rights and the Injunctions of the Decision on interim measures without any real added value. According to APIG, the proposed commitments maintained Google's ability to abuse its dominant position. This risk would result from the very terms of the commitments, which allow Google to offer zero remuneration for the reuse of protected content (paragraph 11 of the proposed commitments of 9 December 2021³³), not to display certain content at the end of the arbitration procedure (paragraph 23³⁴) and to modify the indexing or referencing of content not included in the agreements (paragraph 25³⁵).
109. Given the history of the case, according to the AFP this proposal of commitments would be insufficient to provide the necessary guarantees for the effectiveness of a system that already

³¹ SEPM, APIG, AFP, the M6 group, the TF1 group, the company Droits Voisins de la Presse ("DVP"), the Fédération de la Presse Spécialisée (the "FNPS"), the Syndicat de la Presse Indépendante d'Information en Ligne (the "SIPI"), the Fédération Française des Agences de Presse (the "FFAP"), Corint.

³² Procedural notice of 2 March 2009 on commitments, paragraph 11.

³³ https://www.autoritedelaconurrence.fr/sites/default/files/prop_enga_google_dtsvoisins_dec21.pdf

³⁴ https://www.autoritedelaconurrence.fr/sites/default/files/prop_enga_google_dtsvoisins_dec21.pdf

³⁵ https://www.autoritedelaconurrence.fr/sites/default/files/prop_enga_google_dtsvoisins_dec21.pdf

existed and was not respected by Google. According to the AFP, these fears are reinforced by the appeal filed by Google against the Decision of non-compliance with injunctions, an appeal that, shall it succeed, would give Google the possibility to reduce the scope of the commitments.

110. Several respondents to the market test argued that Google continued to not comply with the injunctions of the Decision on interim measures³⁶. In this respect, the SEPM pointed out that the legislator itself recently noted, in the report of the parliamentary information mission on the application of the Law on related rights³⁷, that Google was persisting in its strategy to circumvent this law.
111. Third, the French Minister of Economy and several respondents to the market test argued that the absence of a decision on the merits of the case would represent a considerable advantage for Google, in that it would allow it to avoid both a decision establishing it committed an infringement, which could be used by publishers and news agencies in the context of an action for damages before the competent courts, and the imposition of a fine.

b) On the scope of the commitments

112. The French Minister of Economy and several respondents to the market test criticised the restrictive nature and lack of clarity of the scope of the commitments.
113. First, they note that the commitments proposed by Google applied only to editors who published an "online press service" (hereinafter "SPEL") recognised by the CPPAP, under the terms of Decree 2009-1340 of 29 October 2009. This criterion therefore excludes, in fact, the websites of several publishers that are not recognised by the CPPAP, particularly in the magazine press. According to the respondents to the market test³⁸, the addition of this criterion would be restrictive and in contradiction of the Law on related rights, which applies to all publishers within the meaning of III of Article L. 218-1 of the IPC, and not only to SPELs recognised by the CPPAP.
114. Second, the AFP and the *Fédération Française des Agences de Presse* ("FFAP") pointed out that, in its proposed commitments, Google did not clearly and unequivocally recognise that news agencies whose content is included in third-party publications could be entitled to related rights. Google's proposed commitments would therefore offer no guarantee to news agencies that they would receive remuneration under related rights for the content taken up by news publishers, even though this represented the majority of their feeds. This risk would be even greater since Google had challenged the entitlement of related rights by news agencies in this category of content in the context of the appeal against the Decision on non-compliance with injunctions.
115. Third, the commitments did not contain a precise definition of the notion of "*protected content*", giving rise to the right to remuneration for related rights, so that the scope of the commitments remained unclear.
116. APIG argued that the commitments needed to include a precise definition of protected content:

³⁶ AFP, SEPM, DVP, FNPS, Spiil.

³⁷ https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information#

³⁸ The French Minister of Economy, the SEPM, the FNPS, the Point, the M6 group.

- on the criterion of the territorial application of the related right in particular, which should include taking into account all use of protected content throughout the world and all associated revenues;
- on the limitations of related rights, and in particular the exclusion of "short extracts", on which Google would maintain an opacity unfavourable to publishers.

117. APIG also proposed clarifying what was meant by Google's "*existing services*", to precisely define Google's uses of protected content that gave rise to the right to a specific remuneration offer. In the same way, News Media Europe suggested clarifying paragraph 10 of the proposed commitments³⁹, to specify that the negotiation of the remuneration for "*existing uses*" and the negotiation of the remuneration of "*new uses*" remain distinct and result in independent agreements.

c) On the first commitment relating to the principle of negotiating in good faith

On the launch of negotiations

118. Google's proposed commitments provide that negotiations will be launched upon receipt of a complete request to enter into negotiations. To be considered complete, the request for information must include a list of specific information (set out in Appendix 2) and a signed confidentiality agreement (a template of which is included in Appendix 4).
119. The APIG disputed that entry into negotiations could depend solely on Google's assessment of the completeness of a publisher's request. According to the APIG, the publisher must have the full opportunity to initiate a negotiation without Google being able to require to be provided with information beforehand.
120. The *Groupement des Éditeurs de Services en Ligne* ("GESTE") suggested specifying the criteria used by Google to assess the completeness of a request to enter into negotiations and setting a deadline for Google to decide on the completeness of this request.
121. According to the M6 Group, imposing formalities on the requests to enter into negotiations did not seem justified. To simplify the negotiation procedure, the M6 Group proposed to submit the assessment of the completeness of the request to enter into negotiations to the trustee only in the event of disagreement between the parties.
122. The AFP and the FFAP pointed out that Appendix 2 was insufficiently precise with regard to news agencies. In addition to the provision of IPTC⁴⁰ meta tags requested by Google in this Appendix, other methods of identifying news agency content should be considered, and it should be Google's responsibility to ask agencies in advance to provide the information and data reasonably necessary to do so.

On the remuneration offers issued by Google

123. Several respondents to the market test⁴¹ indicated that the commitment to negotiate in good faith did not add value to the Law on related rights, nor did it provide any guarantee that Google would put an end to its practices.

³⁹ https://www.autoritedelaconurrence.fr/sites/default/files/prop_enga_google_dtsvoisins_dec21.pdf

⁴⁰ So called in reference to the metadata format promoted by the International Press Telecommunications Council (IPTC), allowing the transmission of information on the contents, along with an image file.

⁴¹ APIG, FNPS, News Media Europe.

