

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

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

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

Having regard to the letters registered on 15 November 2019 under numbers 19/0074F and 19/0075M, by which the *Syndicat des Éditeurs de la Presse Magazine* referred to the *Autorité de la concurrence* practices employed by Google LLC, Google Ireland Ltd and Google France in the press, online communication services to the public and online advertising sectors, and requested that interim measures be ordered;

Having regard to the letters registered on 19 November 2019 under numbers 19/0078F and 19/0079M, by which the *Alliance de la Presse d'Information Générale*, the *Syndicat de la Presse Quotidienne Nationale*, the *Syndicat de la Presse Quotidienne Régionale*, the *Syndicat de la Presse Quotidienne Départementale* and the *Syndicat de la Presse Hebdomadaire Régionale* referred to the *Autorité de la concurrence* practices used by Google LLC, Google Ireland Ltd and Google France in the press, online communication services to the public and online advertising sectors, and requested that interim measures be ordered;

Having regard to the letters registered on 19 November 2019 under numbers 19/0080F and 19/0081M, in which the *Agence France-Presse* referred to the *Autorité de la concurrence* practices employed by Google LLC, Google Ireland Ltd and Google France in the press, online communication services to the public and online advertising sectors, and requested that interim measures be ordered;

Having regard to the decision of 26 November 2019 issued pursuant to Article R. 463-3 of the French Commercial Code (*Code de commerce*), and joining the investigations of cases 19/0074F-19/0075M, 19/0078F-19/0079M and 19/0080F-19/0081M ;

Having regard to Article 102 of the Treaty on the Functioning of the European Union (“TFEU”);

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

Having regard to the Decisions on Business Secrecy 19-DSA-709 of 10 December 2019, 19-

DSA- 710 of 11 December 2019, 20-DSA-068 of 3 February 2020, 20-DSA-069 of 3 February 2020, 20-DSA-070 of 3 February 2020, 20-DSA-082 of 11 February 2020, 20-DSA-086 of 11 February 2020, 19-DSA-730 of 27 December 2019, 19-DSA-731 of 27 December 2019, 20-DSA-116 of 17 February 2020, 19-DSA-732 of 30 December 2019, 19-DSA-733 of 30 December 2019, 19-DSA-735 of 30 December 2019,

20-DSA-121 of 18 February 2020, 20-DECR-129 of 18 February 2020, 20-DECR-131 of 19 February 2020, 20-DEC-139 of 19 February 2020, 20-DEC-142 of 20 February 2020, 20-DSA-147 of 25 February 2020, 19-DSA-706 of 9 December 2019, 20-DSA-013 of 9 January 2020, 20-DSA-025 of 16 January 2020, 20-DSA-031 of 17 January 2020, 20-DSA-033 of 20 January 2020, 20-DSA-034 of 20 January 2020, 20-DSA-049 of 28 January 2020, 20-DSA-051 of 28 January 2020, 20-DSA-052 of 28 January 2020, 20-DSA-057 of 29 January 2020, 20-DSA-060 of 31 January 2020, 20-DSA-061 of 31 January 2020, 20-DSA-062 of 31 January 2020, 20-DSA-067 of January 31, 2020, 20-DSA-158 of 2 March 2020, 20-DSA-160 of 3 March 2020;

Having regard to the decision of 24 February 2020 by which the President of the *Autorité de la concurrence* appointed Ms Valérie Bros, member, to complete the quorum and to examine the case registered under numbers 19/0074F and 19/0075M, 19/0078F and 19/0079M, 19/0080F and 19/0081M at the session of the Standing Committee of 5 March 2020;

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

Having regard to the other evidence in the case;

The case handlers (*rapporteurs*), the Deputy General Rapporteur, the representative of the Minister of the Economy and the representatives of the *Syndicat des éditeurs de la presse magazine*, the *Alliance de la presse d'information générale* and others, *Agence France-Presse* and the companies Google LLC, Google Ireland Ltd, Google France, having been heard at the hearing with the *Autorité de la concurrence* of 5 March 2020;

Adopts the following decision:

## Summary<sup>1</sup>:

*Under this Decision, the Autorité de la concurrence (hereinafter 'the Autorité') orders interim measures against Google LLC, Google Ireland Limited and Google France (hereinafter 'Google').*

*On 15 and 19 November 2019, 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 "APIG"), which represent the interests of a very large number of newspaper and magazine publishers in France, and Agence France-Presse (hereinafter "AFP"), respectively referred to the Autorité practices employed by Google in the press, online public communication services and online advertising sectors.*

*According to the complainants, Google's implementation of Law 2019-775 of 24 July 2019, which is designed to create a related right in favour of news agencies and publishers (hereinafter, the "Law"), constitutes an abuse of a dominant position in violation of Articles L. 420-2 of the French Commercial Code (Code de commerce) and 102 of the TFEU, as well as an abuse of a situation of economic dependency.*

*The Law of 24 July 2019, which transposes into French law Article 15 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, aims to establish the conditions for balanced negotiations between publishers, news agencies and online public communication services in order to redefine the sharing of value between these stakeholders and in favour of publishers and news agencies. However, in order to comply with the Law, Google unilaterally decided that it would no longer display excerpts from articles, photographs and videos within its various services unless the publishers gave it permission to do so free of charge. In practice, the vast majority of news publishers have granted Google free licenses for the use and display of their protected content, without any negotiation and without receiving any remuneration from Google. In addition, under Google's new display policy, the licences granted to Google by publishers and news agencies give it the opportunity to reuse more content than before the Law on Related Rights came into force.*

*Against this backdrop, and in parallel with their complaints on the merits of the case, the complainants requested that interim measures be ordered in order to force Google to enter into negotiations with them in good faith.*

*At this stage of the investigation, the Autorité considered that Google is likely to hold a dominant position on the French market for general search services. Indeed, its market share of monthly searches was around 90% at the end of 2019. In addition, there are significant barriers to entry and expansion in this market due to the significant investments needed to develop search engine technology, and to network and experience effects that make Google's position difficult to challenge.*

---

<sup>1</sup> This summary is strictly for information purposes. Only the grounds of the decision listed below are binding.

*Furthermore, at this stage of the investigation, the Autorité considers that the practices referred by the complainants could be regarded as anti-competitive.*

*On the one hand, in that Google may have imposed unfair transaction conditions on publishers and news agencies within the meaning of Articles L. 420-2 of the French Code of commercial law (Code de commerce) and 102 a) of the TFEU by avoiding any form of negotiation and remuneration for the reuse and display of content protected under related rights.*

*On the other hand, Google is likely to have treated economic stakeholders in different situations in an identical manner, without any objective justification, and, therefore, to have employed 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.*

*Finally, in that Google may have abused its dominant position to circumvent the Law on Related Rights, in particular (i) by using the possibility available to 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; (ii) by refusing to communicate the information needed to determine the remuneration; and (iii) by using headlines of articles in their entirety based on the assumption the Law on Related Rights was not, on principle, applicable to them.*

*In its assessment, the Autorité also took into account the fact that Google's new display policy imposed more unfavourable trading conditions on industry stakeholders than those that existed prior to the entry into force of the Law on Related Rights and those that should have resulted from negotiations in good faith.*

*These practices are made possible by Google's likely dominant position on the market for general search services. This position leads to Google bringing significant internet traffic to the sites of publishers and news agencies. This traffic is also proving to be irreplaceable and critical for publishers and news agencies, which cannot afford to lose any part of their digital readership because of the economic difficulties noted by the legislator, and which justified the urgent adoption of the Law on Related Rights. Under these conditions, publishers and news agencies are placed in a situation where they have no choice but to comply with Google's display policy without any financial compensation. Indeed, the threat of downgraded display terms equates, for each news publisher, to a loss of traffic and therefore revenue, both if it is the only one affected by this and if it affects all publishers. It is also the reason why these publishers are forced to accept conditions that are even more unfavourable to them following entry into force of the Law on Related Rights than those that existed before it came into force.*

*The Autorité has found that serious and immediate harm has been caused to the press sector as a result of Google's behaviour, which, in the context of a major crisis in this sector, deprives publishers and news agencies of a vital resource to ensure the continuity of their activities, and this at the crucial time of entry into force of the Law on Related Rights. It has ordered interim measures allowing publishers and news agencies, if they so wish, to enter into negotiations in good faith with Google with a view to discussing both the terms and conditions for the reuse and display of their protected content and the corresponding remuneration. These negotiations must take place within a limited period of three months following the publisher or news agency's request and, in respect of remuneration, must include the period since 24 October 2019. During the negotiation period, Google shall continue to display text excerpts, photographs and videos in the manner chosen by the publisher or news agency concerned. In addition, in order to ensure a balanced negotiation, the interim measures provide for a principle of neutrality in the negotiations in terms of the*

*way in which the protected content of the publishers and agencies concerned is indexed, classified and more generally presented via Google's services, as well as a principle of neutrality in those negotiations in terms of the other commercial relations that Google has with publishers and news agencies. Finally, these interim measures will remain in force until the Autorité publishes its decision on the merits. During this period, and in order to ensure the effectiveness of these interim measures, Google shall provide the Autorité with regular reports on the arrangements for implementing this Decision.*

**TABLE OF CONTENTS**

**I. FINDINGS.....7**

**A. REFERRALS ..... 7**

**B. SECTOR AND UNDERTAKINGS CONCERNED..... 8**

**C. REPORTED PRACTICES..... 21**

**II. DISCUSSIONS..... 33**

**A. APPLICABILITY OF EU LAW..... 33**

**B. RELEVANT MARKETS..... 34**

**C. POTENTIALLY ANTICOMPETITIVE NATURE OF THE REPORTED PRACTICES..... 42**

**D. REQUESTS FOR INTERIM MEASURES..... 61**

**III. CONCLUSIONS..... 71**

## I. FINDINGS

### A. REFERRALS

#### 1. REFERRAL BY THE SYNDICAT DES ÉDITEURS DE LA PRESSE MAGAZINE

1. By letter registered on 15 November 2019 under number 19/0074F, the *Syndicat des Éditeurs de la Presse Magazine* (hereinafter “SEPM”) referred to the *Autorité de la concurrence* (hereinafter “the *Autorité*”) practices employed by Google LLC, Google Ireland Limited and Google France (hereinafter “Google”).
2. According to the complainant, Google, which enjoys a dominant position on the search engine market, has employed abusive practices through a sudden and unilateral change in its policy for displaying news content on the occasion of the entry into force of Law 2019-775 of 24 July 2019 creating a related right for the benefit of news agencies and press publishers (hereinafter “Law 2019-775” or the “Law on Related Rights”), transposing into French law the relevant provisions of Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market (hereinafter, the “Directive” or “Directive 2019/790”). Google's objective is purportedly to force news publishers to accept the displaying of their editorial content without remuneration. Such behaviour would constitute circumvention of the purpose of the Law on Related Rights with the aim of imposing unfair trading conditions on publishers under the threat of de-listing of their content from Google's services. In so doing, Google allegedly also abused the situation of economic dependency in which magazine publishers find themselves in respect of Google.
3. In addition to its complaint on the merits of the case, SEPM requested, by letter registered on 15 November 2019 under number 19/0075 M, interim measures pursuant to Article L. 464-1 of the French Commercial Code (*Code de commerce*).

#### 2. REFERRAL BY THE ALLIANCE DE LA PRESSE D'INFORMATION GENERALE AND OTHERS.

4. By letter registered on 19 November 2019 under number 19/0078F, 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') referred practices employed by Google to the *Autorité*.
5. According to the complainants, Google, which holds a dominant position on the general online search and online search advertising markets, employed abusive practices in the form of a series of unilaterally decided changes to the treatment of news results in its search engine and other services following entry into force of the Law on Related Rights. Google is said to have forced news publishers to make their editorial content available free of charge under the threat of downgraded display terms for their content within its services. In so doing, Google is alleged to have imposed unfair conditions on news publishers for the purchase of their content and to have wrongfully circumvented the Law on Related Rights. Lastly, Google allegedly also abused the situation of economic dependency in which magazine publishers find themselves in respect of Google.



6. In addition to its complaint on the merits of the case, AIPG requested, by letter registered on 19 November 2019 under number 19/0079 M, interim measures pursuant to Article L. 464-1 of the French Commercial Code (*Code de commerce*).

### **3. REFERRAL BY AGENCE FRANCE-PRESSE**

7. By letter registered on 19 November 2019 under number 19/0080F, *Agence France-Presse* (hereinafter “AFP”) referred practices employed by Google to the *Autorité*.
8. According to AFP, Google, which holds a dominant position on the online search market and the online search advertising market, has abused that position through changes to its news content display policy, which the complainant claims are aimed at abusively circumventing the spirit of Directive 2019/790 and Law 2019-775 and imposing unfair trading conditions on press publishers and news agencies in respect of reuse of their content. It is also claimed that these practices constitute an abuse of the situation of economic dependency in which magazine publishers find themselves in respect of Google.
9. In addition to its complaint on the merits of the case, AFP requested, by letter registered on 19 November 2019 under number 19/0081 M, interim measures pursuant to Article L. 464-1 of the French Commercial Code (*Code de commerce*).

### **4. JOINDER OF THE THREE REFERRALS**

10. By decision of 26 November 2019, the Deputy General Rapporteur of the *Autorité* joined Cases 19/0074F-19/0075M, 19/0078F-19/0079M and 19/0080F-19/0081M. The reference number for processing these cases following this joinder decision is 19/0074F-19/0075M.

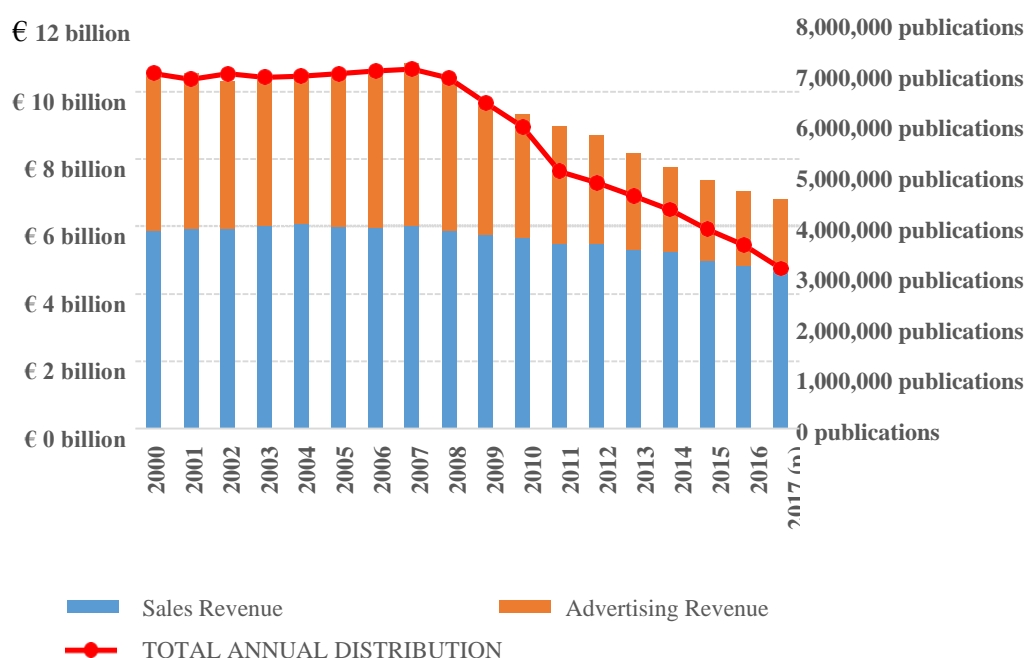
## **B. SECTOR AND UNDERTAKINGS CONCERNED**

### **1. THE PRESS SECTOR**

11. The press sector traditionally comprises several categories of stakeholders, including publishers and news agencies, printers and distributors (logistics intermediaries, sales agents, newsagents). In addition to these stakeholders, who are directly involved in the production of publications, there are also those involved in the advertising activity of press publishers (advertisers, advertising agencies). The paperless environment has led to the development of new intermediaries, who are active both in the field of publication itself and its modes of distribution to the public (content aggregators, digital kiosks) and online advertising (technical facilitation, data exploitation).
12. Press publishers are themselves made up of a myriad of stakeholders that differ in terms of the purpose of their publications (general and political news press, free news, specialised general public press, specialised technical and professional press, free advertising papers, etc.), their frequency (daily, weekly, monthly, quarterly, etc.), their format (magazines, others), their business model (sales by issue and/or subscription, commercial advertising and/or classified ads), or their distribution methods (paper or online only, mixed).

13. The specificity of the press sector is that the economic activities it represents also contribute to the functioning of a democratic society. In France, this sector is thus covered by a dedicated body of legal texts aimed at preserving the freedom and pluralism of the press, including in particular specific rules applicable to companies, business models, distribution models and aid to the sector. In this context, during the committee examination of the bill establishing a related right for news agencies and news publishers on 16 January 2019, Senator David Assouline stressed the *“essential nature of free, independent, pluralistic and professionally produced information for the vitality and quality of democratic debate”* (classification mark 6833).
14. The business model in the press sector is traditionally based on two sources of revenue: the sale of content, whatever the channel or model (sales by issue, subscriptions, etc.) and advertising. In 2017, press publishers in France generated revenues of approximately € 6.8 billion, of which € 4.8 billion (or 69%) came from sales and € 2.1 billion (or 31%) from advertising.
15. However, this model has undergone profound changes over the past decade. Between 2007 and 2017, the sector lost more than a third of its turnover, while total annual circulation slumped by 55% (or -7.8% per year).
16. This decline in revenues was mainly due to advertising revenues (- € 2.7 billion, i.e. more than two-thirds of the total € 4 billion decline in revenues). Advertising revenue accounted for 31% of the total revenues of news publishers in 2017 compared with 44% in 2007.

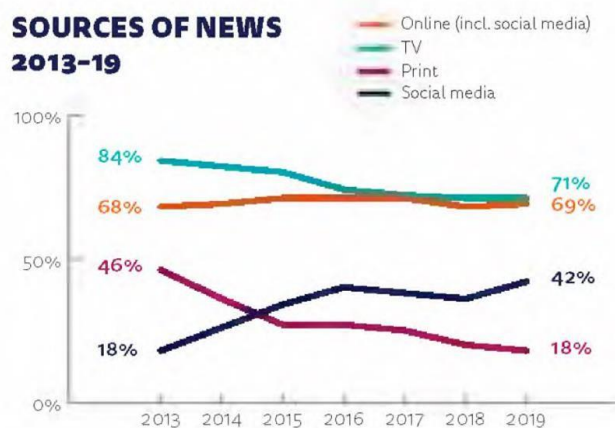
**Figure 1: Evolution of press revenues between 2000 and 2017**



Source <https://www.culture.gouv.fr/Sites-thematiques/Presse/Chiffres-Statistiques>

17. The steady decline in press advertising revenue is due in particular to changes in usage in the media sector stemming from the emergence and development of digital content. Thus, the decline in the use of print media has led to a decline in advertising revenues.

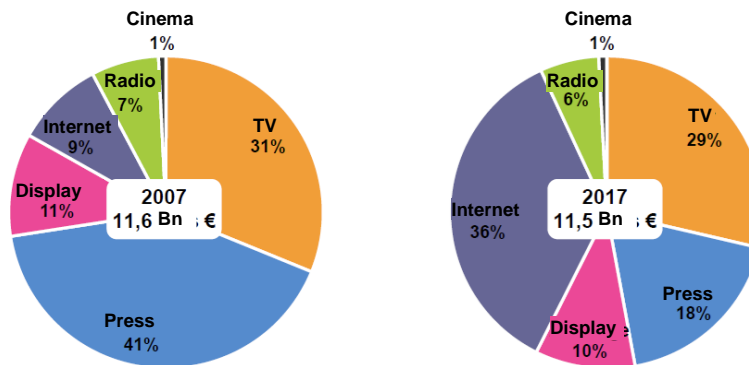
**Figure 2: Changes in usage in the media sector in France between 2013 and 2018**



Source: Reuters Digital News Report of 2019 (classification mark 8060)

18. In its Opinion [19-A-04](#) of 21 February 2019 on the audiovisual sector, the *Autorité* noted the sharp fall in press advertising revenue between 2007 and 2017. At the same time, it noted the significant increase in advertising revenues for digital stakeholders and indicated the following : “The majority of online advertising revenues are captured by search engines and social networks, primarily Google and Facebook, while traditional audiovisual stakeholders have a very low share of this market (around 9% in 2017) and enjoy more limited growth prospects” (§153).

**Figure 3: Comparison of the distribution of cross-media advertising revenues between 2007 and 2017<sup>2</sup>**



Source: Opinion 19-A-04 of the *Autorité de la concurrence*, page 42.

