

# NEWS MEDIA EUROPE

## **News Media Europe's contribution to the French Competition Authority's consultation on the commitments offered by Google in the context of press publisher right agreements**

Brussels, 31 January 2022

### **Introduction**

News Media Europe is a trade association representing the progressive news media industry – over 2,500 European news brands in print and online, radio and TV. News Media Europe represents national news media from sixteen countries (BE, EE, DK, FI, NL, IE, NO, ES, SE, CY, UK, HU, HR, RO, CZ, LT) working actively on the transposition of the EU Copyright Directive 2019/790 and its proper implementation. In addition to copyright, News Media Europe also works on public policies related to press freedom, fundamental rights, competition, data protection and privacy, advertising and taxation.

News Media Europe welcomes the Authority's consultation initiative on the [commitments](#) offered by Google. In our view, the proposed commitments seem insufficient to address competition concerns. Our comments aim to improve the proposed commitments, with a view to enabling genuine openness and transparency for negotiations in France and other European markets.

### **The significance of the Authority's decisions for the press sector in Europe**

As a preliminary remark, News Media Europe wishes to underline the importance for the entire press sector in Europe of the interim measures of [9 April 2020](#) and the sanction of [12 July 2021](#) published by the Authority. These decisions represent an important precedent for European publishers who hope to enter into negotiations with Google to better control the use of their online content and obtaining appropriate remuneration under the EU Directive.

News Media Europe and its members see in the injunctions issued by the Authority the creation of a fair and balanced negotiation framework that will encourage the emergence of licensing and remuneration agreements as intended by the European co-legislators. European publishers welcome the Authority's obligations of good faith, information-sharing and neutrality, in full observance of contractual freedom principles.

News Media Europe hopes that the expertise provided by the French regulator will resonate at European level and in the Member States. We believe that the experience of the French regulator deserves a common reflection within the European Competition Network. While respecting the legal traditions of each country and differences inherent to cultural markets,

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we believe that the implementation of the neighbouring right is an opportunity to raise this issue beyond national borders.

## Overview of the negotiations between Google and European publishers

More than two years after the adoption of the Directive (EU) 2019/790, negotiations between Google and European press publishers across EU Member States remain opaque, fragmented, uneven and discriminatory.

While France was the first Member State to transpose the press publishers' neighbouring right in July 2019<sup>1</sup>, transposition has been seriously delayed in other Member States for various reasons (e.g. delayed legislative procedures due to emergency health measures, national consultations, waiting for the European Commission's guidelines on Article 17, etc). By the transposition deadline of 7 June 2021, only four Member States had completed the full transposition<sup>2</sup>.

For publishers already approached by Google, this delay in transposition has the effect of depriving them of a statutory right to control and remuneration, and therefore of significant bargaining power, since they are neither in full knowledge of their rights nor equipped with legal instruments to enforce them.

In several Member States, publishers are under pressure by Google to rapidly conclude News Showcase agreements, even where the law has not yet been transposed. Based on a “divide-and-conquer” approach, Google arbitrarily hand-picks its contractual partners, and in doing so privileges bilateral talks and proposes agreements only to a limited selection of publishers in an effort to undermine a collective approach by publishers.

In addition, Google proposes agreements to publishers exclusively based on their participation in its News Showcase product, whereas compliance with copyright law has little to no bearing in shaping the conclusion of agreements. It is therefore desirable that a renegotiation of such agreements takes place when the law comes into force, on the basis of the neighbouring right.

In smaller European markets and those with less spoken official languages, publishers find it difficult to enter into negotiations with Google, who demonstrates little interest in concluding agreements. In such case, publishers sometimes choose to collectively reach out to Google

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<sup>1</sup> [Loi n°2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse](#)

<sup>2</sup> [Infringement procedure](#) European Commission's press release, 26 July 2021

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through a trade association or a collective management organisation<sup>3</sup>, but even then, Google favours individual agreements.

It is also important to consider the case of specialised publications that face considerable difficulties in concluding agreements with Google, despite claims by the company that such markets are covered by its agreements.