124. In this respect, they pointed out that Google reserved the option of making a zero remuneration offer to publishers and news agencies, without explaining in which particular cases such a proposal would be justified.
125. Several respondents to the market test emphasised the need, as part of the proposed commitments, to define a calculation methodology approved by the stakeholders, specifying the criteria for evaluating the revenues associated with protected press content, in particular indirect revenues.
126. According to the APIG, this calculation methodology should correct the current biases of the method used by Google, which is characterised by a uniform valuation of all types of press content, the exclusion of all hyperlinks/titles, the "insignificant" valuation of indirect revenues on *Google Search*, the total absence of valuation on the *Discover* and *Google News* services, and the scope limited to users located in France.
127. The M6 Group deplored the absence of a reference offer to determine the remuneration of protected content. It argued that it was necessary at least for the trustee to be able to control the criteria on which Google would establish a compensation proposal.
128. TF1 denounced the lack of precision concerning the way Google intended to apply the legal criterion of investments⁴² to build its remuneration proposal due in application of Article L. 218-4 of the IPC. According to TF1, knowledge of how this criterion would be applied was essential for the political and general press, which require their own editorial staff and international correspondents.
129. Altice considers that Google should commit to detailing the elements used to calculate the global value of the related rights market and the percentage of redistribution to rights holders. According to Altice, such a commitment appears necessary, as Google's related rights market estimates are far removed from their own estimates. Altice added that Google should undertake to take into account any re-evaluation of the total amount of the related rights market during the course of the contract in order to re-evaluate the amount of the remuneration, if necessary.
130. The GESTE considered that, to meet the commitment to negotiate in good faith, the trustee must be able to obtain a second opinion on the remuneration base estimated by Google. To do so, it must obtain the necessary information. The GESTE also considered that Google should undertake to ensure that the overall remuneration package could evolve according to the economic situation, the reality of individual negotiations and, if necessary, the assessment by the trustee or any authorised expert.

On the obligation of confidentiality

131. Several respondents to the market test⁴³ criticised Appendix 4, which required the negotiating parties to sign a confidentiality agreement. They considered that this commitment would be likely to hinder the emergence of a transparent market for press content related rights in France.

⁴² Paragraph 2 of Article L. 218-4 of the IPC states that (translated) "*Setting the amount of this remuneration shall take into account elements such as the human, material and financial investments made by press publishers and news agencies, the contribution of press publications to political and general information, and the extent to which press publications are used by online public communication services*".

⁴³ FNPS, News Media Europe and Corint.

132. According to Corint⁴⁴, any element of confidentiality would hinder the emergence of a transparent market for related rights. Therefore, all references to it should be deleted from the proposed commitments.
133. The National Federation of the Specialised Press (*Fédération Nationale de la Presse Spécialisée*, "FNPS") considered that the licences negotiated by Google for related rights should be transparent, as business secrecy cannot be absolute in the area of related rights, as suggested by the proposed confidentiality agreement, and even less so in the context of collective management of these rights.
134. According to News Media Europe, it would be appropriate to allow publishers who so wish to discuss and compare, on a sufficiently aggregated and anonymous basis, the key criteria of the agreements proposed by Google. Furthermore, News Media Europe suggested that the content of arbitration decisions be made available to the media industry, if necessary through an appropriate mechanism to be set up by the *Autorité* or the trustee.

d) On the second commitment relating to the information provided by Google on the revenues it earns from the display of press content on its services

On the information provided by Google

135. Many respondents to the market test⁴⁵ argued that the information listed in Appendix 1 of Google's proposed commitments was insufficient to conduct balanced negotiations.
136. With respect to Google's revenue data, they stated that the proposed commitments only provided for the disclosure of direct and indirect advertising revenue, earned on *Google Search*, and that no revenue related to news content on *Google News* and *Discover* was to be disclosed. However, in their opinion, these services would be sources of indirect revenue for Google, even if not monetised with advertising in France. Lastly, they found that no information was provided on indirect revenues related to personal data collection in connection with Google's knowledge of the consultation of press sites, even at a flat rate.
137. With regard to the data on the use of protected content, the French Minister of Economy stated that Google undertook to communicate the figures of the publisher or agency only in absolute value and as a percentage of the total figures for press publishers. According to the French Minister of Economy, in the absence of a comparison, these figures alone are not sufficient to evaluate the relative importance of press content for the Google search engine.
138. In addition, several respondents to the market test noted that Google would provide the information 21 workdays after the date of receipt of the request. As a result, they considered that for nearly a third of the negotiation time, the publisher or agency would not have the information required to assess the value of its remuneration.

On the definition of indirect revenues

139. Lastly, several respondents⁴⁶ to the market test indicated that Google persisted in disputing the existence of indirect revenues derived from the display of press content on its services.

⁴⁴ Corint is a company licensed as a collective management organisation under the German law on collective management companies, which includes several hundred publishers in Germany.

⁴⁵ APIG, AFP, SEPM, Le Point, European Newspapers Publishers Association/European Magazine Media Association (ENPA/EMMA), News Media Alliance.

⁴⁶ APIG, AFP, SEPM, Le Point.

In its proposed commitments, Google defined indirect revenue from the display of protected content as "*Advertising revenue on Google Search that could result from the attractiveness of Google's services through the display of protected content.*" Several respondents to the market test considered that the use of the conditional in this definition did not offer them any guarantee that the indirect revenues would actually be taken into account by Google, especially since Google was contesting the existence of these indirect revenues in its appeal against the Decision on non-compliance with injunctions before the *Cour d'appel de Paris* (Paris Court of Appeal).

e) On the third commitment regarding the maintenance of the conditions for displaying press content on Google

140. Several respondents to the market test⁴⁷ criticised the fact that the commitment to maintain the display of press content only covered the negotiation period and considered that it should extend throughout the duration of the licences concluded with Google. They considered that the reservation expressed by Google in its proposed commitments, which allowed it to not maintain or to "*oppose*" the display methods chosen by the publishers at the end of the negotiation period risks being used by Google as a means of pressure, or even discrimination between publishers.

f) On the fourth commitment

On the deadline for negotiations

141. Several respondents to the market test⁴⁸ expressed reservations about Google's three-month deadline to submit a remuneration offer.
142. According to the FFAP, the starting date for negotiations should be set as of the communication by Google of all the information required by Article L. 218-4 of the IPC, and not as of the filing by the publishers and news agencies of a complete request to enter into negotiations. The FFAP suggests the setting of a one-month period for negotiations with Google, provided that the latter has submitted publishers or news agencies a remuneration proposal within five workdays following the opening of the negotiations. The M6 Group proposed that Google commit to finalising negotiations within three months of a request to enter into negotiations, which implies that it provides a compensation offer within a maximum of fifteen days after the opening of negotiations. In the same vein, the GESTE suggested Google commits to a three-month period to finalize the negotiation and that the period allowed for Google to submit a remuneration offer is shorter than this three-month period.

On the arbitration procedure

143. Respondents to the market test⁴⁹ were critical of the use of the arbitration procedure and its operational procedures.
144. They expressed concerns about the costly and complex nature of an arbitration procedure, as well as the particularly long delays inherent in this type of procedure. The existence of a

⁴⁷ APIG, FNPS, News Media Europe.

⁴⁸ The FFAP, the M6 Group and the GESTE.

⁴⁹ AFP, APIG, SEPM, Corint, FFAP, ENPA/EMMA.