19. This finding is also in line with those of a study by the Bearing Point consultancy firm carried out jointly with the Ministry of Culture and the French Broadcasting Regulator (*Conseil supérieur de l'audiovisuel*, hereinafter “CSA”), which notes that these changes in advertising revenue come at a time when the digital audience of press publishers and the online communication expenditure of advertisers have increased from 1% in 2012 to nearly 9% in 2017 (classification mark 2161 and 2210).
20. In this respect, Report 243 of 16 January 2019 drawn up by Senator David Assouline (hereinafter “Report 243”) in the context of preparation of the Law on Related Rights highlights the structural difficulties in the press sector, which are characterized by a contraction of its two main sources of revenue (advertising and sales of paper copies), which are not offset either by the growth of online advertising, which mainly benefits digital players, or by digital sales.
21. Report 1912 of 30 April 2019 by MP Patrick Mignola on the establishment of a related right (hereinafter “Report 1912”) also warns about the phenomenon of value capture by digital stakeholders in the press sector: “*We know that nowadays infomediaries are taking advantage of the value created by the distribution of content that they do not produce and for which they do not bear the costs, to the point of capturing more than 90% of the growth of the online advertising market, more than two thirds of which is attributable to Google and Facebook alone [...]. In Portugal, the very existence of national media will be under such a threat over the next ten years or so, given the speed at which their advertising market is being absorbed by GAFAMs which, like the social networks Facebook and Twitter, are striving to become the world's leading media, without ever employing a journalist*” (classification mark 6674).

<sup>2</sup> The internet segment includes both search advertising and display advertising on websites, see opinion 19-A-04 of the *Autorité de la concurrence* of 21 February 2019 on a request from the Committee on Cultural Affairs and Education of the French National Assembly (*Assemblée nationale*) for an opinion on the audiovisual sector, page 42.

22. Finally, Report 243 describes the situation in the print media sector as “*alarming*”. While stakeholders are already suffering the consequences of this decline in both sources of income, there are also societal risks related to the need for debates based on verified information. The report states on this point that: “*Perhaps never before has the need for professionally processed information been so great. [...]*” (page 11)

## **2. COMPANIES CONCERNED**

### **a) SEPM**

23. SEPM is a professional trades union created in December 2012 comprising the *Syndicat de la Presse Magazine* (SPM) and the *Syndicat Professionnel de la Presse Magazine et d'Opinion* (SPPMO), whose registered office is in Paris. It brings together 80 press publishers, which publish more than 480 magazine titles in France, including both the paper version of the title and its online digital version where applicable.
24. The members of SEPM include the main magazine publishers active in France, such as the *Bayard Presse* groups (which publish, among other things, titles such as *Okapi*, *J'aime lire*, *Phosphore*, *Notre Temps*, etc.), *CMI Media* (*Elle*, *Ici Paris*, *Télé 7 jours*, etc.), *Prisma Media* (*Télé Loisirs*, *Femme Actuelle*, *Voici*, *Geo*, *Capital*, *Gala*, etc.), *Groupe Sebdo-Le Point* (*Le Point*), *Le Nouvel Observateur* (*L'Obs*), *Groupe L'Express* (*L'Express*) or *Marie-Claire Group* (*Marie Claire*, *Cosmo*, etc.) (classification marks 65 to 75).
25. Under the terms of its articles of association, SEPM's objects include (i) defending the collective professional interests, both material and moral, of publishers of paper and digital magazine titles, (ii) providing advice and assistance to its members in the technical, commercial and legal fields in order to contribute to the development of the magazine press in France and (iii) representing the collective interests of the profession and its members in legal proceedings (classification mark 78).

### **b) APIG and its trade union members**

26. The *Alliance de la Presse d'Information Générale* is a union of unions created in September 2018 by the four professional unions - *Presse Quotidienne Nationale* (“SPQN”), *Régionale* (“SPQR”) and *Départementale* (“SPQD”) and the *Syndicat de la Presse Hebdomadaire Régionale* (“SPHR”). Its registered office is located in Paris. As at 15 November 2019, APIG represented 298 member newspapers (classification mark 110, 19/0079M).
27. The mission of the *Alliance de la Presse d'Information Générale* is to be the main point of contact with the public authorities, public and private partners, representing the collective interest of the French daily press and related sectors (classification mark 12, 19/0079M). It is chaired by Mr. Jean-Michel Baylet, who is also President of the SPQR (classification marks 63 and 75, 19/0079M).
28. The SPQN is a trade union organisation representing the French national daily press. As at 15 November 2019, it represented 8 press groups and 12 nationally active newspaper titles (classification mark 117, 19/0079M)<sup>3</sup>.

---

<sup>3</sup> These are those press groups and newspapers: Groupe Parisien - Les Échos (Today in France, Les Échos); Groupe Bayard Presse (La Croix); Groupe Amaury (L'Équipe); Groupe Figaro (Le Figaro); L'Humanité; Groupe Lagardère (Le Journal du Dimanche); Libération; Groupe Le Monde (Le Monde); The New-York Times France; L'Opinion; Groupe Turf Editions (Paris-Turf).

Under the terms of its articles of association, the SPQN's objects include (i) the study and defence of the collective professional interests, both material and moral, of national daily press publishers, (ii) representation of the collective interests of the profession in legal proceedings and (iii) advice and assistance to its members in commercial and legal matters (classification mark 77, 19/0079M).

29. The SPQR is a trade union organisation representing the French regional daily press. As at 15 November 2019, it represented 14 press groups and 36 regional dailies active throughout metropolitan France (classification mark 117, 19/0079M). Under the terms of its articles of association, the SPQR's object is to defend the professional and moral interests of its member press companies (classification mark 85, 19/0079M).
30. The SPQD is a trade union organisation representing the French daily press in the *départements*. As at 15 November 2019, it represented 8 press groups and 25 local dailies active throughout metropolitan France and in the overseas territories (classification marks 116 and 117, 19/0079M). Under the terms of its articles of association, the SPQD's object includes defending the moral, social, professional, economic, industrial and commercial interests of the press at *département* level and validly represents all of the press at *département* level before the administrative authorities (classification mark 97, 19/0079M).
31. The SPHR is a trade union organization representing the French regional weekly press. As at 15 November 2019, it represented 225 regionally based weeklies active throughout metropolitan France and in the French overseas territories (classification marks 110, 19/0079M)<sup>5</sup>. Under the terms of its articles of association, the SPHR's object is to defend the moral and material interests of its members and validly represents all its members in dealings with all public or private organizations (classification mark 104, 19/0079M).

#### **c) AFP**

32. AFP is a worldwide, generalist news agency of French origin, tasked with collecting, checking, cross-checking and disseminating, both in France and abroad, information 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. It is a *sui generis* body whose articles of association and missions stem from Law 57-32 of 10 January 1957 creating *Agence France-Presse*<sup>6</sup>. It is registered with the Paris Trade and Companies Register (classification mark 5, 19/0080F).
33. AFP is present in 151 countries through 201 offices. It provides complete coverage of world news in all fields and in all forms: photography, computer graphics, video and text. Every day it produces more than 5,000 dispatches, 3,000 photographs and 300 videos. In 2018, AFP had a turnover of around 300 million euros (classification mark 5, 19/0080F).

---

<sup>4</sup> These include the following press groups and newspapers : La Dépêche du Midi (Groupe Dépêche du Midi), Ouest France (Ouest France Group), Le Parisien (Groupe Parisien - Les Échos), Sud Ouest (Sud Ouest Group), le Télégramme (Groupe Télégramme) and La Voix du Nord (Groupe Rossel - La Voix).

<sup>5</sup> The complete list of member weeklies is available on the following website <http://sphr.fr/hebdomadaires/>

<sup>6</sup> <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000315388>

#### **d) Google**

##### ***The company***

34. Google is a company created in 1998 whose founders invented the search engine of the same name, which is the most widely used search engine worldwide and in France. Google's activities are now focused in four main areas: the supply of online search services, platform and operating systems offer, online advertising and computer equipment.
35. As a result of an internal reorganization, 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<sup>7</sup>.
36. In France, Google LLC provides advertising services to web and mobile application developers mainly through Google Ireland Ltd, whose ultimate parent company is Alphabet Inc (classification mark 4993).
37. Google France is a limited liability company specialising in media advertising sales, a subsidiary of Google LLC, with its registered office in Paris.
38. In 2019, the consolidated worldwide turnover of Alphabet Inc, the umbrella company of Google Group, was 144.58 billion euros<sup>8</sup>.
39. The companies Google LLC, Google Ireland Limited and Google France will be referred to together or separately in the rest of the decision as "Google".

##### ***General overview of Google's activities***

40. Google's business model is based mainly on the interaction between services provided to users, without financial compensation but giving it access to the users' personal data, and online advertising services, from which it derives most of its revenue<sup>9</sup>.
41. In order to maximise their attention, Google offers a wide range of services to users and displays news content, in particular on its general search service "Google Search" (or "Search"), on its news service "Google News", and on its "Google Discover" (or "Discover") service. These various services are presented below.

*News content displayed as part of the generalist online search service "Google Search"*

---

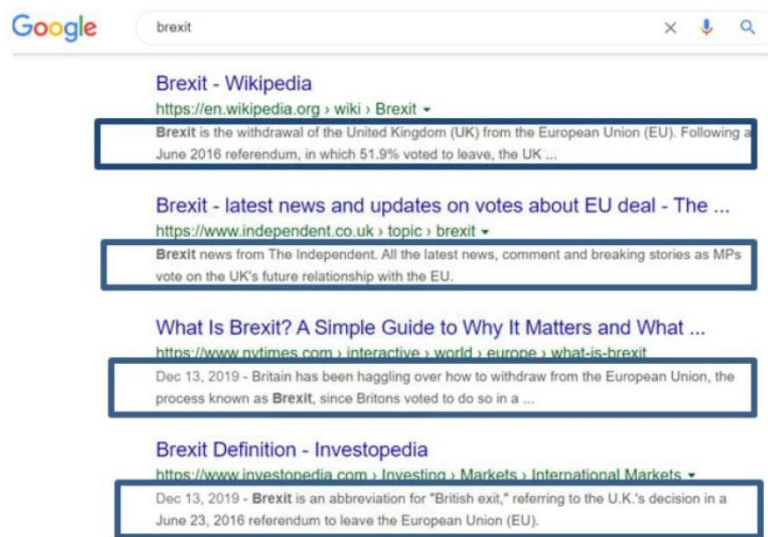
<sup>7</sup> See the Decision 19-D-26 of the *Autorité* of 19 December 2019 regarding practices employed in the online search advertising sector, paragraph 8, and classification mark 4992.

<sup>8</sup> SEC Form 10-K ([www.sec.gov](http://www.sec.gov)). Conversion into euros on the basis of the average exchange rate from 1 January 2019 to 31 December 2019 according to ECB data (€1 for \$1.1195, [www.ecb.europa.eu](http://www.ecb.europa.eu)).

<sup>9</sup> See aforementioned Decision 19-D-26, paragraph 13.

42. The online search engine service, Google Search, is Google's flagship service, accessible via the website [www.google.com](http://www.google.com) or its local versions (in France: [www.google.fr](http://www.google.fr)). It allows users to search for information on the Internet by entering a keyword or a series of keywords (which together constitute a "query"), after which Google Search proposes and displays the corresponding results<sup>10</sup>.
43. Within Google Search, Google may display news-related results in the form of "standard" results showing a title, the name of the source website and a text excerpt. These results can be enriched by including a thumbnail image. These display features apply regardless of the medium used (computer, mobile phone, tablet).
44. Google uses the term "*snippet*" to refer to the excerpt displayed in the search results. The term "*snippet*", according to Google, does not cover the title or any thumbnail image appearing in search results. This can be seen in the following illustrations provided by Google, where what Google calls a "*snippet*" only corresponds to the text excerpts in the blue boxes.

### Screenshot - Google Search - Snippets



*Source: Google's response to the Questionnaire from the Investigation Services, classification mark 4954*

45. In addition, Google Search has features that allow you to respond specifically to searches for news and in particular:

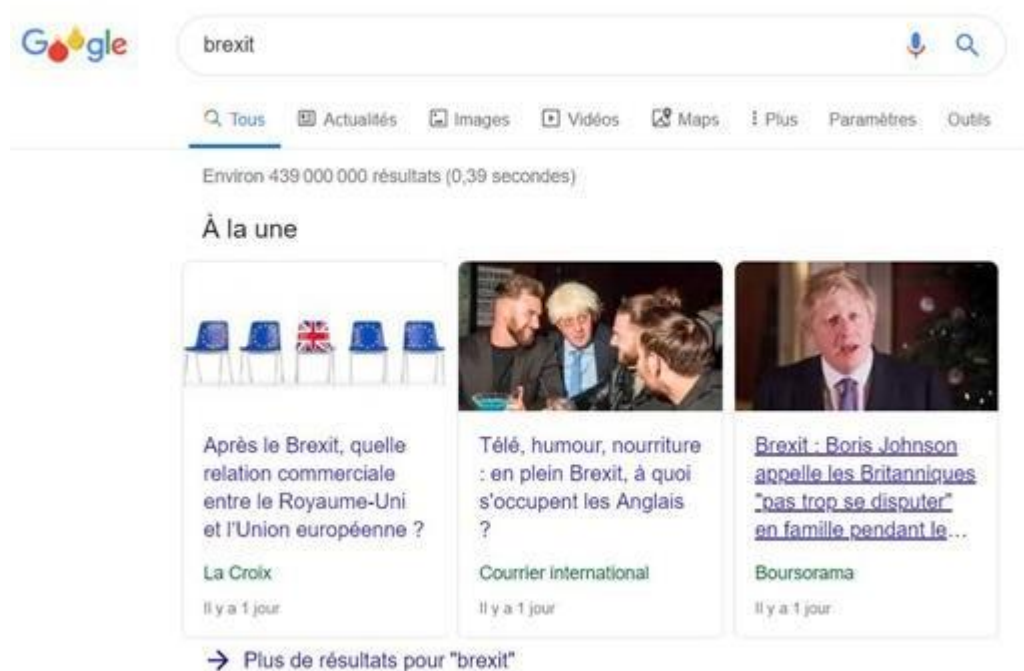
---

<sup>10</sup> In order to do this, Google Search performs a series of operations described by Google in the following manner: "Google displays its search engine results in three main steps. First, it crawls websites to gather information about their content. Second, it stores this information in its index. Third, in response to a user query, Google ranks these sites according to their likely relevance to the query and displays them on that basis on its results pages." (classification mark 4936)



- *“Top stories”* takes the form of a carousel of topical results that can be scanned horizontally and appear above the results from natural referencing. Google indicates that the *“Top stories”* “carousel” usually displays the title of the article and the name of the publisher, often accompanied by a thumbnail image and an indication of how long ago the article was published. According to Google, *“Top Stories”* does not usually include an excerpt from the article.<sup>11</sup> (classification mark 5339)

### Screenshot - Google Search - Top Stories

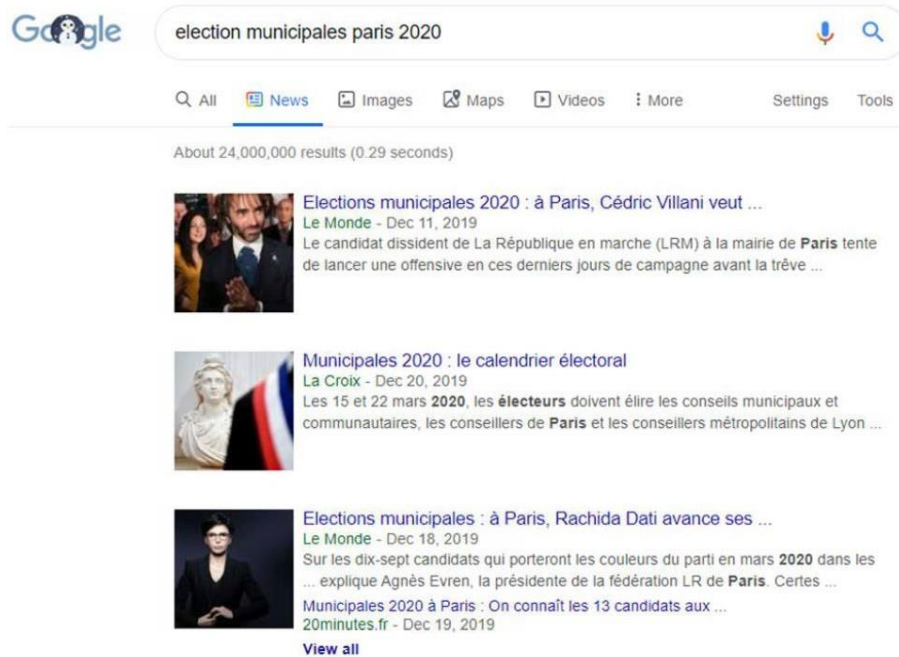


Classification mark 4955

- The News Tab is a search tab that users can click on from the results page (*“News”* in the illustration below) and which filters the results to select only news articles. The News Tab usually displays the title of the article and the publisher's name, along with a thumbnail image and an excerpt from the article, as shown in the illustration below, which is included in the file.

<sup>11</sup> For the sake of completeness, it should be noted here that in order to appear on the mobile "Top stories" carousel, publishers' content must be available through the MPA protocol. This protocol allows caching of publishers' pages to speed up their loading on to users' mobile devices. As Google indicates, the use of protocol "is equivalent to giving consent to 'caching' and previewing large images. However, since Google's roll-out of the new thumbnail and snippet size settings, AMP publishers (like all publishers) can use markup to change the size of the pre-viewable images if they wish" (classification marks 4942 and 4943).

## Screenshot - Google Search - News Tab



Classification mark 4 956

46. The direct revenues generated by these services are mainly derived from advertising activities, comprising in particular the sale of space to advertisers (see, in this respect, paragraphs 18 et seq. of Decision 19-D-26 of the *Autorité*), which is facilitated by Google's collection of user data in relation to its services: *"Google's business is about building products and services that users like, and offering advertisers effective and high-quality advertising opportunities. It does not monetise data in and of itself. Data are, for instance, an element in the ad generation process that contribute to identifying ads that are likely relevant to a user. However, the key contributors for the quality and relevance of Google's ads are Google's technologies and engineering efforts. Showing relevant ads renders ads more useful for users and more effective for advertisers because it increases the likelihood that clicks will come from users who are genuinely interested in the advertised offer."* (classification mark 4943, emphasis added).
47. Google also derives indirect revenues from the various advertising intermediation services<sup>12</sup> that it offers to news publishers and which are partly based on the use of user data (classification mark 4 944).

<sup>12</sup> Opinion 18-A-03 of the *Autorité* of 6 March 2018 on data processing in the online advertising sector states that the online advertising sector is characterised by the existence of numerous markets, including service publishing, intermediation, ad server services and data mining services. As regards Google's positioning on these markets, the opinion notes that Google is present in all areas of advertising intermediation. It provides several services to advertisers (ad network, DSP, ad server) to implement campaigns and deliver ads on its own services and on third-party sites and applications. It also provides several services to publishers (ad network, SSP, Ad Exchange, ad server). Google also provides several data collection and exploitation services (Data Analytics, DMP and tag management) as well as a range of cloud computing tools, which can be used in conjunction with advertising tools to exploit very large volumes of data.