Google has so far concluded agreements related to its News Showcase product in France, Germany, Italy, Ireland and the UK, many of which were concluded before the transposition of the press publishers' right or in the absence of such a right (e.g. UK). The opaque and selective conclusion of these agreements raises serious competition concerns:

- Making copyright remuneration dependent on participation in the News Showcase product, by tying the statutory right to remuneration under the Copyright Directive to participation in a Google product or service.
- The tying and bundling of different, unrelated Google products and services as part News Showcase agreements (eg. subscription, analytics and advertising products).
- The exclusionary effects on publishers resulting from the arbitrarily selective and discriminatory approach of Google in concluding News Showcase agreements.
- The use of unfair negotiation tactics and unfair contractual provisions, based on “take-it-or-leave-it proposals”, the conclusion of individual agreements in preemption of transposition and action by collective management organisations, the use of pre-determined spending caps for News Showcase agreements in different national markets, abusive contractual provisions limiting access to data for publishers and excessively broad contract termination clauses.
- The cumulative difficulties that result from the above and prevent news publishers from effectively exercising their rights under the Copyright Directive.

In conclusion, the press sector deplores the absence of fair and transparent negotiations ensuing from Google's conduct. This conduct raises concerns in relation to a potential abuse of dominant position by Google in the search market. Such behaviour has started a race to the bottom across Europe, especially for the smallest publishers (independent, online-only, local, regional) who cannot viably operate without visibility on Google's services. It is fair to say that Google's pick-and-choose attitude threatens the existence of thousands of publications and more broadly, media pluralism online. Here, we would like to emphasise that the neighbouring right is a statutory obligation.

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<sup>3</sup> By virtue of the [Collective Rights Management Directive 2014/26/EU](#), in accordance with competition law.

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## Position on the commitments offered by Google

News Media Europe takes the view that Google's proposals represent a step in the right direction but remain insufficient to guarantee the desired level of fairness and transparency in the negotiations. While the Commitments seem very reasonable on paper, the reality of negotiations can be more complex and difficult, as we have seen in repeated attempts to come to an agreement in France. We would therefore welcome strengthened Commitments to enforce publishers' exclusive neighbouring right, as enacted in European law, in a rigorous manner.

Moreover, the innovative nature of these commitments should be put into perspective, as they overlap with previous measures issued by the Authority. In this respect, Google is simply committing to comply with the injunctions, which is fortunate but overdue. We recall that the violations by Google of the injunctions constitute, according to the Authority, "a practice of exceptional gravity"<sup>4</sup>.

It is then worth recalling Google's strategy of circumvention through deliberately long and unsuccessful negotiations and repeated court actions. Voluntarily submitting to the regulator's injunctions in December 2021, based on a strategy aimed at exhausting the financial, human and logistical resources of press publishers, carries little credibility and warrants careful consideration, and perhaps even a slight suspicion, of the terms drafted by Google itself. We question whether tech giants' behaviour will change unless a clear mechanism and binding negotiation framework is put in place. The commitments should therefore be viewed with a critical eye and the continuation of negotiations should be subject to rigorous oversight by the Authority.

The following Commitments seem important for a successful continuation of the negotiations:

1. **A strict distinction between remuneration for "existing uses" (the neighbouring right) and remuneration for "new uses"**, as required by the Authority in its decision of 12 July 2021 [Undertaking 1(10)]. Concretely, publishers must be able to exercise their rights independently of their participation in Google's products or services. This means that neighbouring right contracts should not cover any other uses or participation in Google's products or services, nor should these contracts be inter-related. For this purpose, we suggest clarifying:
  - Point (10) of the First Undertaking to specify that the two negotiations should be separate and lead to independently valid agreements not affecting the neighbouring rights procedure.