"*de novo*" appeal against the first arbitration decision would make the procedure longer and more complex, especially since the proposed commitments provide no details as to the execution of the first arbitration decision while the appeal is being heard. Regarding the cost of arbitration, the FFAP considered that Google should commit to paying the costs incurred by the beneficiaries in the event of an arbitration decision in their favour, including the costs of counsel.

145. In addition, the proposed commitments did not make the arbitration procedure binding on Google, since under paragraph 23 of the proposed commitments, Google reserved the right not to "*licence the protected content of the negotiating party*"
146. The AFP stated that the effectiveness of such a procedure depended on the information available to the tribunal. However, the proposed commitments did not give the arbitrator the ability to order Google to provide information. Moreover, if the tribunal does not consider itself able to fulfil its mission, for example due to a lack of the necessary information, the consequences should be foreseen.
147. Several respondents to the market test⁵⁰ argued that the financing arrangements for the arbitration procedure fail to ensure the neutrality of the procedure, since they were charged to Google.
148. As a result, several respondents suggested alternatives to Google's arbitration process, including mediation or referral, which would be simpler, faster and less costly.
149. Several respondents to the market test⁵¹ also suggested replacing the arbitration procedure with a mechanism similar to that adopted in Australia under the *News Media Bargaining Code*, under which, according to the News Media Alliance:
 - arbitration can be requested by a press publisher, in the event of the failure of the negotiations;
 - the Australian Communications and Media Authority is responsible for establishing and updating a list of approved arbitrators and may appoint members of the arbitration tribunal in the event of disagreement between the parties;
 - the News Media Bargaining Code establishes rules for the "*final-offer arbitration*" process, whereby each party must submit a final offer within a specified time frame; the code details the information needed to draft offers, the factors that must be considered when evaluating offers, and the requirements that parties must meet when submitting their final offers;
 - the arbitration tribunal must arbitrate between the two final offers proposed and select the one that appears more reasonable. Arbitrators may refuse or adjust the offers they receive if they consider that such remuneration offers present a risk of serious harm to the dissemination of protected press content in Australia or to the interests of the Australian consumer.
150. For its part, TF1 proposed that the trustee should be able to intervene in the first instance to set the remuneration for the takeover of content and that, in the event of disagreement, the parties should be able to refer the matter to the arbitration tribunal.

⁵⁰ APIG, Corint, ENPA/EMMA.

⁵¹ APIG, SEPM and News Media Alliance.

151. TF1 also indicated that it was necessary to harmonise the procedural rules concerning control of the determination of remuneration and the execution of the remuneration contract for the use of the content. On this point, TF1 indicated that the draft agreement sent to it by Google provided for the application, in the event of difficulties in the execution of the contract, of English law and recourse to an arbitration procedure in London and in English. According to TF1, there is therefore a distortion between the two procedures that could entail the risk of a "stalling strategy", should Google decide to suspend the payment of all or part of the remuneration, the dispute would then be brought before the arbitration court in London, at the publisher's expense.

g) On the fifth commitment

152. Several respondents to the market test⁵² expressed concern that Google might stop indexing, reference listing or displaying protected content from publishers or news agencies that did not comply with Google's service usage policy. They pointed out that these rules, defined unilaterally by Google who can change them at any time, can be used by Google as a means to exert pressure on publishers or news agencies in the context of negotiations on related rights.

153. The APIG also considered that Google's proposed commitments of 9 December 2021 gave Google the option to no longer index and to downgrade content not included in negotiations or agreements. Such possibility would put publishers in the same situation as in September 2019 before the Law on related rights came into force, at least for some of their content. According to the APIG, the obligation of neutrality should therefore be maintained throughout the negotiations and execution of the licences.

h) On the sixth commitment

154. Le Point noted that Google's proposed commitments, which require Google to respect a principle of neutrality in negotiations on related rights vis-à-vis any other economic relationship, applied only to parties with which Google was negotiating. The proposed commitments thus represented a step backwards from the Decision on interim measures, which required that this principle of neutrality apply to all publishers and news agencies, whether or not they were party to the negotiations.

i) On the use of an independent trustee and, if necessary, experts

155. The APIG criticised the arrangement provided for in Google's 9 December 2021 proposed commitments, as the appointment of the trustee was, in its view, "*essentially in Google's hands*". The APIG also notes that there is too much proximity between Google and the trustee, characterised by direct exchanges and privileged access by Google to the trustee's reports. This proximity would create a conflict of interest and an asymmetry with respect to publishers. In the same vein, the French Minister of Economy noted that Google would have access to the expert's conclusions before they were sent to the *Autorité*, whereas the negotiating parties would only have access, at best, to a non-confidential version of the expert's conclusions and findings. This difference appears unjustified and likely to unbalance the relationship between Google and the negotiating parties.

⁵² L'APIG, la FFAP, le Point, the M6 Group, News Media Europe.

156. The APIG would like the *Autorité* to appoint a "certifier-auditor" to verify the relevance and conformity of the data provided by Google. To guarantee its independence, the determination of its remuneration should be within the competence of the *Autorité*.
157. The French Minister of Economy considered that the procedure for appointing one or more experts was complex and lacked consistency, since the wording of the commitments indicated that the trustee may appoint one or more experts, whereas Appendix 3 indicated that only one expert may be appointed and not several. Corint believed that the trustee should be able to choose the experts it wishes to select, not that Google should be responsible for appointing them.
158. Altice and the GESTE considered that the trustee's missions could be extended to the task of evaluating the total amount of the related rights market, in particular with the help of an expert. To ensure the effectiveness of such a mission, the commitments could be amended to oblige Google to send the trustee any element that would allow the determination of this amount. In the same vein, Corint stated that Google should commit to giving the trustee the right to review all internal Google procedures and data.
159. According to TF1, to ensure the proper execution of the commitments, the trustee must have at its disposal all the elements likely to affect the calculation of the remuneration. The commitments should therefore stipulate:
- the requirement that Google provide the trustee with a general methodology for assessing direct and indirect revenues, as well as the corresponding data;
 - the transmission to the trustee by the publishers and news agencies of all the data they have concerning the assessment of direct and indirect revenues, the estimation of the global base of their remuneration, as well as information on the amount of any human, material and financial investments and the contribution of their publications to political and general information.
160. In the event of disagreement between the parties, the trustee may adjust the amount proposed by the parties upwards or downwards on the basis of their own calculations. In the event of continued disagreement, use could be made of third-party determination of remuneration in accordance with the fourth commitment.

j) On the duration of the commitments

161. Several respondents to the market test pointed out that the five-year commitment period was too short and should be set for an unlimited period.

3. THE COMMITMENTS PROPOSED BY GOOGLE FOLLOWING THE MARKET TEST

162. On 11 March 2022, after reviewing the results of the market test, Google submitted a new version of its commitments⁵³ to the Investigation Services.
163. The hearing before the Board began on 12 April 2022 and was suspended. Google then filed two new versions of the commitments on 21 and 26 April 2022⁵⁴. The hearing resumed and

⁵³ Quotations 2558 to 2575, 19/0074 F.