More generally, the collection of user data contributes to improving Google's services and making them more attractive to users (classification mark 2 398). However, this data collection is likely to increase, as the number of French people using the Internet to follow the news is constantly growing. ARCEP's<sup>13</sup> 2019 Digital Barometer notes in this regard that

*"In 2019, a majority of French people - 63% of the total population and 72% of the Internet user population - used the Internet to follow the news in the last 12 months. These figures have been increasing since 2016, +4 percentage points for both populations."* (classification mark 5 654)

*News content displayed as part of the specialized service "Google News"*

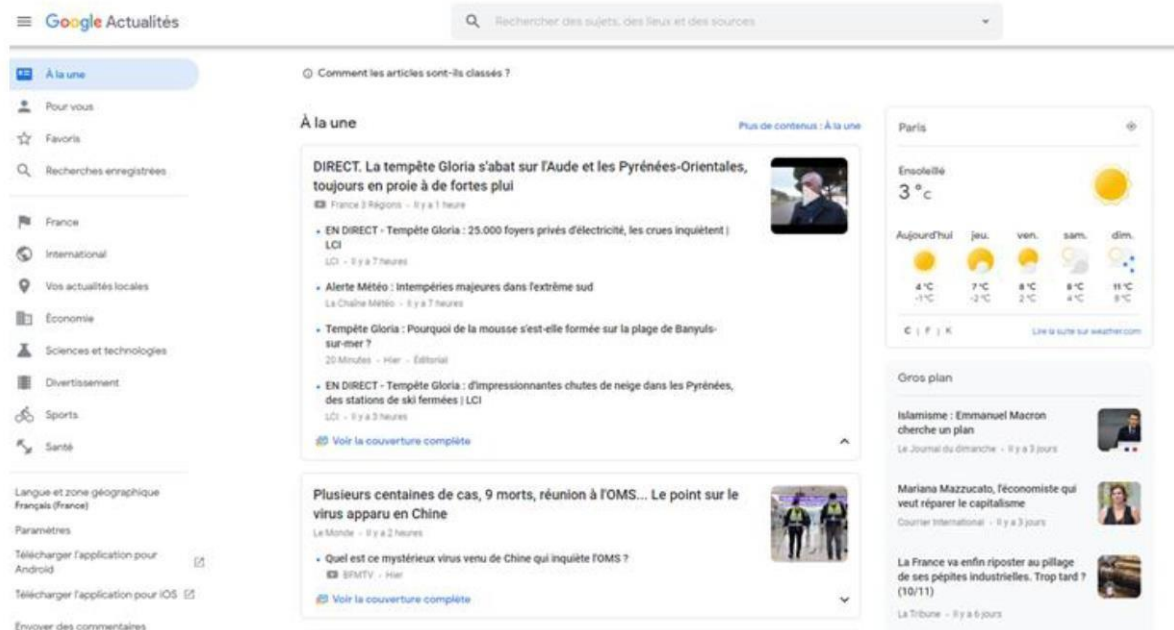
48. Google News (accessible via [www.news.google.com](http://www.news.google.com), as well as through mobile applications available on iOS and Android) is a Google service that is separate from Google Search and entirely dedicated to news.
49. On its homepage, Google News presents news content selected according to the user's language and region, without the user having to make a prior request. The user can also access different categories - "Top stories", "For You", "International", "Your Local News", "Economy", etc. - where content is grouped by topic. Finally, this service also offers the user the possibility of performing news searches (classification mark 4 938).
50. The content presented in Google News is a subset of the Google Search index and appears according to specific ranking rules (classification marks 4936 and 5330). During the hearing, Google explained that the way in which publishers could choose whether or not to appear on the service changed at the end of 2019 (classification mark 4 423): *"Until the end of last year (2019), publishers had to fill out a form to be displayed in Google News. Now, editors can opt out of Google News by giving an instruction to the robots"*.<sup>14</sup>
51. Depending on the information provided by Google, content is displayed in Google News differently from in Google Search. Links to news articles and content are presented in the form of a title, accompanied by the name of the publisher, an indication as to whether or not the content in question is recent and sometimes a thumbnail image, generally without text excerpts or "snippets" (classification marks 5340 - 5341), as shown in the illustration below.

---

<sup>13</sup> Document also available at the following address  
[https://www.arcep.fr/uploads/tx\\_gspublication/rapport-barometre-num-2019.pdf](https://www.arcep.fr/uploads/tx_gspublication/rapport-barometre-num-2019.pdf)

<sup>14</sup> The term "robot" refers to the automated crawlers used by Google services to collect and index the resources available on the Internet.

**Figure 2: Screenshot of Google News (news.google.fr) - Top stories section**



Classification mark 5357

52. Finally, the results displayed in Google News are also based, in the case of mobile applications, on hosted content for which Google has acquired use rights from press publishers. In this respect, Google explains in its response to the Questionnaire dated 13 January 2020 from the Investigation Services that *“Google News (news.google.com and the Android and iOS News apps) also relies on Google’s general Search index, but the apps also carry additional content: news publishers who have agreements with Google may provide RSS<sup>15</sup> feeds of their content to Google News directly.”* (classification mark 5330).

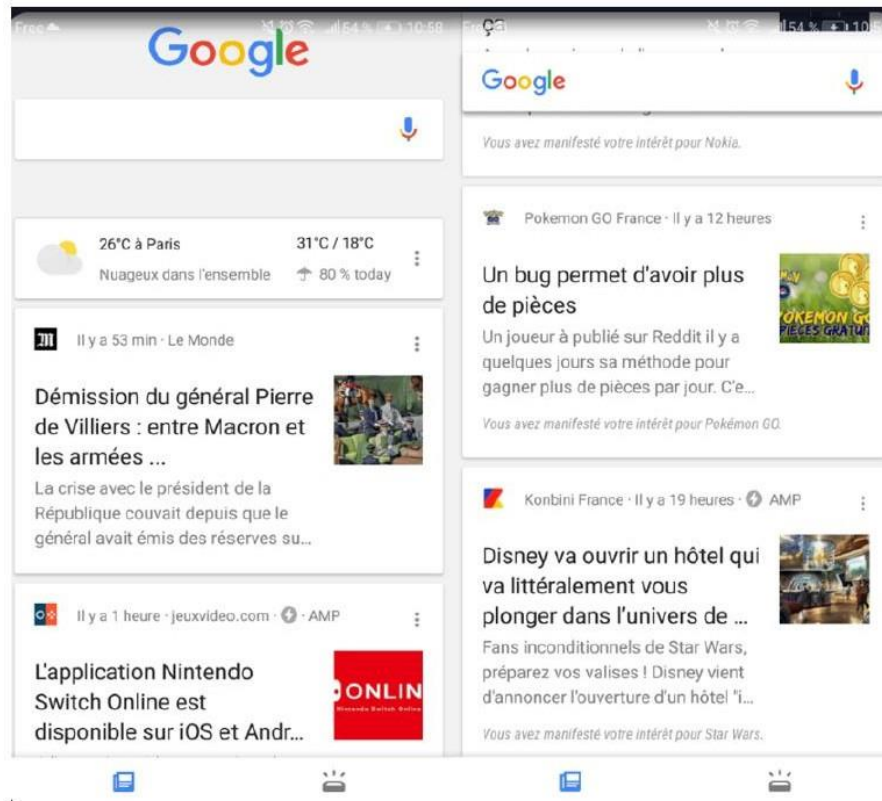
*News content displayed as part of the "Google Discover" service*

53. Google Discover is a service linked to Google Search, which is accessible on mobile phones or tablets, and which presents users, without them having to make a specific query, with content selected based on their past interactions with Google products, or based on topics that they tend to follow. The content displayed as part of the *Discover* service may include news amongst other things (classification mark 4938).
54. As Google explained during the investigation, there are close links between Google Search and Discover, which is *“an extension of Search”* (classification mark 4423). In its written observations of 1<sup>st</sup> January 2020, Google also stated that *“Discover is not a specialised news service: it is essentially the general search engine operating without a specific query, instead using the user’s known interests to deliver a personalised feed of results the user may be interested in. Users can access Google Discover through the Google app or through their web browser on a phone or tablet.”* (classification mark 3673)

<sup>15</sup> Acronym corresponding to “Really Simple Syndication” and designating a family of data formats.

55. The results displayed by Discover, which may be news related, are mainly *“in the form of thumbnail images, page titles, publisher or domain names, and potentially text snippets or animated video previews”* (classification mark 3678), as shown in the illustration below.

### Screenshot - Google Discover



Classification mark 3678

#### e) Links between Google and the press industry

56. Google and the press industry have forged many ties in recent years. The developments below provide a description of these links, which are of particular importance in this case.
57. The indexing and display of the content of press publishers in Google's services is done in particular via robots deployed by Google to which the publishers can give instructions. Firstly, the Robot Exclusion Protocol (REP), which allows publishers to grant or deny access to automated crawlers to parts of their sites. Then there are the Meta tags, which, like the REPs, issue instructions to the robots. Using these tags, publishers can, among other things, ask robots to index web pages or not. Publishers can also give their consent to index and display their content using Google's special tools, which allow them to customize the presentation of their content in Google Search and Google News. Finally, thanks to the *“Publisher Center”*, publishers can manage the presentation of their content in Google News. (classification marks 5009 to 5011)

58. With regard to advertising activities, publishers and press agencies can act as sellers of advertising space or as advertisers.
59. When they sell advertising space, Google may interact with them as an intermediary in the advertising ecosystem (classification marks 5007 and 5008). Within this context, some publishers may choose to conclude an advertising concession agreement with Google Ad Exchange. Under this agreement, Google markets some of the advertising space of news publishers to advertisers, either through real time bidding or by direct agreement. In return for this service, Google receives a commission for the space sold on behalf of the publisher concerned (classification mark 518).
60. When acting as advertisers, publishers may, in particular, enter into contracts with Google Ads (formerly Ad Words) under which they purchase keywords to promote their websites on Google's search engine via sponsored links (classification mark 517). In addition, Google offers a range of ad management services through the Google Marketing Platform. Among these services, news publishers can conclude a Google Analytics or Google Analytics 360 contract, under which Google offers audience and traffic analysis of their websites. News publishers pay Google for these services (classification marks 517 and 5008).
61. Finally, Google has developed specific initiatives for the press sector, such as the “*Google News Initiative*”, which aims to fund and support press organisations that have developed initiatives to run quality projects, and “*Subscribe with Google*”, which allows users to purchase a subscription from participating publishers via their Google account (classification marks 5005 and 5006).

### **C. REPORTED PRACTICES**

62. The complainants have reported the change in the policy for displaying news content within Google's various services, including Google Search, Google News and Discover, concurrently with entry into force of the Law on Related Rights.
63. It is appropriate to first present the applicable legal framework (1) and how Google applies the Law on Related Rights, as well as how news publishers are positioning themselves in respect of these new display rules (2).

#### **1. APPLICABLE LEGAL FRAMEWORK**

##### **a) Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market**

64. Through Directive 2019/790, the European legislator has, among other things, pursued the objective of establishing a legal protection system for publishers and news agencies taking into account the specificities of the press sector and its role in a democratic society. The recitals of the Directive stipulate the following:

- “A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society” (recital 54) ;
- “The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information.” (Recital 55).

65. In order to achieve this objective, Article 15 of the Directive provides for the creation of a related right for the benefit of publishers of press publications, giving them the right to authorise or prohibit the reproduction of their publications by platforms, aggregators and search engines:

*“Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.*

*The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.*

*The protection granted under the first subparagraph shall not apply to acts of hyperlinking.*

*The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.”*

66. The reproduction right referred to in the above-mentioned Article 15 of the 2019 Related Rights Directive was defined by Article 2 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, entitled “Reproduction right”. Under these provisions: *“the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonograms producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite”* and Article 3(2) of Directive 2001/29/EC provides for : *“the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite”*.

67. In order to assess the scope of Article 15 of the Directive, it is worthwhile making certain clarifications, which result both from the scope of the Directive - in the light, in particular, of the definitions laid down in Article 2 thereof - and from its recitals.



68. First of all, the Directive covers both publishers and news agencies. In this respect, the Directive stipulates that “*publisher of press publications*” should be understood to mean “*service providers, such as news publishers or news agencies, when they publish press publications*” (recital 55).
69. Secondly, the Directive does not limit the scope of protection of related rights to text content alone but may extend to other protected works or objects (such as photographs or videos). Thus, the notion of “press publication” is defined as “*a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which [...] constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine; [...] has the purpose of providing the general public with information related to news or other topics; [...] is published in any media under the initiative, editorial responsibility and control of a service provider*” (Article 2, emphasis added).
70. Furthermore, recital 57 provides that “*the rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC*”. In this respect, Directive 2001/29/EC specifies that “*If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work*” (Recital 10, emphasis added).
71. Moreover, recital 58 specifies the scope of this related right defined by the Directive: “*The use of press publications by information society service providers can consist of the use of entire publications or articles but also of parts of press publications. Such uses of parts of press publications have also gained economic relevance. At the same time, the use of individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive. Taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive*”.
72. Lastly, Article 15, paragraph 4, establishes the duration of the protection granted to publishers and news agencies by providing that these related rights “*shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published*”.

**b) Law 2019-775 of 24 July 2019 creating a related right for the benefit of news agencies and press publishers**

***The objectives pursued by the national legislator***

73. The purpose of Law 2019-775 of 24 July 2019 is to create a related right for the benefit of news agencies and press publishers. It transposes into domestic law Article 15 of the aforementioned Directive 2019/790.



74. France did not wait for the deadline of 7 June 2021 granted to Member States to transpose Article 15. Indeed, the Law on Related Rights stems from a parliamentary bill tabled on 5 September 2018 - i.e. before adoption of the Directive - by Senators David Assouline, Patrick Kanner, Marc Daunis and the members of the Socialist and Republican Group.
75. The explanatory memorandum to this parliamentary bill justifies the need for legislation in these terms in the following terms: *“Search engines reproduce and distribute millions of unlicensed texts, photographs and videos on their own pages, as if they were free of rights, which in fact causes considerable economic damage to news agencies and their authors. These search engines have become veritable information and data bases, exploiting content that they have neither created nor financed and for which they pay no remuneration”*<sup>16</sup>. In this regard, during parliamentary proceedings, concerns were raised about *“newer techniques (“snippets”)”* that double the hyperlink<sup>17</sup> taking the user to a press article *“from a reprint, an excerpt, or any other element likely to explain the content of the link”* and about the fact that it would appear *“that a large proportion of Internet users are satisfied with this information without feeling the need to go and click on the link, and therefore to visit the site, which subsequently cannot monetize its content via a subscription or advertising”*. (page 18)
76. The choice of such a rapid transposition - barely three months after the adoption of the Directive - can be explained by the willingness of parliamentarians to respond to what they considered to be an emergency situation, which was stressed throughout the parliamentary debates, notably in Report 243 drawn up by the aforementioned Senator Mr. David Assouline, who states that: *“There is a very real urgency to act on this matter: publishers and news agencies are losing resources every day and, every day, the major platforms are making huge profits by using articles written by journalists and photos produced by agencies.”* (page 26)
77. Following the example of what already exists for other stakeholders in the cultural industries (publishers of phonograms and videograms, audiovisual communication companies), the introduction of a related right for the benefit of news agencies and press publishers should, according to the will of the legislator, enable them to ensure better protection of their content and the development of their structures and products, by protecting both their human and financial investments. Thus, the objective of this new related right is to rebalance the existing balance of power between digital players and press operators by redefining the sharing of value in favour of the latter.
78. The above-mentioned report also looks at specific developments relating to news agencies, which are the main providers of images and videos to press publishers, stressing that *“Content produced by agencies and licensed to publishers may end up online without any authorisation in the context of an unintended and therefore non-remunerated use. This is especially true for images, which can be stored ad infinitum in “image banks”*. The objective pursued by the Law therefore concerns the protection of content produced by both press publishers and news agencies (extracts from articles, photos, videos and computer graphics).

---

<sup>16</sup> <https://www.senat.fr/leg/pp17-705.html>

<sup>17</sup> Link associated with part of a hypertext document, which directs the user to another text or multimedia content (Larousse).

79. Thus, the new system is intended in particular to ease the burden of proof on publishers and news agencies to prove reproduction and take action against the mass reproduction of their online publications. Indeed, in his Report 1912, MP Mr Patrick Mignola notes that *“Faced with the capture of their revenues by ‘infomediaries’, publishers and news agencies are at a loss”* insofar as *“the legal instruments of protection available to press publishers in the field of trademark law and civil liability in the physical world are ineffective in the digital world.”* (pages 22-23). He adds in this regard that: *“While publishers have a right to the collective work constituted by a newspaper title as a whole, they do not have a right to the use of each article or part of an article considered in isolation, whereas today there is more competition between articles than between newspaper titles”*. In these circumstances, he considers that *“the granting of related rights to publishers and news agencies will ease the burden of proof that an infomediary has reproduced all or part of their content without authorisation”* (classification marks 6690 and 6691).
80. Furthermore, the legislator envisaged negotiation as the appropriate means of making it possible to remunerate publishers and agencies for their related rights. The objective pursued by the Law is thus to establish a balanced negotiating framework *“in order to guarantee publishers and news agencies the highest level of transparency in terms of the parameters used by online public communication services to determine the amount of these revenues”*<sup>18</sup> and thus the basis for the remuneration of the related right as established in Article L. 218-4 of the French Intellectual Property Code (hereinafter “IPC”). In this context, the legislator stressed, with regard to this transparency obligation placed on the platforms, that *“it is essential to ensure transparent transmission of data allowing for the most objective possible assessment of the base for and amount of the remuneration, knowing that this cooperation could flourish, beyond mere remuneration for the use of content, thanks to the conclusion of partnerships, in particular in respect of data exchanges, within a ‘win-win’ relationship”*.
81. Finally, with regard to the negotiations over remuneration of related rights, the above-mentioned Report 1912 stressed the importance of taking into account *“the human, material and financial investments made by publishers and press agencies, as well as the notion of contributing to public debate and the functioning of democracy”*.
82. This quest to rebalance the balance of power between press publishers and news agencies on the one hand, and online platforms on the other, is thus one of the key objectives of the Law, which aims to afford publishers the means of achieving stabilised cooperation with digital players. Report 1912 states in this respect: *“Thanks to the balance afforded by the protection of their economic rights, publishers and news agencies will be able to enter into cooperation on a sound basis with online platforms that use their content”*. (pages 60 and 61).

### ***The content of Law 2019-775***

83. In accordance with Article 15 of the Directive, Article 4 of Law 2019-775 creates a related right for the benefit of press agencies and publishers through provisions inserted in a new Chapter VIII entitled *“Rights of press publishers and press agencies”*, added to Title I of Book II of Part 1 of the IPC.

---

<sup>18</sup> Mignola Report of 30 April 2019, pages 8-9

This new chapter includes Articles L. 218-1 et seq. of the IPC created by the Law on Related Rights.

84. Article L. 218-1 defines the notion of press publication, as well as the scope of the content protected by related rights:

*“I. - For the purposes of this Chapter, a press publication shall be understood to mean a collection consisting mainly of literary works of a journalistic nature, which may also include other protected works or subject-matter, in particular photographs or videograms, and which constitutes a unit within a periodical or regularly updated publication bearing a single title, with the aim of providing the public with information about news or other published subjects, in any medium, at the initiative, under the editorial responsibility and under the control of the press publishers or a press agency.*

*Periodicals that are published for scientific or academic purposes, such as scientific journals, are not covered by this definition.*

*II. - For the purposes of this chapter, a news agency shall be understood to mean any undertaking mentioned in Article 1 of Order 45-2646 of 2 November 1945 regulating news agencies whose main activity is the collection, processing and formatting, under its own responsibility, of journalistic content.*

*III. - For the purposes of this chapter, a press publisher shall be understood to be a natural or legal person who publishes a press publication or an online press service within the meaning of Law 86-897 of 1 August 1986 reforming the legal system governing the press.*

*IV. - This Chapter shall apply to news publishers and news agencies established in the territory of a Member State of the European Union.”*

85. Article L. 218-2 provides for the prior authorisation by the publisher or press agency for the use of their content by an online public communication service:

*“Art. L. 218-2 - The authorisation of the press publisher or press agency is required prior to any total or partial reproduction or communication to the general public of its press publications in digital format by an online public communication service.”*

86. Article L. 218-3 specifies that these related rights "may be assigned or licensed".

87. Article L. 218-4 establishes the terms and conditions of remuneration of the press publisher:

*“Art. L. 218-4 - 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.”*

88. The exceptions are specified in Article L. 211-3-1, which reads as follows:

*“The beneficiaries of the rights provided for in Article L. 218-2 may not prohibit:*

*1° Acts of hyperlinking;*

*2° The use of isolated words or very short excerpts from a press publication. This exception may not affect the effectiveness of the rights provided for in the same Article L. 218-2. This effectiveness is particularly affected when the use of very short extracts replaces the press publication itself or means that the reader does not have to refer to it.”*

89. Finally, in accordance with Article 14 of Law 2019-775, this law came into force three months after its enactment, i.e. on 24 October 2019.

## **2. GOOGLE’S CHANGE TO ITS POLICY OF DISPLAYING NEWS RESULTS AND THE REACTION OF PUBLISHERS**

### **a) Google's change to its news results display policy**

90. From 25 September 2019 onwards, in anticipation of entry into force of the Law on Related Rights, Google announced to publishers and news agencies its new policy for displaying their content within its various services.

91. This announcement was published on Google’s blog on 25 September 2019, in which it states :

*“When 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. This applies to search results across Google services”* (classification marks 120-121, 19/0079M).

92. In line with this announcement, Google has implemented new "tags", which are code fragments, that publishers and news agencies can insert into the source code of their web pages to allow Google to take excerpts from their editorial content in the form of text, images and video. Google explained how these tags work to publishers in an email sent as of 25 September 2019 to owners of websites identified as *“European news publication”* (classification mark 103).