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<sup>4</sup> AdIC's [press release](#), 13 July 2021

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- Point (29) of the Sixth Undertaking to specify that "other economic relationships", in particular negotiations on the News Showcase, should not affect the neighbouring rights procedure. Finally, publishers should be able to immediately report Google to the regulator should they be otherwise forced to.
2. **The provision of a standardised notification procedure to enter in negotiations [Undertaking 1(12)] is welcome, provided that the template form does not require the submission of more information than that mentioned in Annexe 2.** Such a procedure should help smaller titles to conclude agreements and should aim for a formal, transparent and non-discriminatory selection procedure.
  3. **The promise of a remuneration proposal within three months starting from the formal request to enter in negotiations [Undertaking 4(19)] is a good proposal to the extent that this amount allows negotiations to progress, is reasonable and reflects the substance of the exchanges between the negotiating parties.**
  4. **The continued display of press content in the manner chosen by the publisher both during the negotiation period and during the arbitration procedure [Undertaking 3(17)] is a very important point.** This point must include the protection of the presentation of press content, its indexing and classification during both the negotiation and arbitration periods [Undertaking 5]. The regulator must remain uncompromising about Google's threats of suspending its services or downgrading Protected Content to pressure publishers into consenting to a zero rate, as has been done in France and in Australia. In this regard, the proposal [Undertaking 5(26)] is insufficient, as it explicitly mentions that Google is not prevented from taking measures to stop the indexing, classification or display of the Publisher's Protected Content in case it would not respect conditions unilaterally drafted by Google, such as its terms and conditions. We suspect that the current text opens the door to Google unilaterally modifying its terms and conditions to provoke a so-called infringement by the publishers, in case Google would not like where the negotiations are going.
  5. **The recourse to an arbitration tribunal in case of disagreement [Undertaking 4(22)] is one solution, which yet deserves concrete guarantees in terms of independence and transparency.** We note that in Australia, the threat of arbitration led Google in early 2021 to propose remuneration agreements (US\$100m/year<sup>5</sup>) almost five times higher than the amounts proposed in France (US\$22m/year<sup>6</sup>), and this for a market half the size. We therefore recommend, for the arbitrators to act independently from the Negotiating Parties, that the said arbitrators are instructed by and receive guidelines from the Authority. The Authority should also be able to exercise scrutiny over the arbitration procedure and enforce its previous decisions.

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<sup>5</sup> <https://www.afr.com/companies/media-and-marketing/why-google-is-finally-striking-meaningful-australian-news-deals-20210217-p57396>

<sup>6</sup> <https://www.reuters.com/article/us-google-france-copyright-exclusive-idUSKBN2AC27N>

6. **Recourse to the arbitration mechanism, which represents a very costly procedure for press publishers, should not be over-used by Google.** Efforts must primarily focus on a successful completion of the negotiations within a three-month timeframe.

We also expect concrete improvements on the following points:

1. **The scope of Protected Content should be understood broadly to include specialised press content, excerpts of articles, videos, infographics, etc.,** as specified in the decision of 9 April 2020 (Section 1.2, “Scope of the Commitments”). Moreover, Google should not exploit exceptions and limitations to avoid paying for content, a practice deplored by the *Assemblée Nationale*’s fact-finding mission<sup>7</sup>. To the contrary, Google should respect the publisher’s control and pay protected content according to Article 15 of the EU Directive.
2. **A zero-rate remuneration at Google’s discretion cannot be a fair solution** even when it is accompanied by some other form of consideration, as it risks undermining the neighbouring right application [Undertaking 1(11)]. This safeguard should be made explicit.
3. **The disclosure of data must be clear, comprehensive and include indirect revenues,** i.e., advertising revenues, viewers data, revenues generated across the Google ecosystem and from other services like YouTube, total revenues on the (French) market as a reference and so on. The communication of data must also be plain and intelligible and accompanied by an interpretation that will enlighten the publisher about the actual use of its content and the revenues generated by Google [Annexe 1]. Finally, drowning the Negotiating Party in spreadsheets and non-convertible documents cannot serve the purpose of good faith negotiations.
4. **Given Google’s lack of transparency throughout negotiations, the substance of non-disclosure agreements must be reviewed** [Annexe 4]. Currently, press publishers are denied the opportunity to benchmark Google’s proposals. Yet it would greatly benefit interested press publishers, in full compliance with competition law, to exchange and compare on the basis of aggregated and anonymous data, the key criteria of the proposed agreements (e.g. remuneration methodology, duration of contract, type of content covered, etc). In addition, the substance of the arbitration decisions should be communicated to the press sector, for instance through a mechanism put in place by the Authority or its Trustee. Also, non-disclosure agreements should never prevent a publisher from taking legal action in the event of misconduct [Annexe 4, point 4]. This means that once a license and a remuneration agreement have been concluded, it is important that the publisher retains the right of recourse without threat of termination of the licence.