⁵⁴ Quotations 3101 to 3121, 19/0074 F; quotations 3164 to 3184, 19/0074 F.

concluded on 27 April 2022, during which a new version of the commitments was transmitted⁵⁵. Finally, two notes for reserved judgement were placed in the file, containing a new version of the commitments dated 29 April 2022⁵⁶ and then the final commitments, on 9 May 2022⁵⁷. These final commitments were signed by Google representatives and transmitted to the parties on 10 May 2022⁵⁸.

⁵⁵ Quotations 3235 to 3250, 19/0074 F.

⁵⁶ Quotations 3252 to 3274, 19/0074 F.

⁵⁷ Quotations 3310 to 3328, 19/0074 F.

⁵⁸ Quotations 3347 to 3352, 19/0074 F.

III. Assessment

A. ON THE IMPLEMENTATION OF THE COMMITMENT PROCEDURE

164. Article L. 464-2 of the French Commercial Code (*Code de commerce*) states that the *Autorité de la concurrence* may (translated) "*accept commitments of a limited or unlimited duration proposed by companies or trade associations which are likely to put an end to its competition-related concerns which may constitute prohibited practices referred to in Articles L. 420-1, L. 420-2-2 and L. 420-5, or contrary to the measures taken in application of Article L. 410-3*".
165. In its 2 March 2009 notice, the *Autorité* stated, among other things, that the use of the commitment procedure "*allows the Autorité to accelerate the resolution of cases that do not involve practices whose nature or effects are such that they require a priori the imposition of a sanction*"⁵⁹ and that "[the] *Autorité does not apply the commitment procedure in cases where, in any event, the infringement of public economic policy requires the imposition of financial penalties, which excludes, in particular, particularly serious cartels and certain abuses of a dominant position that have already caused significant damage to the economy.*"⁶⁰
166. As stated in the above-mentioned press release, the *Autorité* therefore has broad discretion to determine the most appropriate procedure among those provided for in Article L. 464-2 of the French Commercial Code (*Code de commerce*), and in particular to choose between the procedure for accepting commitments and the sanction procedure.
167. Furthermore, the *Cour d'appel de Paris* (Paris Court of Appeal), in a judgement of 19 December 2013, noted that "*the commitment procedure is therefore one of the tools that enable a competition authority to carry out its mission of guaranteeing the functioning of competition on the markets, this mission of defending economic public order empowering said authority to issue commitment decisions, not to satisfy the request of a complaining party, but to put an end to situations likely to be detrimental to competition.*"⁶¹
168. Even though the practices implemented by Google, in particular between 25 September 2019 and 9 April 2020, the date of adoption of the Decision on interim measures (see paragraphs 34 et seq. above), are very serious, this circumstance does not preclude the use of commitments as the most appropriate way to address the competition concerns, since this solution improves and supplements the injunctions issued by the *Autorité*.
169. A decision rejecting Google's commitments as a matter of principle would be all the more inappropriate in this case since, thanks to the mechanism of retroactive remuneration (see paragraph 212 below), Google's proposal makes it possible to remedy, *a posteriori*, the damage caused by Google's practices.
170. While Google's failure to comply with the Decision on interim measures (see paragraphs 45 et seq.) constitutes an exceptionally serious conduct, the *Autorité* has already sanctioned it in its decision of 12 July 2021. In addition, this sanction cannot be called into question,

⁵⁹ The *Autorité's* Procedural Notice of 2 March 2009 on competition commitments, point 6.

⁶⁰ The *Autorité's* Procedural Notice of 2 March 2009 on competition commitments, point 11.

⁶¹ Judgment of the *Cour d'appel de Paris* (Paris Court of Appeal), 19 December 2013, 2012/19484.

following Google's commitment to withdraw its appeal against the Decision on non-compliance with injunctions (see paragraph 176 below).

171. Moreover, the fact that the *Autorité* found that Google had not complied with the interim measures does not create a presumption that Google will fail to comply with its commitments in the future. Lastly, the allegation that Google continues not to comply with the Decision on interim measures is not supported at this stage⁶².
172. In these circumstances, it is for the *Autorité*, in the context of this decision, to ensure that the commitments proposed by the Parties are sufficiently relevant, credible, verifiable and proportionate to put an end to the competition concerns identified.

B. ON THE MODIFICATIONS TO GOOGLE'S PROPOSED COMMITMENTS

173. Following the 12 April 2022 hearing before the *Board*, Google successively submitted four new versions of the commitments to the Board, as well as a final version of the proposed commitments on 9 May 2022.
174. This final version contains a number of changes compared to the initial version submitted to the *Autorité* on 9 December 2021, and therefore takes into account both the concerns expressed in the market test and those expressed during the meeting before the *Board*.
175. The main changes are summarised below.
176. First, Google extends its commitments to Alphabet Inc, the parent company of the Google Group, and agrees to withdraw its appeal against the Decision on non-compliance with injunctions.
177. Second, Google expands and clarifies the scope of the commitments, both with respect to news publishers and news agencies and with respect to the protected press content:
 - with regard to press publishers, the commitments are no longer limited to those with CPPAP certification, but apply to all press publishers within the meaning of Article L. 218-1 of the IPC;
 - with regard to news agencies, Google expressly recognises the ownership of related rights by news agencies of content that is reproduced identically in the publications of third-party press publishers;
 - with regard to the notion of protected press content, Google specifies that it extends to texts, photos and videos included in press publications.
178. Lastly, in the event of disagreement as to whether a publisher or news agency qualifies as such under the terms of the commitments or whether a publisher's domain contains protected content, the parties may refer the matter to the trustee responsible for monitoring compliance with the commitments, who must issue an opinion within ten workdays of the date on which they were consulted, with which Google undertakes to comply.
179. Third, Google specified the terms and conditions for the application of the commitment to negotiate in good faith the inclusion of press content on its services (Commitment 1).

⁶² To date, only one complainant has lodged a complaint with the *Autorité* for non-compliance with the Decision on interim measures for the period following the publication of the Decision on non-compliance with injunctions. The complainant subsequently withdrew its action.