93. These tags, which take the form of a piece of computer code exploitable by Google's robots, are as follows:

- The *“max-snippet”* tag: this tag allows the publisher to indicate to Google whether it authorises the reuse and display of excerpts of articles by the various Google services (Search and Discover in particular, classification mark 110), as well as the length of the excerpts that can be displayed by Google. The *“-1”* parameter in the *“max- snippet”* tag allows Google to reuse news content without a limit on the size of the text excerpts. Conversely, by setting the parameter to *“0”*, the publisher indicates that no text excerpts will be displayed by Google on its services.
- The *“max-image-preview”* tag: this tag allows the publisher to indicate to Google whether it authorises the reuse and display by Google of photographs in the form of thumbnail images in the results pages, as well as the display size of these thumbnail images in Google’s services (Search, Google News and Discover in particular, classification mark 111). Enabling the *“wide”* setting gives Google the ability to display these photographs at maximum quality.

- The “*max-video-preview*” tag: this tag allows the publisher to indicate to Google whether it authorises the reuse and display by Google of videos in Google’s services (Search and Discover in particular, classification mark 112), as well as the duration of the preview.

94. Finally, on the same day, Google indicated in the press that it did not intend to remunerate press publishers for including their editorial content<sup>19</sup>. This position is also conveyed in the “FAQ” page published by Google for news publishers, in which it specifies that it will not remunerate publishers and news agencies if they choose to maintain the display of “text and image previews” in its services:

*“Q: If I use the settings to allow text and image previews, will Google pay me?”*

*A: We believe that the operation of the search engine should be based on relevance and quality, and not on commercial agreements. To do otherwise would reduce the choice and relevance of search results for our users - and undermine confidence in our services. For this reason, we do not accept remuneration for organic search results and we do not remunerate links or previews in search results. When you use the new settings, you agree to the use of previews of your content without payment, both for traffic to and from Google.”* (classification mark 5103, emphasis added)

95. A publisher’s agreement to the reuse of its content via the new tags is thus equivalent to granting Google a free license to use its content.

#### ***Special case of the headlines of press articles***

96. As explained above, the tags created by Google following adoption of the Law on Related Rights allowing publishers to give their consent relate only to “text excerpts”, “thumbnail images” and videos, but do not include the headlines of news articles (classification marks 102-116; classification marks 5339 - 5340).
97. However, before the Law on Related Rights came into force, Google displayed the headlines of news articles on numerous occasions within its various services<sup>20</sup>, and continues to do so to this day, without obtaining the agreement of the publishers and news agencies concerned or remunerating them.
98. The absence of explicit consent from publishers to reuse the headlines of their articles raises the issue of interpretation of paragraph 2 of Article L. 211-3-1 of the IPC and, where applicable, non-compliance with the letter of this legal text.

---

<sup>19</sup> <https://www.lefigaro.fr/flash-eco/google-ne-paiera-pas-les-editeurs-de-presse-francais-pour-les-extraits-de-contenus-20190925>; <https://www.lesechos.fr/tech-medias/medias/google-refuse-de-payer-les-editeurs-de-presse-1134633>

<sup>20</sup> In Google Search, links to news publishers’ articles are displayed by including all or part of the headlines of the corresponding articles (classification mark 14, 19/0079M; classification marks 120-121). In addition, as Google explains, the “Top stories” inserts usually display the headline of the article (classification marks 5339 - 5340). In Google News and Discover, the links to the articles show the headline of the article (which may be accompanied by a thumbnail image, or even text and video excerpts for Discover) (classification marks 4956 - 4957; classification marks 5339 - 5340).

As noted by the Ministry of Culture at its hearing (Minutes of the Ministry of Culture hearing, classification mark 2869), Google clearly considered that the headlines were covered by the exception provided for in paragraph 2 of the above-mentioned Article<sup>21</sup>. However, it is not clear that all headlines of articles are covered in principle by this exception, since the text refers to “*isolated words or very short extracts*”, which could militate in favour of an assessment *in concreto* based, for example, on the length or informative content of the headlines of press articles.

**b) Positioning of news publishers following Google's announcement**

99. In accordance with Google's new policy on the reuse and display of protected content, news publishers had between the end of September and the end of October 2019 to decide whether they wished to maintain the display of their content within Google's services and, if so, to take the necessary technical measures to do so within that deadline.
100. The *Autorité* also notes that AFP, like all news agencies, is affected by the change in the way news content is displayed, insofar as its content is indirectly used by Google via the content of news publishers. From that point of view, AFP is dependent on the position adopted by the publishers, which are its clients.
101. It should be noted that the term “*snippet*”, as used by Google, i.e. text extracts appearing under hyperlinks in some of its services, may appear simplistic in that it refers only to text elements, to the exclusion of other protected content, primarily photographs and videos. Consequently, in the following part of this decision, reference will be made to “protected content”, the latter including, as we have seen, all or part of the articles (including the headlines of these articles) as well as any photographs and videos.
102. Evidence in the investigation shows that, since the entry into force of Google's new display policy, the overwhelming majority of publishers have allowed Google to display protected content without remuneration. Publishers that did not authorise Google to display protected content suffered significant traffic losses.

***The vast majority of publishers have allowed Google to display protected content without receiving any remuneration***

103. Following the announcement of its new policy, the vast majority of news publishers allowed Google to continue to display protected content in the form of text, photos and videos on the results pages of Search and its various services (including Google News and Discover) without any financial consideration.
104. However, the publishers’ reaction was accompanied by letters to Google indicating that this authorisation, which was the result of a unilateral decision by Google to change its display policy, could not be interpreted as a waiver by publishers of their right to obtain remuneration for the reuse and display of their protected content (classification marks 238-242, 19/0078F).

---

<sup>21</sup> Such an interpretation is clearly not shared by all online public communication services, as evidenced by News Republic's decision to only reuse headlines with the consent of the publishers, although said consent would not give rise to remuneration (Minutes of the hearing of News Republic, classification mark 4486).

Moreover, according to the facts of the case, these letters did not lead to the start of negotiations between Google and the press publishers over remuneration for including and displaying protected content.

105. A survey of the 30 biggest news websites in France in terms of audience, showed that, as at 24 October 2019, 28 of them had used tags to avoid downgraded presentation of their content<sup>22</sup>. This finding is corroborated by at least two other facts in the case.
106. First, according to APIG, based on a survey of a total of 199 websites conducted on 18 December 2019, 123 had enabled the tags and 76 had not enabled them (classification mark 2972). APIG notes, however, that 98 member publishers do not have their own website and share a single site. Furthermore, APIG notes that “*with the notable exception of the websites of regional daily press titles such as Corse Matin or the Nouvelles Calédoniennes and national daily press titles such as L’Humanité or Paris Turf, which have not enabled the tags for reasons related to a lack of manpower or the availability of a dedicated team, 87% of the websites that have not enabled the tags are regional weekly news sites that are in the process of going digital or sites that mainly provide access to digitized versions of their titles (PDF) rather than to native content.*”
107. On the other hand, according to Google, out of a representative panel of 200 news publishers, the publishers that had taken steps to maintain the display of their protected content accounted, in December 2019, for approximately [90-100]% of the total traffic redirected by Google to these 200 news publishers (classification marks 5028 and 5029).
108. Moreover, a study by Mind Media, which was submitted by APIG as evidence in the case and not contested by Google, shows that, among the sites that gave Google permission to display excerpts from articles without remuneration, 86.6% chose the “-1” parameter and, as a result, allowed Google to reuse the content of their articles without any size limit (classification mark 1680).
109. With regard to the photos accompanying the articles, the same study shows that 87.1% of publishers chose the “wide” parameter, which gives Google the possibility of displaying these photos in maximum quality (classification mark 1680).
110. Finally, as regards videos, the same finding can be made as for text extracts and images, since, according to the abovementioned study (see paragraph 108), 78,7 % of publishers granted Google permission to reuse their videos and display previews of them without any time limit (classification mark 1680).

***Publishers who did not allow Google to display protected content faced significant falls in traffic***

***The impact of previews on rankings and traffic redirected to news publishers’ sites***

111. Evidence gathered during the investigation has highlighted a causal link between the presence of a publisher's protected content on Google's various services and the rate of click-throughs to the publisher's content. Similarly, there is a causal link between the rate of click-throughs to the publisher's content and the ranking of this content in Google's algorithm.

---

<sup>22</sup> <https://www.journaldunet.com/media/publishers/1459188-droit-voisin-pour-la-presse-les-editeurs-francais-fold-from-google>

Finally, the lower the ranking of a content in response to a search, the less likely it is that the user will click on the link to that content. This information also shows that the ranking in the algorithm has an effect on the traffic redirected to the sites of news publishers.

112. First, it is apparent from the facts of the case that the display of protected content within Google's services is likely to increase the number of clicks on a link. In its FAQs for press publishers, Google indicates the following (classification mark 23; 5101 and 5103):

*"In order to help people understand why Google has selected the search results it displays, Google presents short previews of the content from the linked web pages – most commonly, short extracts, or snippets, and thumbnail images [...]"*

*Preview content helps users understand what makes your page relevant to their search, which experiments show makes them more likely to click through."*

113. In addition, Google's submission dated 1 January 2020 (classification mark 3673) states:

*"Snippets benefit publishers and users by increasing the probability of matching users with the websites they are looking for: users are more easily able to identify which search results best fit their needs, and publishers gain promotion and traffic that gives them an opportunity to monetize their content. Naturally, therefore, Google is not the only search engine that displays snippets; other search engines such as Qwant and Bing also use them. Displaying snippets as part of general search results is an industry standard approach."*

114. Several search engines competing with Google have also confirmed that the presence of protected content leads to improved click-through rates. Microsoft says, *"This display provides a competitive advantage in that an image and a short description of the item statistically leads to an improved click through rate."* (classification mark 2398). Similarly, according to Verizon Media, which operates the Yahoo search engine, *"By improving the user experience, this content benefits news publishers, who receive more traffic."* (classification mark 4452).

115. On the other hand, the disappearance of protected content, compared to a situation in which it is maintained, is likely to lead to a decrease in the number of clicks on a link. And the click rate on a page is a factor taken into account when determining its ranking in Google's search engine(s). In its response to the Investigation Services' questionnaire of 17 December 2019, Google explained that the number of clicks on a link can affect the ranking of the results: *"The only manner in which the presence of snippets could affect ranking of search results is indirectly, for instance if a page had a lower click through rate due to the absence of snippets."* (classification mark 4941).

116. Consequently, the absence of display of protected content exposes the publisher to a decrease in the click rate and, ultimately, to a lower ranking for the links to its content in Google's search results pages. This finding clearly gives a different perspective to Google's argument that: *"It is not true, as the Plaintiffs' allege, that they are under threat of being 'dereferenced'. Even if Publishers decline to have snippets displayed, their sites will continue to be indexed and referenced in Google's results with a headers and hyperlinks."* (classification mark 3 683).



Indeed, even if the publishers were not delisted completely, the absence of display of protected content is likely to reduce the number of clicks for these publishers and, consequently, their ranking in the algorithm. Such a drop in traffic is a particular challenge for publishers since the readership is bound, in such a case, to shift away from them in favour of competing press publishers that have accepted Google's display conditions and have therefore not suffered any downgrading of their display.

117. Secondly, when a user performs a search, the data provided by Google in its response to the questionnaire of 13 January 2020 show that the probability of the user clicking on a link decreases very rapidly the lower the ranking of the site in question in response to the search (classification marks 5357 and 5358).
118. According to this information, the probability that a user will click on a link decreases significantly according to its ranking on the first page of search results. Thus, the probability that a user will click on the first result of his search is about [20-30] %. This probability drops to [5-10] % for the second and third result, and to [0-5] % for the fourth result (classification marks 5357 - 3358). For links appearing in the "Top stories" insert, this rate is [5-10] % for PCs and mobile devices combined and [10-20] % for mobile devices only.
119. Under these conditions, a downgrading in Google's ranking results is also likely to lead to a decrease in the number of clicks and, consequently, in the traffic redirected to the websites of news publishers.

***Observed decreases in traffic***

120. The causal relationship between the display of protected content and the rate of clicks on the content of press publishers presented above is also corroborated by the fact that a number of publishers that did not take steps to maintain the reuse and display of protected content by Google, albeit only for a very short time, experienced sharp falls in audience numbers.
121. For example, suppressing the display of protected content from the website of the newspaper *La Voix du Nord* within Google's services between 24 and 27 October 2019 led to a fall in traffic redirected from Google of around 33% according to the publisher (classification mark 5 420).
122. According to the La Dépêche Group, Google did not contextually display the Group's content on 24 October 2019. This is alleged to have resulted, according to the La Dépêche group, in a more than 50% reduction in visits from search engines on the day in question compared to the average for that month (classification mark 5421).
123. According to tests carried out by the Figaro Group, a link listed without a photo or description on Google experiences a downturn in its click performance of about 50%. Since traffic from Google Search accounts for around 50% of figaro.fr traffic according to the publisher, the impact on Internet audiences could therefore potentially amount to a drop of 25% (classification mark 2966).
124. Lastly, because of the small share that the French market represents within News Corp's model, the latter stated that it had "*decided not to allow Google to reuse [its] content for French Internet users, in particular the Sun, the Times of London and the Wall Street Journal*" and that, from 24 October to the beginning of December 2019, it recorded a 43 % drop in click-throughs, an 8 % drop in page views and a 9 % drop in the number of French users on The Sun website (classification mark 483 and 2327).
125. In addition, these decreases in traffic are likely to result in significant revenue losses for the news publishers concerned.

In this regard, revenue loss projections by one news publisher based on the decrease in traffic observed on two of its sites on 23 and 24 October 2019 indicate that the elimination of contextualized display could result in the loss of between 30% and 50% of the annual revenues of these sites (classification marks 7035-7036).

## II. DISCUSSION

126. Article L. 464-1 of the French Commercial Code (*Code de commerce*) provides that: “*The Autorité de la concurrence may, at the request of the French Minister of Economy, of the persons mentioned in the last paragraph of Article L. 462-1 or of companies, after hearing the parties to the case and the representative of the minister of the economy, take the interim measures requested or those it deems necessary. These measures may be taken only if the reported practice seriously and immediately affects the Economy as a whole, or that of the concerned industry, the consumers’ interests or the complainant. These measures may include the suspension of the practice in question and an order to the parties to restore the previous state of affairs. They must be strictly limited to what is required in order to address the emergency.*”
127. According to the case law of the French Supreme Court (*Cour de cassation*) to date, interim measures may be decided “*if the facts that have been reported, and referred for investigation on the merits of the case, appear likely, in light of the evidence produced for the investigation, to constitute a practice that infringes Articles L. 420-1 or L. 420-2 of the French Commercial Code (Code de commerce)*” (French Supreme Court (*Cour de cassation*) judgement of 8 November 2005, Neuf Télécom, 04-16857). It is therefore necessary to examine whether the reported practices are likely, at this stage of the case, to constitute anticompetitive practices.
128. The following developments relate to the applicability of European Union law (A), the relevant markets (B), Google’s position on the relevant market (C), the potentially anti-competitive nature of the practices reported (D) and the request for interim measures (E).

### A. APPLICABILITY OF EU LAW

129. Article 102 TFEU provides that “*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*”.
130. 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 Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”), apply to horizontal and vertical agreements, as well as to abusive practices by undertakings which “*may affect trade between Member States*” and must be “*appreciable*”.
131. In this case, the reported practices relate to Google’s conduct following the creation by directive of a related right for publishers and news agencies established in the European Union. In addition, Google is an international player, as are certain new publishers belonging to European or even global groups.

Finally, Google's services, as well as the websites of the publishers and news agencies concerned, cover the whole of France and, as an online activity, are by nature open to cross-border trade<sup>23</sup>. In this respect, Google itself designates the publishers affected by its new policy relating to the reuse and display of protected content as "*European press publication*" (classification mark 22).

132. Therefore, the reported practices, if established, are capable of having an appreciable effect on trade between Member States and qualify under Article 102 TFEU.

## **B. RELEVANT MARKETS**

### **1. DEFINITION OF THE MARKET**

#### **a) Principles**

133. The application of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and Article 102 TFEU, which prohibit abusive practices, first requires the definition of the relevant markets. As regards abuse of a dominant position "*the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined*"<sup>24</sup>.
134. In its Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, the Commission states that "*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*". Substitutability is generally assessed in terms of demand substitutability, "*the most immediate and effective disciplinary force on the suppliers of a given product*", but it can also take account of supply substitutability.
135. In the same document, the Commission also defines the market geographically, specifying that "*the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*".
136. In France, the *Autorité* has said that "*the market, within the meaning of competition law, is defined as the meeting place of supply and demand for a specific product or service. [...] Perfect substitutability between products and services is rarely seen; the Conseil regards as substitutable and on the same market products or services for which it could reasonably be said that those on the demand side view them as alternatives to choose between in order to meet the same demand*"<sup>25</sup>.

<sup>23</sup> Ruling of the Paris Court of Appeal, 16 October 2007, Bijourama, 2006/17900.

<sup>24</sup> Judgment of the Court of First Instance of 6 July 2000, Volkswagen AG v Commission, T-62/98, paragraph 230.

<sup>25</sup> See in particular Decision 10-D-19 of 24 June 2010 on practices in the markets for gas supply, heating installations and management of heating and collective heating networks, paragraphs 158-159; Decision 10-D-13 of 15 April 2010 on practices in the container handling sector at the port of Le Havre, paragraph 220; Judgment of the Paris Court of Appeal of 20 January 2011, Perrigault, 2010/08165

## b) The market for general search services

### *Material scope*

137. In its decisions, the Commission has considered that the provision of generalist (or general) search services constitutes an economic activity and a relevant market<sup>26</sup>. It distinguished this market from that of content sites, such as Wikipedia, IMDb, The New York Times and Nature, for example. It also distinguished this market from the market for specialised search services and social networks. Finally, the Commission considered that this market encompasses both services provided on fixed and mobile devices. In its opinion on online advertising, the *Autorité* noted the existence of a market for general search services, stressing that the decision to provide a service without direct financial consideration is the result of a choice by undertakings, and that there is nothing to prevent an undertaking from providing a service without receiving payment from Internet users in return<sup>27</sup>.
138. The evidence gathered at this stage of the investigation is not such as to call into question the distinction made by the Commission between the market for general search services and the market for content-providing sites and the market for social networks. In addition, the question of a possible market for specialised news searches can be left open at this stage of the investigation.
139. It was noted during the investigation that the operating principle of search engines distinguishes them from content sites and social networks. The Qwant company, which publishes a general search engine, said: *“The principle of the search engine is to direct the Internet user back to the referenced sites unlike, for example, social networks which, by their very nature, keep the Internet user in their environment. [...] Finally, content sites and social networks are indeed separate markets.”* (classification mark 2891). Microsoft explains that: *“Search allows a user to enter keywords to obtain results from the crawl [an “exploration” action that consists of collecting information on websites using software called “crawlers”] from news publishers’ sites or sites that provide news coverage.”* (classification mark 2394).

---

<sup>26</sup> See Commission 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.

<sup>27</sup> Opinion 18-A-03 of the *Autorité* of 6 March 2018, cited above.

162. On the existence of a market for general search services, see also Decision 19-MC-01 of the *Autorité* of 31 January 2019 on the request by Amadeus\* for interim measures, paragraph 104, confirmed in the main by the ruling of the Paris Court of Appeal of 4 April 2019, Amadeus, 19/03274.

140. Search engines and social networks also differ in terms of their uses. Microsoft says in this regard: *“There are pure social networks that can be distinguished from search services. When we go on Facebook or LinkedIn we go there to interact with personal or professional contacts. The distinction is therefore relevant from the user's point of view. Moreover, from a technological point of view, the platforms are different (in particular from an algorithmic point of view). However, the financing method is similar.”* (classification mark 2393).
141. During its hearing, Facebook admittedly expressed reservations about such segmentation (classification mark 4459), considering itself to be in competition with any player seeking to capture *“the time spent by the user”*. This point of view, however, does not seem to take into account the specificities of supply or demand on social networks compared to search engines.
142. Finally, it may be noted that in its written observations, Google does not question the definition of a market for general search services, but contests the existence of a causal link between its alleged dominant position on that market and the practices of which it is accused (classification marks 8238, VC 8240 - 8241, VNC 8362). This point is discussed in paragraphs 218 et seq.
143. Furthermore, the existence of a market for specialised news searches cannot be excluded at this stage of the investigation. In this potential market, Google would be active via, among other things, the Google Search News Tab and the Google News service. However, the question as to the existence of such a market can be left open since, at this stage of the investigation, it appears that most of the traffic redirected by Google to the websites of news publishers is redirected from Google Search (classification marks VC 4 945 - 4 946 / VNC 5 003 - 5 004, VC 5 344 / VNC 5 369, VC 6 959 / VNC 6 961).
144. Finally, the Commission also noted that general search services on fixed and mobile terminals belong to the same market since, although the interfaces are different, the underlying technology is the same. In addition, these services are offered by the same companies on both fixed and mobile terminals. The evidence gathered during the investigation does not call this finding into question<sup>28</sup>.
145. In view of these factors, the *Autorité* considers that the market for general search services is likely, at this stage of the investigation, to constitute a relevant market.