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<sup>7</sup> [Rapport d’information sur l’application du droit voisin au profit des éditeurs et des agences de presse](#), Assemblée Nationale, 12 janvier 2022

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5. **Press publishers must be able to access original reports from the Expert and to be regularly informed about the Trustee's observations.** We note that only Google would have access to the Expert's official conclusions and would be able to discuss those with the Trustee and the Expert [Annexe 3, Section 3(16)]. We also would like to warn against risks of dependency given that the Trustee and the Expert would be proposed and paid by Google (Annexe 3, Section 4). Therefore, to support fair, transparent and objective negotiations, it is important that the Negotiating Parties have equal access to information from the Expert, if necessary after having redacted trade secrets duly justified by Google.
6. **The commitments that have been validated by the Authority must be binding on Google both during the negotiations and the arbitration procedure.** The procedure can be a long one, spreading over the duration of negotiations (3 months), the referral to the arbitration tribunal (2 months) until the publication of the Arbitrators' decision (6 months), during which publishers will undertake their own legal costs. Hence press publishers are entitled to expect Google to behave in good faith, speedily and diligently, in a non-discriminatory manner, also during the six-month arbitration procedure [Undertaking 4 point 24].
7. **Google should not be able to unilaterally walk away from the procedure in place.** We would like to clarify in point (34) of the Sixth Undertaking, specifying that should Google submit a request to revise or terminate commitments, publishers must be heard about this by the Authority.
8. **The commitments must set the basis of a fair and sustainable framework for future negotiations beyond the five-year period [Undertaking 6, point (34)].** Press publishers need guarantees that enforcement of these agreements will ensure sustainable control over their Protected Content and commercial relations for the longer term. Hence, we suggest extending the duration of the Commitments from five to ten years, given the unbalanced relations between the Negotiating Parties. Finally, such commitments cannot in our view replace a robust monitoring from the Authority which remains the best placed to enforce its own decisions.

## **Concerns regarding the termination of the procedure on the merits following the Commitments offered by Google**

We note that the validation of the commitments is intended to close the case on the merits before the Authority (Article [L-464-2](#) of the French Commercial Code).

In principle, the European press sector relies on the Authority to bring the investigation to a successful conclusion and to determine whether Google is abusing its dominant position on the online search market to put pressure on publishers. We believe that such an investigation could shed light on Google's practices and more generally to:

- Clarify which of Google's practices are considered anti-competitive.

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- Provide European publishers with important information to increase their bargaining power against Google in other jurisdictions.
- Enable publishers to be more aware of their rights against the internet giants in licensing negotiations.
- Encourage European publishers to refer to their regulator for effective implementation of competition law in the cultural sector.
- Encourage national authorities to take up competition issues in online markets through the French precedent.

Google's intentions in proposing to submit itself to the Commitments is most likely inspired by the comprehension by Google that the procedure on the merits would indisputably establish its anti-competitive practices. If Google's proposals were to be validated by the Authority, putting an end to the procedure on the merits, then such Commitments would create a legitimate expectation among European publishers to benefit from equally strong standards in other jurisdictions.

As the Copyright Directive transposition is rolling out across Europe, the pace of negotiations between press publishers and platforms will accelerate. Press publishers are hoping to do so peacefully and in good spirits.

To conclude, European publishers applaud the French consultation procedure and would encourage European governments to take inspiration from this transparent and democratic process which consists in testing all the interested parties' views instead of letting Google dictate the terms of the remuneration agreements.

We remain at the disposal of the Authority for any further information.

Yours sincerely,

Wout van Wijk (Director) [wout.vanwijk@newsmediaeurope.eu](mailto:wout.vanwijk@newsmediaeurope.eu)

Aurore Raoux (Copyright Advisor) [aurore.raoux@newsmediaeurope.eu](mailto:aurore.raoux@newsmediaeurope.eu)

Iacob Gammeltoft (Competition Advisor): [iacob.gammeltoft@newsmediaeurope.eu](mailto:iacob.gammeltoft@newsmediaeurope.eu)