180. Unless the negotiating party expressly requests otherwise, Google agrees to conduct separate negotiations regarding the *Showcase* service or any other new Google service, and regarding the existing use of protected content. In the event of negotiations on both existing and new uses of protected content, Google agrees to conduct such negotiations independently and to provide two separate remuneration offers; one for the existing uses of protected content and one for the other Google services or the new uses of such content.
181. In addition, Google's offer will include a proposal to update the remuneration amount at least once a year, on 1 February, based on data provided by Google on the extent of the use of protected content during the previous year and the associated exploitation revenues, as well as a final adjustment of the payment at the end of the agreement, if applicable.
182. Fourth, Google has extended its proposed commitments with respect to communicating information (Commitment 2).
183. Google has added to the minimum set of information that it must provide to each negotiating party (Appendix 1 of the commitments), while reducing the maximum period for providing this information from 21 workdays to 10 workdays in the case of individual negotiations and 15 workdays in the case of collective negotiations.
184. This set of information could be widened, at a second stage, by requests for additional information filed by publishers and news agencies, on the basis of Article L. 218-4 of the IPC. In the event of a disagreement between Google and a negotiating party on the technical feasibility or on the relevance of such requests for additional information with regard to Article L. 218-4 of the IPC, either party may submit their disagreement to the trustee, who will issue an opinion, with which Google commits to comply.
185. Google undertakes to provide this additional information within a maximum of 15 workdays as of the request of the negotiating party or, if necessary, as of the trustee's issuance of its opinion in the event of disagreement on the relevance of the request.
186. In the case of additional requests, Google may ask the trustee to take appropriate measures to safeguard the confidentiality of the information. The trustee may then submit a proposal to the *Autorité*, which Google commits to comply with, that provides for:
 - disclosure of information without additional safeguards to publishers and news agencies, which are already subject to a confidentiality agreement;
 - disclosure of information with enhanced confidentiality procedures, such as restricted access only to the publishers' and news agencies' counsel or the sharing of a redacted version of confidential information; or
 - disclosure of information exclusively to the trustee and, where applicable, to experts, where the data contains particularly sensitive information and is of such a nature as to enable them to assess Google's remuneration offers in a more global context or in connection with requests for additional information. Google's *Search ads* and *Display ads* advertising revenues in France fall into this category.
187. Fifth, Google has made several changes to the arbitration process in the event of a continuing disagreement with the negotiating party on the remuneration offer issued by Google.
188. While in its initial proposal Google reserved the right to refuse to pay and display protected content on its services after arbitration, Google now commits to making a remuneration offer

to the negotiating party at least equal to the remuneration set by the arbitration tribunal⁶³. Therefore, the remuneration set by the arbitration tribunal will be binding on Google.

189. In addition, Google undertakes to pay the arbitrators' fees, at the request of the negotiating party, not only for the first arbitration proceeding, but also for the possible review proceeding on appeal. Google also states that it will pay all or part of the other negotiating party's legal fees, if the arbitration tribunal so decides, in accordance with Article 38 of the ICC Arbitration Rules⁶⁴.
190. In addition, Google has extended the list of information to which the arbitration tribunal will have access to make its award. Google undertakes to provide the arbitration tribunal with the information and documents exchanged with the trustee and the experts, without prejudice to the possibility for the arbitration tribunal to request additional documents, including information relating to offers made by Google to other negotiating parties.
191. Lastly, the compensation terms determined at the end of the initial arbitration will apply in a non-suspensive manner in the event of the activation of the review mechanism.
192. Sixth, in the final proposed commitments, Google deleted the reference to restricting the scope of the sixth commitment to only relationships with publishers and news agencies with which Google is negotiating.
193. Seventh, Google added a seventh commitment that provides for the possibility for publishers and news agencies which, prior to the publication of this decision, had already entered into an agreement with Google for the remuneration of related rights, or already received such an offer, or already had the right to receive such an offer under a framework agreement, to benefit from these commitments. In such a case, the implementation of the commitments will be at no cost to publishers and news agencies in relation to the termination or amendment of any existing agreement with Google. In addition, the pre-existing agreement will continue to apply until the date of its amendment or termination.
194. Eighth, in its final version of the commitments, Google proposed renewing the commitments for a period of five years under the terms of a decision by the *Autorité* motivated by a new competitive analysis.
195. Ninth, with respect to Appendix 3 relating to the trustee, the main changes introduced by the final proposed commitments relate, first, to the transmission of the expert's reports and analyses under identical conditions for Google and the other negotiating parties (paragraphs 13 and 15 of Appendix 3); second, the ability for the trustee to appoint the experts it wishes (paragraph 14 of Appendix 3), and, lastly, the possibility for the trustee and the expert, if applicable, to appoint an independent auditor to certify the financial information provided by Google (paragraph 18 of Appendix 3).
196. Tenth, in the final version of the commitments, Appendix 1, which lists the information to be provided by Google to the negotiating parties pursuant to paragraph 16 of the commitments (i.e. the base of the information provided routinely), and Appendix 2, which lists the information to be provided by the negotiating parties to Google pursuant to paragraph 13 of the commitments (i.e. the information provided in the request to commence negotiations), provide for an annual review clause.

⁶³ Paragraph 23 of the commitments.

⁶⁴ The Rules of Procedure are available via <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>.

197. Google thus undertakes to review these two lists of information once a year with the trustee, and to amend them if necessary⁶⁵.

C. ON THE RESPONSE TO THE COMPETITION CONCERNS

1. ON THE SCOPE OF THE COMMITMENTS

198. The improvements made by Google in the final proposed commitments address the competition concerns regarding the restrictive nature and lack of clarity in the scope of the commitments.
199. First, Google extended the scope of the proposed commitments to publishers that meet the criteria of Article L. 218-1 of the IPC, and not only to online press services recognised by the CPPAP. Therefore, the scope of Google's commitments is now in line with that defined by the legislator in the Law on related rights.
200. Second, Google unequivocally recognised the ownership of related rights by news agencies whose content is integrated into third-party publications. By clarifying this point and agreeing to withdraw its appeal against the Decision on non-compliance with injunctions, Google expressly agrees to remunerate news agencies for related rights in this category of content.
201. In addition, clarity is brought to the notion of "protected content" that gives rise to the right to remuneration. In particular, by undertaking to withdraw its appeal against the Decision on non-compliance with injunctions and by expressly stating that it will comply with the Decision on interim measures and the judgement of the *Cour d'appel de Paris* (Paris Court of Appeal) of 8 October 2020, Google recognises that the excerpts of articles composed of texts, photos and videos constitute protected content and give rise to the right to remuneration.
202. The geographical scope of the commitments is the French territory only. The use of the term "in France" in Appendix 1 of Google's final proposed commitments is assessed on the basis of the user's location (GPS, IP address or other) with respect to searches, impressions and clicks generating the display of protected content, and on the basis of accounting data with respect to revenues. The fact that the remuneration is calculated according to the location of the end user in France and not according to the location in France of the publisher or news agency appears to be consistent with the provisions of Article L. 218-1 of the IPC, which states that "*This chapter applies to press publishers and news agencies established in the territory of a Member State of the European Union*".
203. As a result, a publisher or news agency established in a European Union country other than France will be able to collect related rights under the terms of the final proposed commitments for its protected content displayed on Google's services following searches made by an Internet user located in France. Conversely, while publishers and news agencies located in France may also receive additional related rights for the display of protected content generated by a user located in a European Union country other than France, the negotiation of these rights is not covered by the commitments, since their scope cannot be extraterritorial.

⁶⁵ First paragraph of Appendices 1 and 2.