### ***Geographic dimension***

146. In its decision-making practice, the Commission has considered the market for general search services to be national in scope<sup>29</sup>.
147. Firstly, it noted in this respect that the main general search services were provided on a national and language basis.
148. Secondly, according to the Commission, there are barriers to the extension of search technology beyond national and linguistic borders. In particular, it noted that even for large multinational companies, the internationalisation of a search service was costly.

---

<sup>28</sup> At the hearing, Microsoft confirmed that this was the same market (classification mark 2395).

<sup>29</sup> See Google Shopping decision of 27 June 2017, cited above, paragraphs 252 to 255; Google Android decision of 18 July 2018, cited above, paragraphs 422 to 425.

149. This position is confirmed by Microsoft, which indicates: *“This demarcation is more local than international. Advertisers that buy keywords do so in the local language and culture”*, while noting that *“Technical aspects, on the other hand, are pooled internationally”* (classification mark 2395).
150. In terms of the factors taken into account when ranking results in response to a user’s search, Google also indicates that : *“Relevant factors include the search terms used, the relevance and usability of websites, the expertise of the websites, the location/settings of the user, and information Google has recorded as to how users interact with the websites in the past. [...] Google may return different results depending on contextual factors such as the user’s location. For example, a search for the word “football” likely means something different in the United Kingdom than in the United States.”* (classification mark 4 937, emphasis added).
151. On the basis of the information under discussion, it should be considered that the market for general search services is likely, at this stage of the investigation, to be national in scope.

### **c) Conclusion**

152. In conclusion, the relevant market on which the practices referred to in this Decision are likely to be committed is the French market for general search services.

## **2. GOOGLE'S POSITION ON THE RELEVANT MARKET**

### **a) Principles**

153. A dominant position is defined as *“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”*<sup>30</sup>.
154. The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative<sup>31</sup>. Among which, a highly important one is the existence of very large market shares<sup>32</sup>.
155. According to ECJ case-law, a market share of 50% is in itself, and save in exceptional circumstances, evidence of the existence of a dominant position<sup>33</sup>.
156. Aside from the size of market share of the undertaking in question, it should also be taken into account of the difference between the market shares of the undertaking concerned and those of its competitors.

---

<sup>30</sup> Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission*, 27/76, paragraph 65.

<sup>31</sup> *Ibid*, paragraph 72.

<sup>32</sup> Judgment of the Court of 12 December 1991, *Hilti v Commission*, T-30/89, paragraph 90; and judgment of the Court of 25 June 2010, *Imperial Chemical Industries v Commission*, T-66/01, paragraphs 255 and 256.

<sup>33</sup> Judgment of the Court of 3 July 1991, *AKZO v Commission*, C-62/86, EC Rep. P. I-3359, paragraph 60.

157. The General Court of the European Union considered that in recent and fast-growing sectors which are characterised by short innovation cycles and a dynamic context, high market shares are not necessarily indicative of market power<sup>34</sup>. On the other hand, the high market share criterion is still relevant in fast-growing markets that do not show signs of instability during the period at issue and where a stable hierarchy is established<sup>35</sup>.
158. Additional indicators can be used to determine whether a player can be regarded as being in a dominant position. The existence of barriers to entry or barriers to expansion and the compensatory power of customers are worthy of particular mention<sup>36</sup>.
159. In this case, and in light of the facts of the case, Google is likely to hold a dominant position on the French market for general search services. Its market shares are very large, while its competitors' market shares are still very limited (b). Google's dominant position is also confirmed by the existence of high barriers to entry onto the market for online general search services (c).

#### **b) Google's market shares**

160. The complainants argue that Google hold a dominant position on the online search market. According to SEPM, which reiterates findings made by the *Autorité* in its decision [19-MC-01](#), “Google has a significant market share on the market for general search engines. Google Search accounts for more than 90 % of all searches carried out in France (more than 93% in October 2019)” (classification mark 28). APIG also notes that “[t]he same source used by the Commission to establish a dominant position in the Google Shopping decision indicates that, in September 2019, Google held 93.41% of the online search market in France. Its largest competitor, Bing, had only 2, 94 % of the market share [...]. Google's market share is therefore increasing.” (19/0079M, classification mark 29). Finally, according to AFP, “[Indeed,] the search engine giant had a 93.34% market share on the online search market in October 2019, holding a significant lead over its main competitors, including the first, Bing, which has only 3.03% market share [...]. On the market for online search advertising, Google had more than 70% market share [...].” (19/0081M classification mark 7).
161. The Commission considers that there are<sup>37</sup> several methods to calculate market share by volume on the online search market: the number of queries, the number of users, the number of page views or the number of sessions. In this case, the respondents confirmed the relevance of indicators such as the number of queries (minutes of Qwant's hearing, classification mark 2 379) or the number of users (minutes of Microsoft's hearing, classification mark 2411, minutes of Yahoo's hearing classification mark 4447). Google did not contest these facts in its written observations.

---

<sup>34</sup> Judgment of the General Court of 11 December 2013, *Cisco Systems, Inc. and Messagenet SpA v European Commission*, T-79/12, paragraph 69.

<sup>35</sup> Judgment of the Court of First Instance of 30 January 2007, *France Telecom v Commission*, T-340/03, paragraphs 107 and 108.

<sup>36</sup> Judgment of the Court of First Instance of 7 October 1999, *Irish Sugar v Commission*, T-228/97, paragraphs 97-104.

<sup>37</sup> See the Google Shopping decision, cited above, paragraphs 276 to 279.

162. The evidence in the case file shows that, whatever indicator is used to assess its market share, Google has a very large majority share of the market for general search services. In particular, its market share in terms of average monthly number of queries was around 90% at the end of 2019 (compared to around 5% for its main competitor Microsoft, which operates the Bing search engine)<sup>38</sup>.
163. These facts are consistent with the findings previously made by the *Autorité*. In 2010<sup>39</sup>, it had already observed that *“The position of the Google engine has been steadily strengthening since its creation and, since 2004, it has exceeded 50% in France”*. At the beginning of 2019<sup>40</sup>, the *Autorité* noted that *“In the market for general search services, Google generates more than 90% of French Internet users’ queries via its Google Search service”*. Finally, the *Autorité* found, at the end of 2019<sup>41</sup>, that the number of queries on search engines other than Google Search did not exceed 10 % in 2016, a similar finding to that already made in 2018<sup>42</sup> and reflecting stable market shares over time.
164. Finally, the stakeholders surveyed that provide an online search service also identify Google as the main player in this type of activity (minutes of Microsoft's hearing, classification mark 2411; minutes of Qwant's hearing, classification mark 2379; minutes of Yahoo's hearing, classification mark 4433). Google did not contest these statements in its written observations.

### c) Barriers to entry and expansion

165. As noted by the *Autorité* in Decision [19-D-26](#), the development of a generalist search engine implies significant investment in technologies designed to supply search advertising and to provide access to datasets that optimise content referencing<sup>43</sup>. The documents in the case file confirm that the development and operation of an online search service requires, at the very least, the development of particularly sophisticated algorithms, which are constantly being updated or innovated, considerable computing and data storage power, making it possible to browse the Internet and analyse the data thus collected and, lastly, cyber security capabilities to prevent attempts to hack the algorithm and the data.
166. According to Microsoft (classification marks 2393 - 2394), *“A first barrier to entry is the algorithm. It takes several million lines of code. This allows for extremely precise results. You also need a lot of computing power to crawl the web and be able to store this data worldwide if you want a global search engine. It is then necessary to maintain a state of the art in terms of cybersecurity to prevent the algorithm as well as the data from being hacked. This requires several million euros in annual investments. There is a third barrier which is the potential for marketing investment. We need to be able to communicate on this algorithm. For example, particular colours, a particular identity. Also required are devices [electronic devices] on which the engine is available and preconfigured. That is a key point.”*

<sup>38</sup> Classification marks 4 978 VC / VNC 5 036, 3 642 VC / 3 816 VNC, 4 432 VC / 4 447 VNC, 2 378 VC / VNC 2 889,

5 207 VC / 5 225 VNC, 3 642 VC / VNC 3 815, 6 954 VC / VNC 6 969, 2 902 VC / 2 933 VNC

<sup>39</sup> Decision 10-MC-01 of the *Autorité* of 30 June 2010 on the request by Navx for interim measures submitted, paragraph 133.

<sup>40</sup> Decision 19-MC-01 of the *Autorité* of 31 January 2019, cited above, paragraph 105.

<sup>41</sup> Decision 19-D-26 of the *Autorité* of 19 December 2019, cited above, paragraph 313.

<sup>42</sup> Opinion 18-A-03 of the *Autorité* of 6 March 2018, cited above, paragraph 208.

<sup>43</sup> Decision 19-D-26 of the *Autorité* of 19 December 2019, cited above, paragraph 318.



167. This observation is shared by Qwant (classification mark 2381), which states that “*The barrier to entry for engines is technology, which is highly complex and expensive.*”
168. The development and subsequent combination of these elements necessary for the operation of a general search engine requires significant investment which, at this stage of the investigation, appear likely to constitute barriers to entry and expansion on the French market for general search services.
169. The barriers to entry are exacerbated by two interrelated factors. On the one hand, as the volume and variety of searches increases, the more relevant the results are. On the other hand, the intrinsic attractiveness of search services that exceed a certain threshold of use reinforces the network effects between the use of a generalist search engine and search advertising services. As the number of users providing data increases, so the quality of the advertising services improves<sup>44</sup>.
170. Indeed, as noted by the *Autorité* and the Commission<sup>45</sup>, the two sides of a platform - the search engine on the one hand and search advertising on the other - operate interdependently: the more search engine users there are, the greater the likelihood that a search advertisement will be correctly targeted and lead to a purchase by the person targeted. In return, the price of search ads may increase as the number of clicks increases.
171. As a result of these network and experience effects, Google's ability to generate revenue and invest far exceeds that of most of its competitors. These effects, combined with the significant entry costs inherent in the technology required to develop a search engine, raise the barriers to entry and expansion for competitors.

#### **d) Conclusion**

172. In conclusion, at this stage of the investigation, Google appears likely to hold a dominant position on the French market for general search services. In many respects, Google's dominant position is likely to have the “extraordinary” or exceptional aspect noted by the Commission in the Microsoft case<sup>46</sup>, and more recently by the *Autorité* in its Decision 19-D-26<sup>47</sup>.

---

<sup>44</sup> Decision 19-D-26 of the *Autorité* of 19 December 2019, cited above, paragraphs 25, 26 and 319; Google Shopping decision, cited above, paragraphs 287 et seq.

<sup>45</sup> Decision 19-D-26 of the *Autorité* of 19 December 2019, cited above, paragraph 319; Google Shopping decision, cited above, paragraph 292 et seq.

<sup>46</sup> Commission Decision of 24 March 2004, *Microsoft*, COMP/C-3/37, paragraphs 429, 472 and 560; Judgment of the Court of First Instance of 17 September 2007, T-201/04, paragraph 387. The term “extraordinaire” is undoubtedly a literal translation of “extraordinary” which would probably be better rendered in French by “exceptionnel”.

<sup>47</sup> Decision 19-D-26 of the *Autorité* of 19 December 2019, cited above, paragraph 321.

### 3. POSSIBLE ECONOMIC DEPENDENCY OF PUBLISHERS ON GOOGLE

#### a) The *Autorité*'s decision-making practice with regard to economic dependency

173. Article L. 420-2, paragraph 2, of the French Commercial Code (*Code de commerce*) prohibits “*whenever it is likely to affect the functioning or structure of competition, the exploitative abuse, by a company or group of companies, of the situation of economic dependency in which a customer or supplier finds itself in respect of that company or group of companies. These abuses may consist of the refusal to sell, tied selling or discriminatory practices (...)*”.
174. Abuse of economic dependency therefore requires three cumulative conditions to be met: the existence of a situation of economic dependency of one company on another, an exploitative abuse of this situation and an actual or potential effect on the functioning or structure of competition. In the absence of one of these three conditions, the alleged abuse of economic dependency is not established.
175. Established by the order of 1 December 1986, this infringement, which has no equivalent in EU law, but is compatible with Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the TFEU), which “*Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings*”.
176. In a judgment of 12 October 1993, Competition, 91-16988 and 91-17090, the French Supreme Court (*Cour de Cassation*) defined four cumulative criteria for characterizing a situation of economic dependency: “*If the existence of a state of economic dependency is assessed by taking into account the reputation of the supplier's brand, account must also be taken of the importance of the supplier's share of the market in question and of the reseller's turnover, and of the impossibility for the reseller to obtain equivalent products from other suppliers*”.
177. In the case of it being impossible to obtain equivalent products, the French Supreme Court (*Cour de Cassation*) ruled in a judgment of 3 March 2004, Competition, 02-14529, that “*the state of economic dependency is defined as a situation in which a distributor does not have the possibility of substituting for its supplier(s) one or several other suppliers that can satisfy its demand for supplies under comparable technical and economic conditions; it follows that the mere fact that a distributor obtains a significant or even exclusive part of its supplies from a single supplier is not sufficient to characterise this as a state of economic dependency within the meaning of Article L. 420-2 of the French Commercial Code (Code de commerce)*”. It should be recalled that, despite the deletion by the NRE [New Economic Regulations] Act of the reference to the criterion of absence of an alternative solution in the French Commercial Code (*Code de commerce*), the French Supreme Court (*Cour de Cassation*) maintained the requirement for the dependent party to provide proof of the absence of such a solution<sup>48</sup>.

---

<sup>48</sup> Opinion 15-A-06 of the *Autorité* of 31 March 2015 on the merger of purchasing and reference listing centres in the mass retail distribution sector, paragraph 261.

178. The *Autorité* has ruled that the effectiveness of any alternative must also be assessed in the light of its implementation period : *“The possibility of shifting to other markets should only impact the analysis if these markets constitute effective alternative solutions that can be implemented within a reasonable timeframe. Account should therefore be taken of the technical, commercial or legal constraints linked to the shift to other markets (...)”*<sup>49</sup>.
179. Finally, it is settled case law that a situation of dependency must be demonstrated *in concreto*. The *Autorité* has thus ruled that *“the state of economic dependency is to be assessed in concreto, either within a bilateral relationship between two economic operators or, more broadly, within a relationship between a supplier and its distribution network, provided that this network constitutes a group of companies with sufficiently homogeneous characteristics, the members of which have been placed in the same economic and legal position in relation to that supplier”*<sup>50</sup>.

**b) Application in this case**

180. In order to characterise a situation of economic dependency, it is therefore necessary to assess whether the following four criteria have been met: (i) the respondent's brand enjoys sufficient notoriety; (ii) the respondent has a significant share of the relevant market; (iii) its share of the turnover of the company in a situation of possible economic dependency is significant; (iv) company does not have an alternative solution under comparable technical and economic conditions<sup>51</sup>.
181. The investigation of the merits of the case will determine whether or not news publishers and news agencies are economically dependent on Google, and if so, whether or not there is any abuse. However, it is not necessary for the purposes of this urgent procedure to rule on those points, since, as the investigation stands, Google appears to hold a dominant position on the French market for general search services.

**C. POTENTIALLY ANTICOMPETITIVE NATURE OF THE REPORTED PRACTICES**

182. The complainants consider that Google's implementation of the Law on Related Rights constitutes an abuse of a dominant position on the general online search market.
183. According to APIG, this abuse takes the form of *“Google's imposition of unfair conditions for the purchase of protected content from press publishers”* as well as an *“abusive circumvention of the Law of 24 July 2019”* (classification marks 9 and 10, 19/0079M).

<sup>49</sup> Opinion 15-A-06 of the *Autorité* of 31 March 2015, cited above, paragraph 269.

<sup>50</sup> Decision 10-D-08 of the *Autorité* of 3 March 2010 relating to practices employed by Carrefour in the local general food retail sector, paragraph 165.

<sup>51</sup> See judgments of the French Supreme Court (*Cour de Cassation*) of 12 October 1993 and of the Paris Court of Appeal of 4 June 2002; Decision 09-D-02 of the *Conseil de la concurrence* of 20 January 2009 relating to a request for interim measures submitted by the *Syndicat National des Dépositaires de Presse*.

184. According to SEPM, these practices are abusive in that they “*constitute a circumvention of the law, in that they aim to force news publishers to waive remuneration for their related right contrary to the objective pursued by the legislator*”; that “*through this circumvention, Google imposes unfair conditions on publishers for the dissemination of their editorial content on its search engines and Discover (i.e., free distribution of such content in the form of snippets)*”; that “*Google imposes these unfair conditions under the threat of delisting the press publishers (i.e., downgraded display of their content on the Google and Discovery search engines)*”; that “*Google is using its quasi-monopolistic position on the search engine market to impose these unfair conditions insofar as it would not have been in a position to impose these conditions in a situation of effective competition*” and that “*these practices affect the structure and functioning of competition in respect of magazine publishers, consumers (the readers) and search engines*”. (classification mark 32)
185. According to AFP, Google has abused its dominant position in two respects: “*Google has deliberately circumvented the spirit of the Directive and the Law, which aims to restore balance in the relationship between search engines on the one hand and news publishers on the other, in order to ensure a fair distribution of the value created by the latter*” and “*Google imposes unfair conditions of remuneration for related rights by depriving press publishers and news agencies purely and simply of any remuneration, the latter being obliged to grant Google free authorisations to reuse their content, under the threat of delisting or a highly downgraded display of their content in the list of results on Google's search engines, which would compromise the continuity of their business*”. (classification marks 5 and 6, 19/0081M)
186. In its written observations of 24 February 2020, Google stated that it had “*complied with the Law, including with the Laws' underlying objectives, by ceasing to display what may be protected content (snippets) Publisher's prior authorisation, and by developing tools to give Publishers more control over the display of their content*” (classification mark 8251). Google also contends that it has not imposed unfair purchasing terms on publishers because “*snippets (and other previews) do not substitute or replace news Publisher sites, but instead help direct users to these sites, where the Publisher can monetize the user's visit*” and where “*the display of snippets for news results does not generate any inherent monetary value for Google*” (classification marks 8252 and 8253). Google further argues that it does not impede the development of a new market as “*Google simply has no demand for paid licenses to snippets*” and “*the Plaintiffs' complaints in effect demand that Google should be subject to an obligation to distribute and display snippets for free of charge to the benefit of Publishers, and on top of that an obligation to pay the news Publishers*”. (classification marks 8255 and 8257). Google also considers that “*Google's implementation of the Law does not trigger anti-competitive effects*” (classification mark 8257). Finally, Google argues that there is no causal link between its position on the market for general search services and the alleged practices.
187. Google's behaviour will be examined in the light of the dominant position it is likely to hold on the market for general search services.

188. In this regard, based on settled European and French case law, although the existence of a dominant position is not in itself punishable, the company in the dominant position, irrespective of the reasons for which it has such a position, has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the internal market of the European Union<sup>52</sup>.
189. Google's possible use of its dominant position to impose unfair trading conditions (1), discriminatory conditions (2) and to circumvent the Law on Related Rights (3) shall be examined in turn. Finally, the objective justifications put forward by Google (4) and the actual or potential effects of the practices (5) shall be examined.

## 1. IMPOSITION OF UNFAIR TRADING CONDITIONS

190. Article L. 420-2 of the French Commercial Code (*Code de commerce*) sets out a non-exhaustive list of abusive practices when they are 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.”*

191. As recalled by the *Autorité* in its recent Decision 19-D-26, with specific reference to Article 102(2)(a) of the TFEU, its application is not limited to the case where the dominant player imposes unfair or excessive prices, but also covers, as the Article expressly refers to, cases where the dominant player imposes, directly or indirectly, “*other unfair trading conditions*”.

---

<sup>52</sup> Judgments of the Court of Justice of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission*, 85/76, Rec. p. 461; *Michelin v Commission*, 322/81, Rec. p. 3461, paragraph 57; *France Télécom v Commission* C-202/07 P, Rec. p. I-2369, paragraph 105; and of the Court of First Instance of 7 October 1999, *Irish Sugar v Commission* T-228/97, Rec. p. II-2969, paragraph 112; *Conseil de la concurrence*, Decision 09-D-24 of 28 July 2009 concerning practices implemented by France Télécom on various markets for fixed electronic communications services in the French overseas *départements*, paragraph 207; *Autorité de la concurrence*, Decision 14-D-02 of 20 February 2014 concerning the practices implemented in the sports press sector, paragraph 208, confirmed by the judgment of the Court of Appeal of 15 May 2015, *la société Les éditions P. Amaury S.A.*, 2014/05554, paragraph 8.

