



21 January 2022

Benoît Cœuré
Autorité de la concurrence
Bureau de la Procédure
Affaire 19/0074F
11 rue de l'Echelle
75001 Paris

Re: News Media Alliance Comments in Response to the Public Consultation on Google's Proposed Commitments

Dear Mr. Cœuré,

The News Media Alliance (the “Alliance”) is a nonprofit organization that represents the interests of more than 2,000 news media organizations in the United States and around the world. Our members range from large national news organizations to small local newspapers, all serving their communities by providing them with vital and trustworthy news and information. The Alliance diligently advocates for newspapers before governmental and international organizations on issues that affect today’s media organizations, including protecting the sustainability of high-quality and trustworthy journalism in the digital marketplace.

The Alliance welcomes the opportunity to provide input regarding Google’s proposed commitments to settle the Autorité’s investigation into Google’s suspected abuse of dominant position in relation to its negotiations with news publishers under the law (no. 2019-775 of 24 July 2019, transposing Article 15 of the European Union’s Directive on Copyright in the Digital Single Market 2019/790 into national law). We applaud the Autorité for initiating the investigation and this public consultation process on the proposed commitments, and for taking decisive steps to rebalance the online ecosystem, protect competition, and to keep online platforms accountable for their actions.

While the proposed commitments are a positive step forward and demonstrate the importance of effective enforcement and national oversight mechanisms, they fall short of providing adequate assurances to news publishers, the French government, and the public alike that Google will engage in good faith negotiations and adhere to the purpose and spirit of the law. The Alliance stands strongly behind our French and European colleagues in their efforts to ensure a fair, effective, and enforceable compensation framework and to negotiate and receive compensation for the use of their content online by online platforms. We share their concerns over the proposed commitments and would like to highlight two particular aspects – the nature of the arbitration mechanism proposed and the importance of adequate data sharing – in this communique.

With regards to the former, Google proposes that “the negotiating parties will have the option of referring the matter to an arbitration tribunal to determine the amount of remuneration.” Google also proposes “to pay the fees of the arbitrators and the arbitration proceedings in the first instance.” The availability of an arbitration mechanism is vital for a well-functioning and equitable negotiating framework and it is important that the Autorité insist that Google commit to one.¹ However, in order to be effective, such an arbitration mechanism should not be based on the International Chamber of Commerce Arbitration Rules but rather adopt a novel mechanism, similar to that recently adopted in Australia as part of the News Media Bargaining Code.

In the Australian model, a news publisher can request an arbitration in certain circumstances if negotiations and mediation has proved unsuccessful. The Australian Communications and Media Authority is responsible for establishing and maintaining a list of approved arbitrators and can make such appointments if the parties are unable to agree on the three panelists. The Code also sets clear and strong rules for the “final offer arbitration” process. These rules establish clear timelines for both parties to provide adequate information to support the drafting of informed offers, factors for the panel to take into account when evaluating the offers – including the bargaining power imbalance between the parties – and requirements the parties must follow when submitting their final offers, including the inability to withdraw or amend an offer once

¹ Indeed, the Alliance believes such a mechanism should not be limited to Google and this specific instance but, rather, adopted across the European Union to complement the ancillary copyright, potentially as an amendment to the Digital Markets Act.

submitted. The panel must then choose one of the offers over the other, unless public interest requires otherwise, and the parties must comply with the panel's decision. Together, the prospect of final offer arbitration and the specific rules for such arbitration established under the Code ensure that both parties meaningfully engage in any negotiations in the first place and, in case of arbitration, submit good faith offers. We strongly urge the Autorité to insist that Google commit to similar arbitration rules and mechanism, including that Google does not preserve any right to avoid arbitration if demanded by the publisher party.

Further, in order to facilitate successful negotiations between the publishers and platforms – including potential arbitration procedures – Google must be required to share adequate information to evaluate potential offers. It should not be left for Google to decide what information to provide and the news publishers' ability to request, and Google's obligation to provide additional information that the publishers deem necessary to properly evaluate Google's offers, should be preserved. The Alliance is concerned that the commitments, as drafted, do not offer sufficient safeguards to ensure adequate information exchange.

The Alliance commends the Autorité for initiating this investigation and conducting the market test of the proposed commitments. We believe in the fundamental importance of a healthy news media ecosystem and hope that this procedure serves as a major steppingstone towards a more sustainable future for high-quality journalism in France and elsewhere by way of example.

Thank you for your attention.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daboffy', written in a cursive style.

Danielle Coffey
Senior Vice President & General Counsel
News Media Alliance