2. ON THE LAUNCH OF NEGOTIATIONS

204. The *Autorité* considers that Google is justified in asking the other negotiating party, on the one hand, to provide it with the information necessary for it to tailor its compensation offer and, on the other hand, to ask it to sign a confidentiality agreement, to open the negotiations that Google is obliged to carry out within a limited timeframe.
205. The information to be provided by publishers and news agencies to enter into negotiations with Google is listed in Appendix 2 of the final proposed commitments. This information will allow Google to identify to which publishers or news agencies the protected content displayed on its services belongs. Moreover, such information is defined precisely, so that publishers, news agencies, and the organisations that represent them should not have any difficulty in communicating them. In any event, the final proposed commitments now provide that the completeness of a request to enter into negotiations will be assessed under the supervision of the trustee⁶⁶.
206. If, in the opinion of the news agencies, information other than that listed in Appendix 2 of the commitments is relevant for identifying their protected content, they are free to communicate it, insofar as Appendix 2 of the commitments constitutes only the minimum set of information to be provided by the publishers and news agencies for entering into negotiations. To enter into negotiations with Google, news agencies will therefore have to provide Google with information about IPTC meta tags, although this does not preclude news agencies from providing additional information that would be useful in identifying their content included in third-party news publications (such as searching and analysing news agencies' name credits in the computer code of web pages), if they deem it useful. In any event, the list of minimum information to be provided by news agencies will be subject to change, as Google has expressly mentioned that it will review this list annually and, if necessary, amend it, under the supervision of the trustee.
207. Furthermore, the *Autorité* noted that Google is justified in requesting the signature of a confidentiality agreement by the negotiating parties, insofar as the agreements concerning the remuneration of related rights contain sensitive commercial data for both Google and the publishers and news agencies.
208. Lastly, the introduction of full transparency in the negotiations on related rights, as requested by some respondents to the market test, appears disproportionate, given that Google has undertaken to apply objective, transparent and non-discriminatory criteria, under the control of the trustee, to remunerate publishers and news agencies. In this regard, the *Autorité* noted that the trustee, and where appropriate the arbitration tribunal, will be able to request access to the agreements signed by Google and the negotiating parties, if they so wish. Therefore, it does not seem necessary to open this possibility to all publishers and news agencies.

3. ON THE FIRST COMMITMENT RELATING TO THE PRINCIPLE OF NEGOTIATING IN GOOD FAITH

209. With respect to the first commitment, Google made two significant changes in its final version of the commitments compared to its initial version.

⁶⁶ Paragraph 13 of the commitments.

210. On the one hand, Google reworded paragraph 11 (formerly 10) to clarify the notion of "*existing uses*" of protected content by publishers and news agencies. On this point, Google specified that the *Showcase* service is a new service, which will have to be negotiated independently of the existing uses of protected content for which the legislator has created a specific property right, to allow publishers and news agencies to have a new source of revenue in return for the use of their content by online communication services⁶⁷. This clarification by Google addresses the concerns expressed by some respondents to the market test that the former wording of the commitments could potentially give rise to circumvention strategies (for example, if *Showcase* were to be considered by Google as an existing use of protected content).
211. On the other hand, Google has specified that the remuneration offered to news agencies and publishers will be updated at least once a year⁶⁸. This clarification is in line with the provisions of Article L. 218-4 of the IPC, which provides that the remuneration proposed by Google must be based on all its operating revenues, which necessarily evolve over time according to the use of the content protected by Google on its services.
212. The commitments will come into force upon notification of this decision to Google.
213. The negotiations referred to in the first commitment will cover the period of the reuse of protected content since 24 October 2019 - the date of entry into force of the Law on related rights - for all news agencies and publishers that asked to enter into negotiations with Google before the commitments came into force.
214. For publishers and news agencies that will enter into discussions with Google after the commitments come into force, Google will be obliged to negotiate the reuse of protected content under the ordinary law regime provided by the IPC.
215. The criticism expressed by some respondents to the market test regarding Google's ability to offer zero remuneration must be dismissed, since the Law on related rights does not grant publishers and news agencies a right to guaranteed remuneration⁶⁹. As stated in the Decision on interim measures, certain protected content can theoretically be provided to Google free of charge by publishers and news agencies, either when they wish to licence it free of charge or when the criteria set forth in the Law on related rights do not justify the payment of remuneration.
216. However, unless it can be justified on the basis of objective considerations, the situation in which Google offers zero remuneration to a publisher or news agency, while it agrees to positively remunerate other publishers or news agencies in an identical situation, would constitute discriminatory treatment and a particularly serious breach of Google's commitments and competition law. The *Autorité* will be particularly vigilant should such a situation arise.

4. ON THE SECOND COMMITMENT RELATING TO THE INFORMATION PROVIDED BY GOOGLE

⁶⁷ Paragraph 11 of the commitments.

⁶⁸ Paragraph 12 of the commitments.

⁶⁹ Judgement of the *Cour d'appel de Paris* (Paris Court of Appeal), 8 October 2020, 20/08071, point 96.

217. In its final proposed commitments, Google completed the minimum set of information that will be transmitted, initially, to each negotiating party, by including (i) the number of impressions and click-through rates of impressions in France on *Google Search*, *Google News* and *Discover* of the protected content of the publisher or news agency concerned for all queries per month for the last twelve months preceding the date of the request to enter into negotiations, as a percentage of the total number of impressions, (ii) an estimate of the indirect revenues generated in France by searches that follow the one that led to the display of protected content within the same user visit, and (iii) an estimate of the value of protected content on *Discover* and *Google News* by reference to comparable European markets where these services are monetised through advertising. This minimum set of information may also be reviewed and supplemented each year by Google under the supervision of the trustee.
218. Google also reduced the time it has to provide this minimum set of information. From fifteen calendar days for individual negotiations and twenty-one calendar days for collective negotiations, the deadlines have been changed to ten and fifteen workdays respectively.
219. In addition to this minimum set of information, Google has undertaken, as a second step, to provide the negotiating parties with additional information on the basis of Article L. 218-4 of the IPC within fifteen workdays. The trustee may be asked to provide an opinion, which Google commits to comply with, in the event of disagreement as to the relevance or technical feasibility of an additional request.
220. The trustee may also make proposals on how to transmit the additional information requested by the negotiating parties, including, if necessary, measures to preserve the confidentiality of Google's information. This mechanism will reconcile Google's legitimate request to protect its business secrecy with the need for news agencies and publishers to obtain the information necessary to assess Google's direct and indirect revenues from the display of their protected content.
221. Lastly, by undertaking to withdraw its appeal against the Decision on non-compliance with injunctions, Google is no longer challenging the existence of the indirect revenue examined by the *Autorité* in paragraphs 357 and 358 of the present decision, in particular those resulting from the attractiveness provided to Google's services through the display of protected content, which both increase the amount of data it collects and improve its ability to deliver targeted advertising, as well as increase the likelihood that the user will access paid sponsored links on its online search site.