192. In a judgment of 21 March 1974, BRT vs SABAM and Fonior, the Court of Justice refers to Article 102(2)(a) of the TFEU in the case of unfair trading conditions. The Court recalls that, according to the terms of the above-mentioned provisions, a practice must be regarded as abusive where it consists, in particular, of “*directly or indirectly imposing unfair trading conditions*”. It considers “*the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse*”<sup>53</sup>.
193. The standard of proof consists, on the one hand, in examining the manner in which the conditions of the transaction were concluded, the terms of (a) of the second paragraph of Article 102 specifying that the abusive practice may consist in “imposing” conditions, and on the other hand, in assessing the unfairness of those conditions, examining more particularly whether the conduct of the dominant undertaking was carried out to a “reasonable extent”. Case-law states in this respect “*Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it*”<sup>54</sup>.

**a) Context of the practices**

194. Entry into force of Law 2019-775 was intended to make it possible to redefine the sharing of value between platforms and publishers and news agencies within the framework of a negotiation between them. These aims were explicitly confirmed by the Ministry of Culture at its hearing (classification mark 2867):

*“Legally speaking, the aim is to provide press publishers with the tools they need, even before the law was passed, to transfer the rights of the journalists who are the authors of the content they publish. The law therefore allows the publisher to become the holder of its own intellectual property right, thereby facilitating negotiations and litigation. In economic terms, the objective is to rebalance the sharing of value between publishers and a group of economic operators in the digital environment, which is a fairly diverse group including search engines, social networks and content aggregators. [...]. Ultimately, the legal tool serves the economic purpose, the purpose of the related rights being to value, and thus remunerate, the investment made by their holder.”*

195. The Law on Related Rights provides a number of criteria to guide the negotiations and define the remuneration owed by the online public communication services to publishers and news agencies for the use of their editorial content. Article L. 218-4 of the IPC provides as follows:

*“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.*

---

<sup>53</sup> Judgment of the Court of 21 March 1974, *Belgische Radio en Televisie et Société belge des auteurs, compositeurs et éditeurs (BRT) v SV SABAM*, C-127/73.

<sup>54</sup> See, for example, the judgment of the Court, *United Brands*, cited above, paragraph 189.

*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.*

*Online public communication services shall be required to provide news publishers and news agencies with all the information relating to the use of press publications by their users as well as any other information required to make a transparent assessment of the remuneration referred to in the first paragraph of this Article and its distribution.”*

**b) Absence of any negotiations between Google and the publishers and news agencies**

196. The evidence in the case file collected at this stage of the investigation shows that Google has not entered into any negotiations with publishers and news agencies with a view to defining the conditions for displaying and paying for their content that is protected under the Law on Related Rights.
197. In this case, Google's conduct consisted in unilaterally announcing that it would no longer reuse the protected content of publishers and news agencies as of the date of entry into force of the Law on Related Rights, unless the latter gave it permission to do so via three types of different Meta tags (“*max-snippets*”, “*max-image-preview*” and “*max-video-preview*”), which would in principle include the headlines of the articles.
198. In addition, Google announced on its FAQ page for news publishers that it would not pay for the reuse of protected content, ruling out any contractual negotiations on the matter. In addition, these announcements were addressed to all publishers, regardless of the nature of the content.
199. Google therefore, as early as 25 September 2019, i.e. one month before the entry into force of the Law on Related Rights, issued news publishers with notice of termination of their pre-existing relationships by 24 October 2019, accompanied by an offer to continue these relationships, but at zero cost and without any possible negotiation. This practice has therefore had the effect of forcing press publishers, which have no satisfactory alternative to ensure reuse of their content by Google, forsake in advance the expected benefit from the Law on Related Rights, i.e. to allow for a rebalancing of their relations via an effective negotiation process.
200. This unilateral and systematic conduct places news publishers in a situation of extreme coercion, even though the aim of the Law on Related Rights was, on the contrary, to place negotiations, from both a legal and an economic viewpoint, at the forefront of relations between online public communication services and publishers and news agencies.
201. It should be recalled, in this respect, that the alternative offered to publishers between the different ways in which Google displays their content and the absence of reuse of this content is in fact non-existent. Indeed, publishers and news agencies cannot cope with the loss of traffic that would be caused if their protected content were no longer displayed within Google's services, in particular because of the irreplaceable nature of the traffic redirected by Google (see below). Rather than negotiating with a publisher or news agency, Google's behaviour leaves the latter with a choice of either potentially losing traffic and revenue to its competitors that have opted for a free licence, or keeping it by also granting a free licence.

Under these conditions, it is rational for the publisher to accept Google's unilateral offer once it has anticipated the choice of other publishers. The situation in which Google's behaviour places news publishers can therefore only lead to zero remuneration.

202. Thus, in practice, because of the approach adopted by Google, the vast majority of news publishers have requested, without any negotiation, that their protected content continue to be displayed even though the Law on Related Rights now grants them a right over the editorial content they publish.

**c) Unfairness of the conditions imposed**

203. At this stage of the investigation, the *Autorité* considers that Google's application of a “zero price” to all news publishers for the reuse of their protected content does not appear to constitute a reasonable measure within the meaning of the case law and doctrine to date (see the Court's judgment in the United Brands case, cited above), in so far as Google derives an economic interest from the reuse of protected content and the Law on Related Rights is intended to transfer part of that benefit to news publishers and news agencies.
204. In its written observations, Google argues that the Law on Related Rights must be interpreted in accordance with the Directive, which, it argues, creates a right to prohibit the use of protected content, but does not establish a right to obtain remuneration or to require the conclusion of licence agreements for the use of the protected content.
205. However, the European legislator, in particular through recitals 55 and 57 of the Directive, has expressed its wish to allow publishers and news agencies to receive appropriate remuneration for use of their work by information society service providers. Furthermore, while the Law on Related Rights does not, in principle, exclude the possibility for an online platform to reuse certain specific content without remuneration if this content, for example, has not required any particular investment, it would appear, however, to be contrary to the legislator's intentions for all content from publishers and news agencies to be free of any form of remuneration. Yet it is this indiscriminate situation of “zero price”, regardless of the content and the related rights holder concerned, that results from the strategy currently being employed by Google. Furthermore, the fact that Google has, since prior to the practices, secured certain income for publishers and news agencies through the traffic it redirects cannot in itself, in any event, justify the disputed practices when the legislator considered that the current distribution of added value should be altered in favour of publishers and news agencies via a remuneration specifically linked to the related right.
206. In its written observations, Google also argues that news content accounts for a very small share of its business model, pointing to (i) the low share of news and press-related searches on Google Search ([0; 3%], classification mark 8689) and (ii) the near-zero revenues generated by advertising from news results. In its observations, Google also argues that the display of protected content from news publishers in its services does not generate any economic value for it.
207. Firstly, such an argument amounts to questioning the validity of the choice made by the legislator to redefine value sharing in favour of publishers and news agencies. However, it is not for the *Autorité* to question this choice. Google's arguments in that regard are therefore inadmissible.
208. In any event, the evidence in this case shows that there are economic advantages to be derived for Google from the reuse of protected content.



209. Firstly, Google admits that there are ads that appear as a result of news-related queries. While these ads account for a small share of Google's revenues, according to it, they are nonetheless a source of revenue (classification marks 5002 and 5003).
210. Secondly, there is a clear economic interest for Google and indirect revenues that are derived from the reuse and display of protected content. This type of display is indeed attractive for users insofar as it improves the quality and viewing experience of the search page. Statements made by Microsoft at the hearing testify to this advantage derived from the display of content belonging to publishers and news agencies (classification mark 2398). It is therefore in the interest of a search engine to develop this type of display in order to attract or retain users of its services. The attractiveness of this content can play a role both in triggering a search (which may be motivated by news content and then branch off towards another type of search) and in the time spent on the search engine and the personal data derived from the search. Microsoft also explains that this display is likely to keep users in the search engine environment and, potentially, redirect them to a sponsored link that generates revenue for the search engine. These statements were not challenged by Google during the investigation.
211. Google also argues that the display of protected content makes it possible to better monetize the websites of press publishers thanks to the traffic it brings them. However, the profits made by news website publishers from the display of content benefit Google directly or indirectly because of its own role as an intermediary in online advertising.
212. Thus, on the one hand, as shown in the parliamentary reports, some Internet users are satisfied with the enriched information on Google's search page without feeling the need to click on the link, and therefore to visit the site, which subsequently will not be able to monetise its content in the form of a subscription or advertising (report 243, cited above, page 18). In the case of a search for a news item, excerpts sometimes accompanied by images may be sufficient to provide an overview that some readers consider sufficient. In this situation, Google is the only player that benefits from the display of protected content.
213. Google also indicates that it has contractual and financial relationships with news publishers for the sale and purchase of advertising and acts as an intermediary in the advertising ecosystem (classification marks VC 4948 - 4951, VNC 5006 - 5009). When asked about the revenues linked directly or indirectly to advertising and generated by traffic related to news content viewed on or from Google's services, it indicates the following : *"Please not that these figures do not include revenues generated by 'display' advertising intermediated by Google on third party sites, as Google understands this question to focus on the referral of traffic from Google's Search and News services, rather than on the ecosystem through which publishers themselves monetize their own pages using Google's advertising services, for which Google receives a revenue share"* (classification mark 4944, emphasis added).

Moreover, as Google reports in its second economic report (see paragraph 231 below), the removal of the display of protected content and even the closure of a service such as Google News<sup>55</sup> is likely to lead to a decrease in the total traffic on the websites of news publishers. Conversely, the display of protected content from press publishers increases this traffic and thus benefits Google's advertising activities.

214. In addition, it can be noted that all the other operators (search engines, aggregators, social networks) surveyed are committed to maintaining a system of enriched display subject to a partnership with publishers (classification marks 2418-2419, 2897-2898, 4436, 4926, 4461). This intention reflects the benefit that this type of display provides to users, as well as to the audience and the revenues of the platforms.
215. Google's in-house study entitled "*Snippet Experiment*", according to which the display of protected content would not generate revenues for Google, does not call into question the above findings. It is indeed impossible to assess the relevance of the conclusions of this study since it does not describe the scope of the revenues, it being noted that, as indicated above, the revenues that Google generates from these displays may be indirect through "*display*" advertising revenues (classification mark 4944) or derived from the greater attractiveness of its search engine. In addition, and despite the requests by the Investigation Services (classification marks 5341 VC and 5366 VNC), Google did not disclose the data or programmes used in this study. Finally, it can be noted that, according to this study, the display of protected content in the form of a "*snippet*" increases traffic to the websites of press publishers from Google by about 7% (classification mark 8222). According to the results of the study in question, such a display therefore increases the number of click-throughs by Internet users to websites of press publishers from the Google search engine, which is likely to improve its operation.
216. Finally, it can be noted that, unlike news publishers, Google is able to make a profit from any Internet user accessing news content on the Internet, whether this access takes place through a news-related search on Search and results in the display of protected content, or via any other means. In the case of an Internet user that uses the general search engine Search, Google is in fact able to collect revenues, whether or not the Internet user clicks on a link displaying protected content and redirecting it to a press publisher's website (see above). In the case of an Internet user that accesses a press publisher's website by a means other than Search, Google can still take advantage of its role as an intermediary in online advertising. Thus, unlike publishers, which are still dependent for their advertising revenue solely on the traffic directed to them, Google derives a benefit from any Internet user search for news, even though it does not produce news content.
217. Lastly, the unfairness of the conditions imposed by Google also results, at this stage of the investigation, from the paradoxical situation in which publishers and news agencies are placed, whereby their trading conditions are more unfavourable than those that existed before the Law on Related Rights came into force, as well as from Google's practices. This will be further developed in paragraphs 244 et seq.

---

<sup>55</sup> The closure of Google News in Spain in 2014 led to a drop in traffic to news publishers according to the economic literature cited by Google (classification mark 8659). If, in such an extreme scenario, news publishers have been unable to find a comparable substitute, it seems unlikely that they would succeed in doing so in a situation where only protected content would no longer be displayed in search results. This example therefore corroborates the traffic reductions caused by the removal of the display of protected content.

**d) Causal link between Google's dominant position on the market for general search services and the imposition of such trading conditions**

218. As indicated above, the evidence submitted in this case shows that Google has a significant and irreplaceable influence in terms of the traffic on news publishers' websites, which stems from Google's position on the market for general search services and allows for the practices identified to be employed.

***Importance of internet traffic for news publishers and news agencies***

219. As indicated by SEPM, publishers' digital revenue depends entirely on traffic on the websites of these publishers (classification mark 42), which is monetised by the display of advertisements and the sale of digital editorial content (classification marks VC 2 947 - 2 951, VNC 4 504 - 4 508).
220. The evidence in this case shows that online content sales and online advertising as a share of the total turnover of news publishers are indeed quite small. However, their revenues are becoming increasingly dependent on their online activities (content publishing, advertising, etc.). One reason for this is an increasingly porous border between paper and digital readership. The data provided by APIG illustrates this trend with, for example, 82% of subscribers to the *Sud-Ouest* newspaper having a paper and digital offering. This percentage is 94% for subscribers of *La République des Pyrénées*, and 95% for those of *Charente Libre*. Similarly, the paper-only readership is losing ground to the digital readership. Between the first quarter of 2014 and the third quarter of 2018, the paper-only readership of the newspaper *l'Equipe* fell from 48% to 21% of the total readership. This percentage fell from 61% to 57% for *Le Télégramme* between January 2018 and November 2019, from 69% to 58% between 2015 and 2019 for *Le Parisien*, and from 47% to 39% for *Les Echos* over the same period. Similarly, the *Centre France* Group has noted, over the last five years, a decrease in its paper readership of 4% per year and an increase in its digital subscriptions “of around 10% to 30%”. Finally, the *La Dépêche* Group indicates that there is a trend towards mixed and purely digital readers (classification marks VC 2,947 - 2,951, VNC 4,504 - 4,508). Under these conditions, digital technology is emerging as a strategic growth driver for news publishers' revenues. Given the critical situation in which news publishers find themselves, this growth driver is key to the “*economic survival of news publishers and press agencies*”, as noted by the MP P. Mignola in report 1912<sup>57</sup>. It therefore appears that news publishers cannot afford any loss of digital readership.
221. Because of its growth, the role of digital readerships means that Internet user traffic is of the utmost importance to the activity of news publishers. The economic links between news publishers and news agencies, as described above, also make this traffic essential for news agencies.

---

<sup>56</sup> According to a Deloitte study conducted in 2017 for APIG, the digital revenues of national daily newspapers accounted for 21% of total revenues in 2016 (classification mark 207). According to Google, the majority of publishers' revenues come from offline activity (classification mark 8248), and online advertising revenues only account for 11% of total advertising revenues of news publishers (classification mark 8249).

<sup>57</sup> Report of 30 April 2019 on behalf of the Committee for Cultural Affairs and Education on the parliamentary bill adopted by the Senate to create a related right for the benefit of press agencies and news publishers, by Mr Patrick Mignola.

## *Significance of traffic from Google, and its irreplaceable nature*

### *♦ Significance of traffic from Google*

222. The data communicated by news publishers and Google show that the latter provides a very significant share of the traffic directed to news publishers' websites. According to the data provided by the complainants, covering 32 press titles, and which is not disputed by Google, search engines account for, depending on the publisher, between 26% and 90% of redirected traffic, and two thirds of this traffic on average (unweighted<sup>58</sup>). For more than three-quarters of SEPM respondents (and 80% of APIG respondents), this percentage is greater than 50%. These responses also show that almost all the traffic from search engines comes from Google (classification marks 3961 to 3963, 3967, 5428 and 5430 to 5437, 7403 and 7045). Therefore, any decrease in redirections from Google Search is likely to result in a significant decrease in traffic to publishers' websites. These data are corroborated by the statistics provided by the *Syndicat de la Presse Indépendante d'Information en Ligne* (hereinafter 'Spiil'), which are based on the data of some 15 of its members and which are not disputed by Google in the context of the investigation, and according to which Google's share of the traffic of those members is between 8 and 80 % with an average of 40 % (classification mark 2878).
223. In its first economic study, Google claims that it directs 31.5% of the total traffic to the websites of news publishers. Several observations can be made about this percentage figure.
224. First of all, this figure reflects Google's significant influence in terms of traffic to the websites of news publishers. Secondly, the *Autorité* notes that this figure is calculated by excluding "*branded organic traffic*", which consists in associating the name of a specific press title with search terms. Such searches are just as likely to display protected content from news publishers as searches that do not include a publisher's name. Furthermore, no evidence provided for the investigation by Google, in particular its first economic study (classification marks 3699 et seq.), in which it defends the exclusion of "*branded organic traffic*", or Google's internal study entitled "*Snippet experiment*", provides any justification for such an exclusion. It cannot therefore be excluded at this stage of the investigation that the absence of protected content may also lead to a decrease in this "*branded organic traffic*". Taking account of "*branded organic traffic*" would, according to Google's first economic study, increase the share of traffic coming from Google from 31% to almost 37%.
225. Finally, the *Autorité* also notes that this figure of 31,5 % is calculated without weighting and largely on the basis of traffic from foreign news publishers (e.g. 'timesofisrael.com') or from sites that are not news publishers (e.g., 'visa-algerie.com').<sup>59</sup> Of the 200 sites studied by Google in the abovementioned study, APIG states that only 75 are websites of French news publishers (classification mark 7059), a finding that is not disputed by Google in its latest written observations. If, for example, only APIG members are considered, the weighted average of the volume of traffic redirected by Google amounts, according to APIG, to 45,3 % of the total traffic of these publishers (classification mark 7059)<sup>60</sup>.

---

<sup>58</sup> These rates are calculated on the basis of the traffic rate recorded for each publisher.

<sup>59</sup> See ratings 3706 to 3709.

<sup>60</sup> By way of comparison, and on the basis of the data provided by Google, the arithmetic average of the volume of traffic redirected by Google for APIG members amounts to more than 42%, which is more than the direct traffic.

226. In light of this, it appears that, because of its dominant position on the market for general search services, traffic from Google, and in particular from Google Search, accounts for a preponderant share of the total traffic of news publishers.

♦ *Irreplaceable nature of traffic from Google in connection with protected content*

227. Finally, it seems unlikely, from the publishers' point of view, that traffic from search engines can be replaced by traffic from social networks, content aggregators, or even from direct access. These different services have different features and functionalities for users. These specificities, which also exist with regard to access to newspaper articles, have led the Commission to consider separate markets for general search services and social networking sites<sup>61</sup>.
228. Moreover, the data provided by the parties, complainants and Google, show a very substantial gap between the traffic provided by Google and the possible alternatives available to publishers.
229. Thus, in its first economic study, Google estimates the share of different sources of traffic directed to the websites of news publishers (classification mark 3702). According to this study, the leading source of traffic is direct traffic, which accounts for 46.8% (including “*branded organic traffic*”, 41.5% without the latter) of total traffic on the websites of news publishers. The second biggest source of traffic is search engines (31.5% - see above) and the third biggest source of traffic (after direct traffic and search engines) is traffic from social networks, which accounts for 12.6% of the traffic on news publishers' sites. This economic study also identifies four other sources of traffic which together account for less than 10% of the traffic on news publishers' websites.
230. Two comments can be made about these percentages. Firstly, and as indicated above, these data, and in particular those relating to search engines, suffer from methodological biases, which limit their relevance. Secondly, and notwithstanding the first observation, these data underline, in any case, the preponderant influence of search engines compared to any other alternative source of redirected traffic. The data provided by the complainants also point to the gap between Google and the other traffic sources. According to the data provided by APIG, search engines, among which Google has an “extraordinary” position, represent, as an arithmetic average (in the absence of volume data), 4.7 times the traffic of the second provider of redirected traffic, i.e. social networks for the websites of the *Sud Ouest* group, *La Dépêche*, *Courrier de l'Ouest*, *Ouest France*, *Maine Libre*, *Presse Océan*, *La Provence*, *La Croix*, *Le Parisien* and *Les Echos* (classification marks VC 3966 - 3986, VNC 5428 - 5437). Spiil also indicated the following at its hearing (classification mark 2878) “*We compiled figures for the share of the audience represented by Google for some 15 members (all of Google's free services, including Search, Google News and Discover). This share varies between 8% and 80% with an average of 40%. [...] By way of a comparison, for these same members, the share of the audience represented by Facebook, which is the second biggest redirecter of traffic, ranges from 0% to 17%.*” In the end, a news publisher that directly loses traffic and whose ranking in the Google search engine is downgraded due to the absence of protected content could not easily replace this channel and the traffic it generates with another channel likely to generate the same traffic: the traffic that this publisher would lose through this downgrading of the display and its ranking in the Google search engine could therefore not be found via another channel or even another combination of channels.