5. ON THE FOURTH COMMITMENT

222. The *Autorité* considers that the mechanism whereby Google commits to making a remuneration offer after a three-month negotiation period, combined with the intervention of a third party to resolve any remaining disagreements at the end of this period, is the most credible mechanism for addressing the competition concerns identified by the Investigation Services in the preliminary assessment.
223. On the one hand, this mechanism is in line with the intention of the legislator, who favoured the negotiation route to determine the remuneration of related rights. As underlined in paragraph 80 of the Decision on interim measures, the objective of the Law on related rights is to establish a balanced negotiation framework "*in order to guarantee publishers and news agencies optimal transparency as to the parameters used by online public communication services to determine the amount of these revenues*" and therefore the basis for the remuneration of the related right as envisaged in Article L. 218-4 of the IPC.

224. On the other hand, should the negotiations fail, Google provides for the possibility for the negotiating parties to resort to arbitration to determine the remuneration due by Google to a publisher or a news agency⁷⁰. Google has undertaken to provide the arbitration tribunal with the information necessary for it to make an informed decision, namely the information and documents exchanged between Google and the negotiating party and with the trustee and experts in the course of the negotiations and, in particular, if the tribunal so requests, the provision of additional documents, including, inter alia, information relating to the offers made by Google to other negotiating parties⁷¹. This mechanism appears credible, insofar as arbitration is a common method of settling commercial disputes and as in the final proposed commitments, the award rendered by the arbitration tribunal will be binding on Google.
225. Moreover, to take into account the limited financial resources of news agencies and publishers, they may, if they wish, ask Google to pay the arbitrators' fees in full, both for the first-instance proceedings and for any appeal proceedings⁷². Google will only pay the arbitration fee at the request of the relevant negotiating party, which may therefore waive it. The arbitration tribunal may also request Google to bear all or part of the legal costs incurred by the publishers or news agencies, pursuant to Article 38 of the ICC Rules of Arbitration.
226. Lastly, the compensation terms determined at the end of the initial arbitration will apply in a non-suspensive manner, which will prevent Google from resorting to a review procedure before another arbitration tribunal for delaying purposes, as some respondents to the market test feared.
227. Without prejudging the comparative advantages of the arbitration mechanism adopted in Australia as compared to the arbitration mechanism provided for in the commitments, the *Autorité* notes that both procedures allow a competent and independent arbitration tribunal to make a choice between the offers proposed by Google and by the other negotiating party and ultimately to negotiate an offer that appears to be most reasonable. The Australian procedure, which may seem more constraining for the arbitration tribunal, nevertheless allows the tribunal to reject offers it receives if it considers them likely to prejudice the interests of the consumer. The implementation in France of a similar mechanism to take into account the interest of consumers, beyond the particular interest of the publisher or news agency concerned, would require the intervention of the legislator following the example of what has been done in Australia⁷³.
228. In this case, it will be for the arbitration tribunal to freely choose the methodology it deems most appropriate to determine the overall remuneration of protected content. The arbitration tribunal may, if it deems it appropriate, use the respective offers of Google and the other negotiating party as a reference point, deciding, if necessary, to adjust the amount of the offer that it deems more reasonable of the two. It should be noted that Google wanted the remuneration determined by the arbitration tribunal to be expressed as a price per impression. While Google's request seems legitimate, in that it will provide Google with a criterion for comparing its offers to publishers and news agencies, it should not have the effect of limiting the freedom of the arbitration tribunal to choose the valuation method it deems most relevant for assessing the remuneration of related rights.

⁷⁰ Paragraph 25 of the commitments.

⁷¹ Paragraph 28 (g) of the commitments.

⁷² Paragraph 28 (i) of the commitments.

⁷³ The arbitration system in Australia is not the result of a commitment procedure, but of a measure adopted by the Australian legislator.

229. The solution recommended by some respondents to the market test, involving defining a reference offer or a method of using related rights within the commitments validated by the *Autorité*, is not appropriate, since the legislator wanted this remuneration to be the result of negotiations between the stakeholders concerned. Moreover, such a solution would be particularly complex to implement, given the large number of stakeholders involved, the diversity of their business model and their legal situation.
230. Furthermore, the *Autorité* considers that it is not possible, as requested by some respondents to the market test, to require Google to commit to finalising commercial negotiations with the negotiating parties within three months. Such a commitment would be out of Google's control, since the outcome of a negotiation requires, in essence, that two parties reach an agreement. The solution of providing for a dispute resolution process at the end of the three-month negotiation period therefore appears to be the most appropriate solution for settling any disagreements between the stakeholders.
231. In any event, it should be recalled that Google will not be able to require publishers or news agencies to use the arbitration procedure provided for in the final proposed commitments⁷⁴. If a publisher or news agency does not want to use the arbitration process, they can either agree with Google to resolve their disputes through other dispute resolution methods, such as mediation, or they can take their case to court.

6. ON THE SIXTH COMMITMENT

232. In its final proposal, Google extended its commitment to respect a principle of neutrality in the negotiations for related rights vis-à-vis any other economic relationship to all press publishers and news agencies, whether or not the latter are parties to the negotiations. This commitment must prevent Google from rendering negotiations on related rights ineffective by offsetting the remuneration paid to publishers for their related rights against other activities. The aim is also to prevent Google from using its dominant position on the market for general search services to impose the use of some of its services during negotiations with publishers and news agencies.

7. ON THE DURATION OF THE COMMITMENTS

233. In their final version, the commitments are for a period of five years from the date of notification of the *Autorité's* decision, renewable once by a reasoned decision by the *Autorité*⁷⁵.
234. Furthermore, Google proposed extending these commitments to news agencies and publishers that have already entered into negotiations or concluded a contract with Google for related rights, either directly or through a professional association. News agencies and publishers with existing agreements will be able to amend or terminate those agreements at no cost so they can engage in new negotiations with Google, with the understanding that the compensation agreed to under their pre-existing agreements will continue to apply until the date of this amendment or termination⁷⁶. This improvement constitutes a substantial

⁷⁴ Paragraph 25 of the commitments.

⁷⁵ Paragraph 38 of the commitments.

⁷⁶ Paragraph 35 of the commitments.

guarantee of the scope of the commitments, insofar as a large number of press publishers have already entered into an agreement with Google for related rights.

8. REGARDING THE MONITORING OF COMPLIANCE WITH THE COMMITMENTS

235. According to the sixth paragraph of Article L. 464-8 of the French Commercial Code (*Code de commerce*) (translated), "*the Autorité de la concurrence shall ensure that its decisions are implemented*". It follows from these provisions that it is incumbent on the *Autorité* to ensure effective monitoring of the proper implementation of the commitments.
236. Given their nature, behavioural remedies require monitoring that may be more complex than that for structural measures⁷⁷. Indeed, as the *Autorité* noted in its study on behavioural remedies, assessing the implementation of these commitments "*requires an analysis, sometimes delicate, of the actions of their stakeholder and the context of their implementation*".⁷⁸ The monitoring of compliance with these commitments must also be carried out on a regular basis throughout the duration of their execution. As such, verifying these commitments "*often involves the mobilisation of significant resources, for the investigation services in particular*"⁷⁹.
237. While it follows from points 48 and 49 of the procedural notice of 2 March 2009 that the monitoring of compliance with the commitments may be carried out on the basis of reports sent by the company to the investigation services and that the latter may request additional information and, if necessary, carry out an investigation, the appointment of a monitoring trustee may, in certain cases, prove useful, particularly to monitor behavioural remedies.
238. The appointment of an independent trustee may allow the *Autorité* to effectively verify and monitor compliance with the commitments, while not overtaxing its resources⁸⁰.
239. Indeed, the usefulness of having recourse to a monitoring trustee lies in the fact that the latter acts independently of the company that has proposed the commitments. They contribute to the monitoring of compliance by drawing up regular reports for the *Autorité*. The trustee may also alert the latter to any difficulties in application⁸¹. Nevertheless, it should be emphasised that the *Autorité* is not bound by the assessment made by the monitoring trustee as to compliance with the commitments⁸².
240. In order to carry out its mission effectively, the monitoring trustee must be chosen in such a way as not to be in a conflict of interest with the company proposing the commitments, and be remunerated under conditions that allow them to carry out their mission properly. They must also have the necessary qualifications to ensure rigorous monitoring of compliance with the commitments. Finally, they must have access to the necessary information to be able to verify compliance with the commitments.

⁷⁷ See, to that effect, Decision 12-D-15 of 9 July 2012 of the *Autorité de la concurrence* regarding compliance with commitments in the decision clearing the Bigard Group's takeover of Socopa Viandes, paragraph 31 (French only).

⁷⁸ "*Behavioral Commitments*" study, page 148.

⁷⁹ *Ibid.*

⁸⁰ See, to that effect, Decision 13-D-15 of 25 June 2013 regarding practices implemented in the maritime freight transport sector between Northern Europe and the French West Indies, paragraph 175 (French only).

⁸¹ On these various points, see Study "*Behavioural Remedies*", page 380.

⁸² French Administrative Supreme Court (Conseil d'État), Assembly, 21 December 2012, Groupe Canal Plus company, No. 353856, in recueil, paragraph 41.

241. In this case, the intervention of an external trustee, who may, if necessary, be joined by one or more experts (financial, IT or specialised in intellectual property), seems particularly appropriate given the complexity and the resources necessary for the regular monitoring of negotiations on related rights.
242. The modalities for appointing the trustee, as proposed by Google, make it possible to guarantee both their independence and their effective capacity to ensure the implementation and respecting of the commitments⁸³. In addition to the guarantees of independence, the *Autorité* will ensure that the trustee has sufficient human and material resources to monitor compliance with commitments effectively, given the variety and potential complexity of the issues to be examined.
243. It follows from the proposed commitments that the monitoring trustee will be closely involved in the implementation of the commitments.
244. On the one hand, it will supervise the negotiations between Google and the publishers and news agencies⁸⁴, under the control of the *Autorité*. They will also be involved in the review and update of the minimum base of information that Google must provide to news agencies and publishers⁸⁵ and the list of information to be provided by news agencies and publishers to enter into negotiations with Google⁸⁶.
245. On the other hand, it will, if necessary, play an active role in settling any disagreements that may arise between the parties during their negotiations. The trustee may be required to issue opinions or proposals on any dispute relating to the certification of a press publisher or news agency, or on whether a press publisher's domain contains protected content⁸⁷, on the technical feasibility or appropriateness of a request for additional information⁸⁸, and on the manner in which responses to requests for additional information should be communicated to press publishers and news agencies⁸⁹. While the opinions and proposals are not binding on news agencies and publishers, Google has committed to comply with them. This mechanism provides a quick way to resolve disputes that, while binding on Google, preserve the freedom of news agencies and publishers to pursue their claims through other legal avenues if they see fit.
246. To carry out its mission and minimise the asymmetry of information that may result from the fact that Google alone has the information necessary to assess the proper performance of the commitments, the commitments include a non-exhaustive list of the documents that the trustee will receive without having to request them⁹⁰. In addition, the commitments provide that *"The Trustee and the Expert(s) may also ask Google to provide them with all documents, information and explanations necessary for the performance of their duties, and where necessary, to appoint an independent auditor to certify the financial data provided by*

⁸³ Paragraph 7 to 10 of the commitments.

⁸⁴ Paragraph 14 of the commitments.

⁸⁵ Appendix 1 of the commitments.

⁸⁶ Appendix 2 of the commitments.

⁸⁷ Paragraph 7 of the commitments.

⁸⁸ Paragraph 17 of the commitments.

⁸⁹ Paragraph 18 of the commitments.

⁹⁰ Paragraph 17 of the commitments.

Google." The trustee may also interact with publishers and news agencies that want to do so, as the commitments state in this regard that the trustee will be responsible for "*exchanging (virtually or in person), at their request, with the Negotiating Parties that are willing to or have already formally asked to enter into negotiations with Google, the status of the negotiations and any difficulties encountered*"⁹¹. Lastly, the trustee will have the ability to select the experts it wishes to appoint and, if necessary, name an independent auditor to certify the financial information provided by Google.

247. The trustee will submit a quarterly report to the *Autorité*, with a non-confidential version sent to Google and the publishers and news agencies. These quarterly reports, which will include a summary of the exchanges between Google and the publishers and news agencies, will allow the *Autorité* to regularly monitor the progress of the negotiations and be informed of any difficulties they raise. The trustee will also have to alert the *Autorité* without delay if it considers that Google is not respecting its commitments.

248. In view of these factors, the *Autorité* considers that, given the monitoring of compliance with Google' commitments, the appointment of a trustee with the means to carry out their mission enhances the verifiability of these commitments.

9. CONCLUSION

249. The *Autorité* considers that the commitments proposed by Google, in their final version of 9 May 2022, are likely to put an end to the competition concerns expressed in the preliminary assessment of the investigation services and are substantial, credible and verifiable. It is therefore appropriate to accept them, make them binding and close the procedure.

⁹¹ Paragraph 11 (iii) of the commitments.

DECISION

Article 1: The *Autorité de la concurrence* accepts the commitments made by Alphabet Inc., Google LLC, Google Ireland Ltd. and Google France, which form an integral part of this decision to which they are annexed. These commitments are made binding as of the notification of this decision.

Article 2: The referrals registered under numbers 19/0074 F, 19/0078 F and 19/0080 F are closed.

Deliberated on the oral report of Mr Grégoire Colmet-Daâge and Mr Frédéric Fustier, Rapporteurs (Case Officers), and the intervention of Ms Lauriane Lépine, Deputy Rapporteur General, by Mr Benoît Cœuré, President, Ms Fabienne Siredey-Garnier, Vice-President, Mr Henri Piffaut, Vice-President, Ms Laurence Borrel-Prat, Mr Jean-Yves Mano and Mr Savinien Grignon-Dumoulin, members.

Secretary of the hearing,

The Chairperson,

Claire Villeval

Benoît Cœuré

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