---

<sup>61</sup> See above and Google Shopping decision of 27 June 2017, cited above, paragraphs 179 et seq.

231. Thirdly, in its second economic study, Google points out that *“In addition to demonstrating that information platforms and aggregators direct traffic to news publishers' and agencies' websites, economic literature also shows that snippets play a beneficial role for news publishers and news agencies”* (classification mark 8659). Google draws on economic literature that has studied the closure of Google News in Spain in 2014 and the German copyright reform in 2013 (leading to the litigation between Google and VG Media and the removal of *“snippets”* relating to the headlines of this publisher from Google's search engine). In the first case, which led to the closure of the Google News service in Spain and a fortiori the removal of all press content from this service, Google notes that studies agree that the total number of visits to publishers' websites in Spain fell by an estimated 5.3% to 14%. In the second case, Google found that the number of daily visits to the websites of a group of publishers that had not allowed Google to display content in the form of *“snippets”* (but only as links) fell by 8%. Google notes that *“the traffic lost in this way was directed to the web pages of competitors that had allowed Google to display snippets”* (classification mark 8660).
232. These studies therefore show that the removal of snippets does indeed lead to a reduction in traffic to the websites of the targeted publishers, which tends to indicate that at least some of the traffic generated by these snippets is not won back via other channels. The studies cited by Google certainly examine the impact on publishers' traffic over a limited time timeframe (6 months in the Spanish case study, two weeks in the German case study). But the German case is enough to show that a news publisher deemed it cheaper to grant a free licence to Google to reuse its content after two weeks, rather than wait for an indefinite period, and in any case longer than two weeks, to make up for the traffic lost from Google's search engine. More recently, the unanimous reaction of French news publishers to the announcement of Google's new display policy also testifies to the irreplaceable nature of the traffic redirected by Google and of the display of protected content for news publishers and to the fact that each publisher did not want to be penalised by taking a different decision from that of its competitors.
233. Contrary to Google's assertions, these examples, which it highlights, illustrate the irreplaceable nature of the traffic coming from Google for news publishers.

#### **e) Conclusion**

234. The evidence submitted in the case shows that the conditions imposed by Google allowed it to avoid any form of negotiation and remuneration for the reuse of protected content of any kind, even though the related rights created by Law 2019-775 provided news publishers and news agencies with the possibility of negotiation in order to monetise their content based on the criteria established in the Law on Related Rights.

235. This situation has arisen because the traffic generated by the protected content displayed by Google is irreplaceable and essential for the economic viability of news publishers. Indeed, the threat of a downgraded display is synonymous for each publisher with a loss of traffic and therefore revenue whether or not it is the only publisher affected by this downgrading and if this downgrading affects all publishers. This is also the reason why these publishers are forced to accept more unfavourable conditions than those that would have existed if Google had not imposed its policy of zero remuneration for the reuse and display of protected content, but instead had engaged in negotiations with news publishers and news agencies. It is also the reason why the latter have been forced to accept even more unfavourable conditions since entry into force of the Law on Related Rights than those that existed before.
236. This situation is summarised by the Ministry of Culture as follows (classification marks 2870 and 2871):
- “The argument that publishers can choose to refuse to be listed, or even accept a downgraded listing, is questionable for at least two reasons; the first is that every publisher is dependent on effective listing on Google in order to generate traffic and, therefore, advertising revenue, ; the second is akin to a prisoner's dilemma. Indeed, any publisher may feel that it is in its interest to grant the broadest possible license, if only for fear of others doing so. This is corroborated by the attitude of news publishers, the vast majority of which have granted Google the broadest possible free licence.”*  
(classification mark 2870)
237. In light of the above, it appears that Google's implementation of the Law on Related Rights is likely to be qualified as the imposition of unfair trading conditions within the meaning of Article 102 a) of the TFEU and Article L. 420-2 of the French Commercial Code (*Code de commerce*).

## **2. DISCRIMINATORY NATURE OF GOOGLE'S PRACTICES**

238. Among the practices prohibited under anti-competitive practices, discrimination may constitute an abuse of a dominant position within the meaning of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 TFEU when it is carried out by companies that hold a dominant position. As such, Article 102(c) TFEU covers the abuse of discrimination, which consists in “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”.
239. However, under the general principles of EU law, the concept of discrimination consists not only in treating similar situations differently, but also in treating objectively non-comparable situations identically (ECJ, 17 July 1963, *Italian Republic v. Commission*, Case C-13/63).
240. In this case, Google's conduct amounts to imposing zero remuneration for all publishers, irrespective of any examination of their respective situations and the corresponding protected content against the yardstick of the criteria laid down by the Law on Related Rights.

Having regard in particular to the legislator's intention to give news publishers and news agencies the possibility of receiving remuneration for the reproduction and display of their protected content on the basis of precise criteria, such undifferentiated treatment appears likely, at this stage of the investigation, to be devoid of any objective justification. This practice, for the same reasons as those explained above, is made possible by Google's dominant position on the market for general search services.

241. In light of the above, it appears that Google's implementation of the Law on Related Rights is likely to infringe Article 102 c) of the TFEU and Article L. 420-2 of the French Commercial Code (*Code de commerce*).

### 3. CIRCUMVENTION OF THE LAW

242. The European courts have held that an undertaking in a dominant position may be guilty of an abuse when, without formally infringing a law, it circumvents its purposes without any objective justification<sup>62</sup>.
243. In the present case, Google's implementation of the Law on Related Rights appears likely to contravene the spirit of the law. Indeed, as recalled above, the objective of Law 2019-775 is to redefine the sharing of value in favour of news publishers within a negotiated framework. However, the changes made by Google to its display policy have enabled it to obtain the consent of the vast majority of news publishers to the systematic reuse of their content, of whatever kind, without any form of prior negotiation or, a fortiori, without any remuneration being paid by Google. In other words, Google is using the possibility afforded by the Law on Related Rights to grant free licences to establish a general principle of non-remuneration for the display of protected content on its platform.
244. Google's behaviour also enabled it to obtain new, even more advantageous trading conditions than before the new rules on the reuse and display of protected content came into force.
245. For example, the new "*max-snippet*" tag implemented by Google within the framework of the entry into force of the related right in France allows publishers to indicate to Google the length of textual content that Google is authorised to reuse in its results pages. However, as indicated above, the vast majority of publishers (86.6% according to the Mind Media study cited above) indicated to Google via this tag and the associated parameter "-1" that they did not wish to impose a limit on the length of the excerpts (classification mark 1680). For photographs and videos, the vast majority of publishers have granted Google very broad permissions, allowing it to display very high-quality thumbnail images and videos with no time limit, without receiving any compensation in return. In practice, this means that, according to this study, the vast majority of publishers have chosen to allow Google to reuse their full articles in its results pages for free. The Ministry of Culture states (classification mark 2871) :

*"From this point of view, Google's application of the law creates a worse situation than the previous situation. Not only does Google not remunerate, but it also has access to more content since the vast majority of publishers have opted for a licence that allows the reuse of content without character limits whereas, previously, Google had unilaterally applied a limit (of around 300 characters). At present, according to an article by the Mind Media agency, Google is in a position to reuse on its platform all of the press content of most news publishers."*

---

<sup>62</sup> See Judgment of the Court of 6 December 2012, AstraZeneca, C-457/10, paragraphs 129 to 141.



246. This analysis is corroborated by the answers provided by Google in the course of the investigation. Indeed, as Google itself explains, the “*max-snippet*” tag and the “-1” parameter expressly “*authorise Google to copy all of the text on the web page and display it in Google Search*” (classification mark 4952). When asked about its ability to display such content without size limits prior to the Law on Related Rights coming into force and the implementation of this new policy, Google stated that it “*was not able to post 'text snippets' without size limits until October 2019*”. (Minutes of Google hearing: classification marks 4426 and 4427; answer 11 to the questionnaire of 13 January 2020, classification marks VC 5334 and VNC 5359).
247. This paradoxical situation imposed upon news publishers and news agencies, whose trading conditions are more unfavourable than those that existed before entry into force of the Law and Google's practices, is in direct contradiction with the objectives of Law 2019-775.
248. To justify its position, Google argued during the investigation that “*Publishers who choose the 'max-snippet:-1' mark-up (rather than specify a particular length for their snippets) trust Google to select the length of the snippet which will give users enough information about the page to entice them to click, without substituting for the need to visit the page to consume the content in full on the publisher's website. [...] Google does not use “max-snippet” mark-up to take the place of content licensing for consumptive experiences on its own surfaces*”. (classification marks VC 5 335, VNC 5 360)
249. However, this response does not seem likely to call into question the finding that the majority of publishers are in a worse situation following the entry into force of Google's new display policy. Indeed, it is irrelevant whether Google states that it wants to optimise the length of the content displayed for the benefit of publishers when Google appears to have imposed, through its behaviour, the granting of a free licence by publishers to display all or part of the articles in question.
250. Nor can it be excluded that the changes to the conditions for displaying news publishers' content constitute a violation of the letter of Law 2019-775.
251. Indeed, the terms and conditions of reuse of all or part of the headlines of news publishers' articles by Google are not necessarily covered by the exceptions provided for in the Law on Related Rights. In this regard, the Ministry of Culture explained that: “*It should be noted that the exception does not specifically cover headlines. These may not be covered by the exception either as a matter of principle in view of their specific nature or on a case-by-case basis depending on the number of words they contain. Assuming that they were covered, insofar as they could be qualified as isolated words or very short extracts, the question would then arise as to the application of the second sentence of paragraph 2 of this article*”. (classification mark 2869). This approach is also shared by another market player, News Republic (classification mark 4929).
252. The very specific nature of the headlines is also acknowledged by Google itself, which indicates: “*The usefulness of a snippet depends on the origin of the content and the type of information*”.

*For example, in the case of a cocktail recipe, the snippet can be useful to let the user know which link he needs to click on. On the other hand, the news content is produced by professional journalists and the headlines are written with great care to attract the interest of users and encourage them to click to read the article. Therefore, snippets are generally not as useful for news content as they are for other content. In addition, when there are no snippets, we can display more results on a page.”* (minutes of Google's hearing, classification mark 4424).

253. Finally, the failure by Google to communicate the specific information provided for in Article L. 218-4, paragraph 3 of the IPC, which are essential to any trading negotiation between news publishers and news agencies and online public communication services, appears, at this stage of the investigation, to contradict the letter and purpose of the Law on Related Rights.
254. This circumvention of the Law on Related Rights is made possible by the dominant position enjoyed by Google, in particular on the market for general search services, and by the share of traffic directed by it to the websites of news publishers. For the same reasons, Google, through its behaviour alone, appears to be in a position to deprive the Law on Related Rights of much of its effectiveness. Such behaviour is therefore likely to constitute a practice that contravenes Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 of the TFEU.

#### **4. LACK OF OBJECTIVE JUSTIFICATIONS**

255. With regard to conduct by the dominant undertaking that imposes unfair trading conditions, the case law to date examines whether such conditions are both necessary and proportionate to meet the objective pursued by the dominant undertaking or the achievement of its social purpose.
256. Google argues that, in accordance with a purportedly intangible principle of neutrality, it never pays to index content. According to Google, *“paying for snippets would be incompatible with the fundamental compromise inherent in operating a search engine”*. Google also believes that its decision to seek the consent of news publishers to use excerpts from the text without monetary compensation is *“a natural, prudent and reasonable approach”* given the new legal provisions and uncertainties surrounding this legal text and the need to protect itself from possible litigation by publishers. Finally, Google draws a parallel with the proceedings that gave rise to a decision of the Bundeskartellamt in 2015<sup>63</sup>, which analysed Google's behaviour in refusing to enforce an ancillary intellectual property right in favour of news publishers established under German law.
257. However, first of all, supposing that Google's invoking of its internal practice is valid in the case in point, it is clear from the information provided by AFP that it has on several occasions concluded agreements governing remuneration for content originating from AFP and reused by Google.

---

<sup>63</sup> Bundeskartellamt, 6th Decision Division, B6-126/14, *Google Inc. vs. Third Parties*, 8 September 2015.

258. In 2007, following legal proceedings instituted by AFP in 2005, Google agreed to compromise and conclude an agreement to remunerate AFP for the reuse of text extracts and thumbnail images in Google's services. The remuneration agreement provided for a lump sum as well as a mechanism for sharing advertising revenues (see AFP's reply to the December 5 questionnaire: classification marks 2605-2606 and 2718). In 2010, a new contract, which was established on the same basis as in 2007, was concluded for a period of three years (classification marks 472-473 and 2727-2734).
259. The *Autorité* also notes that the refusal to remunerate news publishers itself has an impact on the listing of news publishers that do not wish to grant a licence without remuneration, which see the display of their content downgraded. In any event, Google does not provide any evidence that it is impossible to guarantee the neutrality of its listings while remunerating news publishers for the reuse of their protected content as provided for by law.
260. Secondly, as regards the allegedly natural, prudent and reasonable nature of Google's conduct, the *Autorité* notes that Law 2019-775 does not indeed prevent a publisher, as a matter of principle, from granting a free licence, in certain cases, for use of its content. However, Google's conduct, which consists in systematically placing news publishers and news agencies in a situation where the only possible way of securing stability is to assign a substantial part of their intellectual property rights free of charge, cannot be considered, after this initial analysis, as prudent in light, in particular, of the provisions of Articles L. 420-2 of the French Commercial Code (*Code de commerce*) and 102 of the TFEU. Indeed, as discussed above, such a practice is likely to constitute an abuse of a dominant position on the market for general search services, even though it would not in itself constitute a violation of the Law on Related Rights.
261. Similarly, Google's decision to systematically and indiscriminately include the headlines of news articles under the exception provided for in Article L. 211-3, paragraph 2, of the IPC does not appear, at this stage of the investigation, and contrary to Google's claims, to be "natural", "prudent" or "reasonable".
262. Conversely, "natural, prudent and reasonable" behaviour for a dominant operator such as Google, on which particular responsibility rests, could have consisted in entering into prior negotiations in good faith with news publishers and news agencies. Such negotiations would have allowed Google to comply with the intentions of the legislator while safeguarding its interests.
263. Thirdly and finally, the parallel drawn by Google with the proceedings that gave rise to a decision of the Bundeskartellamt in 2015<sup>64</sup> is, in any event, irrelevant in this case. As the Bundeskartellamt states in its decision, the German case is set within a specific legal and factual context, which cannot serve as a precedent for assessing the anti-competitive nature of practices employed by Google in another context. The decision states in this regard (classification marks 3340 and 3341):

*"It is true that apart from Germany, copyright amendments in favour of press publishers are in force in Spain and are under discussion in Austria [...]. However, in all cases it is a matter of national laws, which are also differently construed."*

---

<sup>64</sup> Bundeskartellamt, 6th Decision Division, B6-126/14, *Google Inc. vs. Third Parties*, 8 September 2015.

*The antitrust assessment of a reaction by Google can therefore – even if Google’s reactions, as postulated by the Third Party, were consistent – vary. Not even a possible “EU wide or even global strategy” pursued by Google will change that. Only concrete action actions are subject to antitrust review of anticompetitive practices. The review takes into account the specific frameworks for such action against the background set by the respective legal context*<sup>65</sup>” (emphasis added).

264. The Bundeskartellamt also takes care to specify in its decision that its assessment could be different in the event of a change to the law on related rights in Germany (“*changes in the ancillary copyright of publishers by the legislator*”) (classification mark 3342). However, Google's practices did indeed take place within a different legislative framework following the adoption of the Directive and its transposition into French law.

## 5. THE ACTUAL OR POTENTIAL EFFECTS OF THE PRACTICES

265. As the *Autorité* recently recalled in its above-mentioned Decision 19-D-26, with regard to the imposition of unfair trading conditions, the anti-competitive effects of the practice do not need to be demonstrated<sup>66</sup>.
266. In any event, at this stage of the investigation, Google’s behaviour is likely to have had two types of effects.
267. On the one hand, Google’s practices are likely to be harmful to news publishers and news agencies insofar as they thwart the intended effects of the Law on Related Rights. This would result from a deterioration in the situation of news publishers and news agencies, both from an economic and legal point of view, given the scope of the free licenses granted to Google compared to the situation that would have resulted from negotiations under the conditions set out in the Law. Beyond the consequences of Google’s practices for news publishers and news agencies, it cannot be ruled out that these practices may also lead to a deterioration in the quality of information because publishers do not have sufficient resources to meet their costs. These consequences would thus undermine the sustainability of the contribution that publishers make “*to public debate and the proper functioning of a democratic society*”, a sustainability that the legislator intended to guarantee. This intention is reflected not only in the provisions of the Law on Related Rights, but also in the provisions of the Directive (recital 54 of the Directive, see also Minutes of the hearing of the Ministry of Culture, classification mark 2867).
268. These practices are also likely to have anti-competitive effects on the market for general search services by placing Google’s competitors, in particular those with a small market share and which pay publishers to display their content, in an asymmetric situation in relation Google (classification marks 2387 and 2400).

---

<sup>65</sup> “It is true that apart from Germany, copyright amendments in favour of press publishers are in force in Spain and are under discussion in Austria [...]. However, in all cases it is a matter of national laws, which are also differently construed. The antitrust assessment of a reaction by Google can therefore - even if Google's reactions, as postulated by the Third Party, were consistent - vary. The antitrust behavioural framework applying to Google may be different in each case. Not even a possible "EU wide or even global strategy" pursued by Google will change that. Only concrete action actions are subject to antitrust review of anticompetitive practices. The review takes into account the specific frameworks for such action against the background set by the respective legal context”. (translation by Google)

<sup>66</sup> See Decision 19-D-26, paragraph 353.

#### **D. REQUESTS FOR INTERIM MEASURES**

269. According to settled case law, “*interim measures may be decided (...), within the limits of what is justified by the emergency, in the event of serious and immediate harm to the Economy as a whole, to that of the industry concerned, to the interests of consumers or of the complainant, provided that the facts reported, and covered by the investigation, in the proceedings on the merits appear likely, based on the evidence in the case, to constitute a practice that contravenes Articles L. 420-1 or L. 420-2 of the French Commercial Code (Code de commerce), i.e., a practice that is the direct and certain cause of the harm observed*” (French Supreme Court (*Cour de cassation*), judgement of 8 November 2005, Neuf Télécom, 04-16857).
270. In order to determine whether the reported practices make it possible to impose interim measures, it is therefore necessary to assess the serious and immediate nature of the harm to the general economy, the concerned sector, the consumers’ interest or the complainant. However, these various cases of harm are not cumulative, but rather alternative, conditions: serious and immediate harm observed in only one of these cases is sufficient to order interim measures.
271. On the other hand, the seriousness of the harm, its immediacy and the existence of a causal link between the reported facts and the harm are three cumulative criteria<sup>67</sup>.

##### **1. SERIOUS AND IMMEDIATE HARM TO THE GENERAL ECONOMY, TO THE ECONOMY OF THE SECTOR CONCERNED, TO THE INTEREST OF THE CONSUMER OR TO THE COMPLAINANT**

272. First, the *Autorité* notes that by using its dominant position in the market for general search services, and given the obvious importance of the use of protected content in its search engine (classification mark 4957), Google is in a position to undermine the effectiveness of a law, in this case the Law on Related Rights, even before it takes effect. This situation could be qualified as serious and immediate harm to the general economy, given the pre-eminent role of the press in the functioning of a democratic society. However, that question may be left open in this case since Google's practices are causing serious and immediate harm to the press sector in particular.

##### **a) Seriousness of the harm to the press sector**

273. As recalled above, the press sector is experiencing very serious economic difficulties. Changing uses has led to the erosion of hard copy circulation and a decline in advertising revenues. The contraction of its two traditional sources of revenue has led to a decrease in total press sector revenues of around 4 billion euros over the last ten years, as noted above.

---

<sup>67</sup> See *Autorité de la concurrence*, Decision 19-MC-01 of 31 January 2019, cited above, paragraph 167; Decision 14-MC-01 of 30 July 2014 on a request for interim measures by beIN Sports France in the pay-TV sector, paragraphs 228 and 229 ; Decision 13-D-16 of 27 June 2013 on a request for interim measures concerning practices employed by SNCF group in the passenger transport sector, paragraph 163; Decision 13-D-04 of 14 February 2013 on a request for interim measures concerning practices employed by EDF group in the photovoltaic electricity sector, paragraph 179.

274. Faced with the decline in the printed press sector and the corresponding fall in advertising revenues in particular, news publishers and press agencies have no other option than to develop their digital activities to ensure their sustainability. In this context, revenues from the online activities of news publishers and news agencies, and in particular the monetisation of their related rights in respect of online public communication services, play a strategic role in the financial stability of these players. It also appears that news publishers cannot afford any loss of their digital readership.
275. Contrary to Google's claims, the reported practices prevent publishers and news agencies from monetising the rights granted to them under the Law on Related Rights, even though the legislator has emphasized that this is a vital source of revenue for the sector. In this respect, in Report 1912, MP Mignola stressed that the related rights system is "*a matter of life or death*" for the media and that "*the survival of media pluralism and, therefore, press freedom depended on the economic survival of publishers and press agencies*". (classification marks 6673 and 6674)
276. This harm appears to be all the more serious since Google's makes significant use of the protected content of news publishers and news agencies on its various services, in particular Google Search. Indeed, as indicated above, Google Search is the main source of traffic redirected to the websites of news publishers and, as such, the service is likely to make use of protected content as much as possible.
277. The seriousness of this harm also stems from the fact that the practice affects a sector that plays a key role in a democratic society. Recital 54 of the Directive thus stresses that the press "*provides a fundamental contribution to public debate and the proper functioning of a democratic society*". This specific nature of the press sector has also been acknowledged by the Constitutional Council, which considered that "*the pluralism of daily political and general newspapers is in itself an objective of constitutional value*"<sup>68</sup>.
278. As a result, the reported practices are causing serious harm to the press sector insofar as they threaten the economic viability of operators in the press sector, and first and foremost news publishers and news agencies.

**b) Immediacy of the harm to the press sector**

279. Only immediate harm can justify urgent action by the *Autorité*, which is designed to prevent the occurrence of damage that the decision on the merits would be powerless to prevent or remedy. The *Autorité's* intervention may thus be requested to put an urgent end to recent behaviour that should be stopped so that the damage cannot materialise or intensify. The immediacy of the harm is assessed in particular in the light of the date of implementation of the practices, i.e. their recent nature.
280. In this case, Google's practices were implemented as from 25 September 2019 and are still continuing. Their recent nature is therefore established.
281. These practices also occurred at a decisive time for the press sector. And the *Autorité* takes into account the economic conditions under which the practices take place.

---

<sup>68</sup> Constitutional Council, Decision 86-210 DC of 29 July 1986, Law reforming the legal system governing the press, paragraph 20.

Thus, the immediacy of the harm may result in particular from the fact that the practices were implemented in a sector being opened up to competition or at “*a decisive time for the stimulation of competition*”<sup>69</sup> on a market.

282. Google’s new news content display policy was announced on 25 September 2019 and implemented on 24 October 2019, the date of entry into force of the Law on Related Rights. This new law should have allowed for the initiation of negotiations in good faith to determine the remuneration owed in respect of related rights upon its entry into force. However, the holders of these new rights were unable to exercise them due to Google’s behaviour at the very time when Law 2019-775 was supposed to produce the expected effects required to remedy the economic difficulties of the press sector. There is therefore no doubt that Google’s practices are taking place at a particularly decisive time for the press sector, and at a time when the economic situation of the players is extremely fragile.
283. According to Google, publishers have never been remunerated for the display of protected content within its services, and the fact that most of them have chosen to continue to allow Google to reuse and display such content means that their situation has not changed in this respect.
284. However, this argument is not convincing. On the one hand, it should be noted that the adoption by Parliament of the Law on Related Rights is a new development, which should lead, according to the intentions of the legislator, to a rebalancing of the distribution of the value chain among online public communication services, such as Google Search, and news publishers and news agencies. On the other hand, the specific implementation of the Law on Related Rights decided by Google is also a new development and, moreover, may be regarded as having “*aggravated the situation for the economy, the sector or consumers*”, which is a state of affairs that is regarded by the *Autorité* in its decision-making practice as making “*their protection particularly urgent by ordering interim measures*”<sup>70</sup>. Indeed, as we have seen, far from rebalancing the relationship between publishers, news agencies and online public communication services, Google’s behaviour has led to publishers and news agencies being placed in an even more unfavourable situation than that which existed prior to entry into force of the Law on Related Rights.
285. The urgency is all the more pressing in this case because the need to immediately rebalance the balance of power between the various players in the press sector was stressed throughout the parliamentary debates preceding adoption of the Law on Related Rights. This “very real urgency to act on the subject”<sup>71</sup> was indeed marked by transposition of the Directive in a very short time. The expected speedy holding and completion of negotiations between platforms and news publishers and news agencies was also an objective that was emphasised by parliamentarians, as is apparent from the preparatory work for the Law.

---

<sup>69</sup> Decision 09-MC-02 of the *Autorité* of 16 September 2009 relating to complaints on the merits of the case and requests for interim measures by Orange Réunion, Orange Mayotte and Outremer Télécom concerning practices employed by the company SRR in the mobile telephony sector in La Réunion and Mayotte, paragraph 89; Decision 14-MC-02 of the *Autorité* of 9 September 2014 relating to a request for interim measures by the company Direct Energie in the gas and electricity sectors, paragraph 215.

<sup>70</sup> Decision 10-D-07 of the *Autorité* of 2 March 2010 relating to practices employed by Kadéos in the prepaid gift voucher sector, paragraph 126.

<sup>71</sup> Report 243 of 16 January 2019 by Senator M. Assouline, page 26.

The MP Patrick Mignola, *rapporteur* for the bill on behalf of the Cultural Affairs and Education Committee of the National Assembly, stated in his report 2141 dated 15 July 2019: “*The urgency now is that negotiations on the remuneration of this right and on the share of it to be paid to professional journalists and other players responsible for works integrated into press publications should begin and be concluded as soon as possible*”<sup>72</sup> (classification mark 6770).

286. It follows from the foregoing that Google's practices must be regarded as causing immediate harm to the press sector.

**c) Causal link between Google's practices and the identified harm**

287. In the light of the foregoing developments, it appears that the harm identified in the press sector is directly linked to Google's implementation of the Law on Related Rights, which deprives news publishers and news agencies, at a time when their digital activities appear to be an essential driver for their long-term sustainability, of any possibility of negotiating and monetising their newly recognized right.
288. As previously with regard to the criterion relating to the immediacy of the harm, Google maintains that there is no link between the change to the conditions for the reuse and display of protected content on its various services and the difficulties in the press sector, the latter having existed prior to the adoption of the Directive and the Law on Related Rights. As indicated above, this argument is not relevant, since it is precisely Google's behaviour that generates the identified harm, which prevents news publishers and news agencies from making use of the rights that the Law on Related Rights has just granted them. Although the pre-existing crisis situation in the sector is likely to aggravate the consequences of the harm resulting from Google's behaviour, it is not the cause of the harm identified.
289. Under these conditions, the causal link between the reported practices and the attack on the press sector is established.
290. Finally, the *Autorité* notes that the complainants, which have acted in defence of the interests of a very large number of publishers of general news, the national daily press, the regional daily press, the *départemental* weekly press, the weekly regional press and the magazine press, account for a large share of the press sector in France. In addition, the *Fédération Nationale de la Presse d'Information Spécialisée* (FNPS) has also expressed its support for their approach. In these circumstances, Google's practices, which manifestly harm the press sector, must be regarded as also seriously and immediately harming the interests of the complainants.
291. In this context, and in light of the evidence produced in the case, it does not seem necessary to analyse whether the reported practices have also seriously and immediately harmed the interests of consumers.

**2. NECESSARY INTERIM MEASURES**

292. According to the third paragraph of Article L. 464-1 of the French Commercial Code (*Code de commerce*), interim measures “*may include the suspension of the practice in question and an injunction ordering the parties to restore the previous state of affairs. They must remain strictly limited to what is required in order to respond to the urgency*”.

---

<sup>72</sup> Report 2141 of 15 July 2019 by MP M. Mignola, page 6.



293. In addition to their complaints on the merits of the case, APIG, SEPM and AFP have requested, on the basis of Article L. 464-1 of the French Commercial Code (*Code de commerce*), that interim measures be ordered, as summarised in the following table:

Interim measure requested	APIG	SEPM	AFP
Enter in good faith into a regulated negotiation aimed at determining the remuneration owed in respect of the related right recognized by the Law on Related Rights for any use of protected content	X	X	X
Order that the negotiation and setting of this remuneration take place in accordance with the criteria and procedures provided for in Article L. 218-4 of the IPC	X	X	X
Provide for retroactive application of the remuneration owed in respect of the related right since entry into force of the Law on Related Rights (24 October 2019)	X	X	X
Set a deadline for reaching agreement on the amount of the remuneration	3 months	1 month and 8 days	6 months
Appoint an independent representative to oversee successful completion of the negotiation	X		X
Submit to the <i>Autorité</i> , every three months from the date of the decision on the interim measures to the date of the decision on the merits of the case, a detailed report on execution of the injunctions		X	
Restore the service levels for publishers that have been downgraded and maintain the display of news publishers' content in the form of text snippets on Google's services	X	X	

294. According to Google, these requests would be “*unjustified and disproportionate*”. These requests would indeed imply a return to the conditions of display prior to the Law on Related Rights, which would expose Google to copyright infringement claims. Finally, according to Google, the requests of the complainants would be such as to transform an intellectual property right limited to an exclusive right over content into a possibility for the right holder to impose an obligation on other undertakings to purchase that right. Not only would such a purchase obligation infringe intellectual property law and free market principles, but it would also be inconsistent with Google's position, which “*has no demand for buying snippets*” (classification mark 8271).
295. During the hearing, the Investigation Services proposed the adoption of interim measures relating to the obligation to negotiate in good faith, while adding more specific measures aimed at introducing a principle of neutrality into any negotiations on the terms of display of news publishers’ and news agencies’ content within Google’s services and into any other economic relationship between Google and news publishers and news agencies.

296. In view of the potentially anti-competitive nature of the reported practices and the serious and immediate harm they cause to the press sector, the *Autorité* considers it necessary to obtain, pending the decision on the merits of the case, guarantees regarding the fairness of the trading conditions between Google and publishers and news agencies with regard to their related rights.
297. As stated above, the practices reported by the complainants, and likely to constitute an abuse of a dominant position, consist, on the part of Google, in imposing a zero remuneration on publishers and news agencies for the reuse and display of their protected content. These practices could be seen as exploitative abuse by Google of its dominant position on the market for general search services, as the irreplaceable nature of the traffic it redirects to news publishers and the current economic situation of publishers mean that any loss of traffic is extremely detrimental to the sustainability of their business activities.
298. Under these conditions, suspension of the harm identified requires the implementation of a set of injunctions (hereinafter the “Injunctions”) allowing publishers and news agencies within the meaning of Article L. 218-1 of the IPC or collective management bodies within the meaning of Article L. 218-3 of the IPC, if they so wish, to enter into negotiations with Google with a view to discussing both the terms and conditions of the reuse and display of their content and their corresponding remuneration. The negotiations entered into within the context of such interim measures should be able to take place in good faith. In order to be strictly necessary and proportionate, the interim measures must also allow news publishers and news agencies not to enter into negotiations with Google, if they so wish, or to grant it a free licence. Finally, it appears necessary to protect Google against requests that do not comply with the criteria established in the Law on Related Rights.
299. Contrary to Google’s assertions both in its written observations and during the hearing, these measures appear to be necessary and proportionate to the seriousness of the practices, as they are the only ones capable of guaranteeing fair trading conditions and effective implementation of the Law on Related Rights.
300. In response to the requests of the complainants to restore the previous state of affairs, Google argues that such an interim measure would expose it to claims of copyright infringement. This argument is not relevant as regards the measures imposed by the *Autorité*, which has not opted for a return to the previous state of affairs but instead ordered that the display conditions be maintained in accordance with the requests made by the news publishers and news agencies following the announcement of Google's new display policy.
301. The measures established by the Injunctions in no way entail placing Google under any obligation to purchase any content, but instead are limited to allowing for a fair sharing of the revenues generated by content that Google has already reused since the launch of its search engine in 1998<sup>73</sup>, and only with publishers and news agencies whose requests comply with the criteria established by the Law on Related Rights.

---

<sup>73</sup> In this respect, Google explained, in response to a questionnaire from the Investigation Services (classification mark 4957), the historical link between its services and the display of short extracts and images within its services : "Although the *Autorité*'s question relates to the display of snippets and thumbnails by Google, Google wishes to state that Google Search has always (since the launch of the search engine in 1998) displayed snippets in its search results (including news-related search results), unless a publisher has asked Google not to do so, through the REP or by using Meta tags on its site. Google News displayed snippets of search results from its launch in late 2002 until mid-2017, but has not done so since. Google Search and Google News display thumbnails."

302. Furthermore, the interim measures do not exclude the possibility that some content may be provided to Google free of charge by the news publishers and news agencies. This could occur when the news publisher or news agency wishes to grant Google a free license, or when the criteria established by Law 2019-775 do not justify the payment of remuneration.
303. As regards Google's argument that, over and above any issue of a purchase obligation, it has no intention of including protected content for display within its services, this does not appear to be supported by credible evidence. Firstly, and as explained above, Google has been including this content for more than 20 years. Secondly, the way in which Google implemented the Law on Related Rights not only allowed it to continue to reuse and display content, but it also strengthened its ability to reuse and display the articles, photos and videos of news publishers and news agencies as extensively as it wished.

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

304. In view of the above, Google shall be ordered to negotiate the reuse of the content of news publishers and news agencies so requesting in accordance with the provisions of Article L. 218-4 of the IPC. In order to ensure the effectiveness of such a measure, the *Autorité* deems it necessary to make the following clarifications:
- (i) the implementation of this injunction must cover all Google services that reuse content protected by Law 2019-775, in particular its online search site Google Search. Once defined, the scope of the interim measures must make it possible to avoid any risk of circumvention of the measures by Google.
  - (ii) this Injunction imposes an obligation on Google to enter into negotiations in good faith when it is requested to do so by a press publisher, a news agency or a collective management body.
  - (iii) this Injunction requires that the negotiations actually result in a remuneration proposal by Google. This financial proposal will be assessed in respect of its compliance with Law 2019-775 and its transparent, objective and non-discriminatory nature. Where appropriate, such a proposal may give rise to zero remuneration being proposed.
  - (iv) taking into account, in particular, the urgency of the situation in which the press sector finds itself, which led the legislator to transpose the Directive within a very short time frame, the negotiations relating to this Injunction shall cover, retroactively, the period starting from entry into force of Law 2019-775, i.e. 24 October 2019.

**[1] Google is ordered to negotiate in good faith with any news publishers and news agencies or collective management organisations so requesting the remuneration owed by Google to the latter for any reuse of protected content on its services in accordance with the terms established in Article L. 218-4 of the IPC and based on transparent, objective and non-discriminatory criteria. This negotiation will have to cover the period of content reuse since 24 October 2019.**

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

305. In order to guarantee the effectiveness of the first Injunction, Google should be ordered to communicate to publishers and news agencies entering into negotiations the information required to make a transparent evaluation of the remuneration due, in accordance with the provisions of Article L. 218-4, paragraph 3, of the IPC.

**[2] Google is ordered to communicate to publishers and news agencies the information provided for in Article L. 218-4 of the IPC.**

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

306. In order to ensure the effectiveness of the negotiation process, Google must be ordered to continue, during the negotiation period, to display the protected content in Google's services according to the terms chosen by those same news publishers and news agencies in the REPs and Meta tags. It shall be the responsibility of Google to ensure compliance with the provisions of the French Intellectual Property Code within the framework of implementation of this Injunction.
307. As regards the publishers and news agencies that have not granted Google permission to reuse their protected content since 24 October 2019, but which have requested to negotiate with Google within the framework of the Injunctions, Google should be ordered not to object to the display of their protected content within its services according to the terms chosen by those publishers and news agencies during the period of negotiation.

**[3] Google is ordered 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 is ordered to allow news publishers and news agencies that have not granted Google permission to reuse their protected content since 24 October 2019 to enter into negotiations within the framework of the Injunctions if they so wish; not to object to the display of their protected content within its services under the terms and conditions chosen by those news publishers and news agencies during the negotiation period.**

***d) Period of negotiations***

308. In line with the urgency of the situation in the press sector, Google shall conduct the negotiations covered by the Injunctions within 3 months of the request to open negotiations. This opening will be materialised by the date of receipt of a request by registered letter with acknowledgment of receipt, if necessary in electronic format, sent by a news publisher, a press agency or a collective management organisation referred to in Article L. 218-3 of the IPC, to at least one of the Google entities covered by these Injunctions.

**[4] Google is ordered to conduct the negotiations referred to in the Injunctions within 3 months of the request to open negotiations made by a press publisher, a news agency or a collective management body.**

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

309. In order to ensure that negotiations between publishers or news agencies and Google can take place in a balanced manner, it is important for Google to comply with a principle of neutrality as regards the way in which the protected content of the publishers and agencies concerned is indexed, classified and, more generally, presented within Google's services. The aim is to prevent publishers from being adversely affected in respect of the usual conditions for displaying, indexing and classifying their content on Google, as a result of or in connection with the ongoing negotiations.

**[5] Google is ordered to take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services.**

*f) Principle of neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies*

310. Similarly, Google should be ordered to comply with a principle of neutrality in the negotiations covered by these Injunctions and in their outcome on any other economic relationship that Google may have with news publishers and news agencies, whether or not the latter are parties to the negotiations.

311. The aim is thus to prevent Google from rendering negotiations on related rights ineffective by offsetting the remuneration paid to publishers for their related rights against other activities. The aim is also to prevent Google from using its dominant position on the market for general search services to impose the use of some of its services during negotiations with news publishers and news agencies.

**[6] Google is ordered to take the necessary steps to ensure that the negotiations provided for in the Injunctions do not affect any other economic relationships between Google and news publishers and news agencies.**

*g) Monitoring compliance with Injunctions*

312. In order to monitor implementation of the Injunctions, which is dependent in particular on Google's good faith in the conduct of the negotiations, it appears necessary to provide for a mechanism to monitor compliance with the Injunctions.

313. Firstly, Google shall provide the *Autorité* with periodic reports on its compliance with this Decision. These reports shall include, in particular, the following:

- (i) any calculation allowing for the evaluation of the remuneration proposal made by Google to news publishers and news agencies;
- (ii) any information that can be used to assess the objective, transparent and non-discriminatory nature of this proposal ;
- (iii) any information that can be used to assess the objective, transparent and non-discriminatory nature of the remuneration on which Google and news publishers and news agencies have reached an agreement, accompanied by the relevant contracts ;
- (iv) any information relating to difficulties encountered in negotiations with news publishers and news agencies and the corresponding exchanges ;
- (v) any information that enables the *Autorité* to assess compliance with the principles of neutrality established in Injunctions 5 and 6.

314. The first of these reports shall be communicated to the *Autorité* within 4 weeks of the day Google entered into negotiations with one or more news publishers, news agencies or collective management bodies. The next reports should be sent on the 5th of each month, up until publication of the decision of the *Autorité* on the merits of the case.

315. Taking into account the variety and potential complexity of the issues to be examined, the *Autorité* may decide to engage the services of one or more external technical experts.

**[7] Google is ordered, within a deadline of 4 weeks as of the opening of negotiations with one or more news publishers, news agencies or collective management bodies, to send an initial report on its compliance with the Injunctions. The subsequent reports shall be communicated to the *Autorité* on the 5th of each month up until publication of the decision of the *Autorité* on the merits of the case.**

#### *h) Duration of interim measures*

316. In view of the potentially anti-competitive nature of the reported practices and the serious and immediate harm they cause, in particular to the press sector, the *Autorité* considers it necessary for the injunctions ordered to remain in force up until publication of the decision of the *Autorité* on the merits of the case.

**[8] The Injunctions shall remain in force until publication of the decision of the *Autorité* on the merits of the case.**

## DECISION

**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.

**Article 8:** Articles 1 to 7 of this Decision shall remain in force up until publication of the decision of the *Autorité* on the merits of the case.

**Article 9:** The investigation into the merits of the case continues into the practices reported by APIG and others, SEPM and AFP.

Deliberation on the oral report by Mr Grégoire Colmet-Daage and Mr Frédéric Fustier, Case handlers, and the speech by Mrs Lauriane Lépine-Sarandi, Deputy General Rapporteur, by Mrs Isabelle de Silva, Chairperson, Mrs Irène Luc, Vice-Chairperson and Mrs Valérie Bros, Member.

Hearing secretary,

Chair,

Thierry Poncelet

Isabelle de Silva

© Autorité de la concurrence

---