



NEWS AGGREGATORS AND PRESS PUBLISHERS:
TO CRAFT COMPETITION LAW REMEDIES
TO ASSIST PRESS PUBLISHERS' COPYRIGHT ENFORCEMENT

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CHAPTER 1 - INTRODUCTION

1.1 Background and research problem

On April 29th, 2021, Google News excerpted from and linked to the sciences news website *Space* an article headlined “*Nasa’s Mars helicopter ingenuity will attempt boldest flight yet today*”, and aggregated four other pieces with a similar content excerpted from and linked to another news websites (e.g., *Daily Mail - Ingenuity will attempt its fourth flight*). In parallel, after unlocking the screen of a device's iPhone, the application Apple New+ displayed on the board six news headlines excerpted from different well-known newspapers. If the user clicked on one of those, it would be oriented straight to the original newspaper website's original content. For instance, a click on the headline “*Decontainment in four stages from May 30th to June 30th, depending on the health situation of each department*” opened the original content published by *Le Monde* through Apple's browser Safari. On April 29th, 2021, by a simple click on these news headlines, some aficionados about space sciences recent developments or others interested in the pandemic timeline would have visited the original contents of these articles on the news website that originally released them. Others would have avoided clicking on those headlines, merely checking them. Thus, this main feature allows the reader to quickly locate the content she may be interested in, providing links that offer website references about a relevant topic. The reader would optimize its activity on news aggregators' websites. Indeed, from the consumer's perspective, using these platforms enhances diversity, traceability, and comfort by easy access to categorized information. From the press publishers' perspective, the phenomenon is apprehended differently.

Over the last three decades, the contemporary media landscape changed drastically, questioning the industry's sustainability. Lowering distribution costs and democratizing access to information, the emergence of the Internet and online digital media announced the « *death of the newspaper* »¹. Consumers' habits evolved, and online news has become the primary source of information. The ongoing new paradigm is forcing traditional news outlets declining in revenue to renew their business model. Furthermore, intermediaries have integrated the information value chain². Incurring low-quality journalism and local press dissolution, their impact on public opinion and, by extension, on the democratic society appears unsurmountable.

¹ Greenslade, Economist predicts the death of newspapers, *The Guardian*, 25 Aug. 2006, available here: <https://www.theguardian.com/media/greenslade/2006/aug/25/economistpredictstheatho>

² OECD, *News in the Internet Age New trends in News Publishing* [2010]

In this new ecosystem, news aggregators websites enjoy an increasing audience worldwide, dominating the digital news offer³. According to the *Encyclopedia of Journalism*, the term “news aggregators” refers to « computer software and journalist practices that enable online computer users to collect news stories and other information as that information is published and to organize the information in a specific, personalized manner. [...] The term news aggregators can also refer to intermediate websites that republish RSS feeds and information from other primary new sources »⁴. Coddington defined merely the phenomenon « as taking news from published sources, reshaping it, and republishing it in an abbreviated form within a single place »⁵. For instance, Google News’ algorithms select hyperlinks and provide articles, videos, and photos. Facebook’s algorithms display stories to generate users’ reactions and comments over this material. News aggregators use headlines or snippets (i.e., short excerpts) already published on press publishers’ websites⁶. They act broadly through automation without asking press publishers’ permission to use their original content. However, some of them also produce original content, such as Yahoo!News. Some commentators would consider this form of business parasitism and piracy instead of reporting and journalism⁷. In response, news aggregators alleged that press publishers’ claims are financial and protectionist⁸.

On September 4th 2018, in France, press publishers executives called for the creation of ancillary rights to « stop the tech giants of capturing without financial compensation a large part of the information produced at great expense by the media and news agencies while attracting to them most of the advertising resources that until then allowed media to be »⁹. Before the rise of media online, press publishers benefited from sales, subscriptions, and advertising revenues published in printed newspapers. Nowadays, the situation is highly critical. Press publishers accuse news aggregators of capturing a large part of advertising revenue by free-riding on their investments. Since 2000, newspaper advertising revenues have reduced by about 62%¹⁰. In 2018, digital display

³ Anderson, *Rebuilding the News: Metropolitan Journalism in the Digital Age*. Philadelphia, PA: Temple University Press [2013]

⁴ Hanff, News aggregators. In C. H. Sterling *Encyclopedia of journalism* (pp. 951-952). SAGE Publications, Inc. [2009]

⁵ Coddington, Gathering evidence of evidence: News aggregation as an epistemological practice, *Journalism* [2020]

⁶ Isbell, The rise of the news aggregator: Legal implications and best practices [2010]

⁷ HI, SC and Zheng, Parasite or partner: Coverage of Google News in an era of news aggregation. *Journalism & Mass Communication Quarterly* [2016]

⁸ Scalzini, Is there free-riding? A comparative analysis of the problem of protecting publishing materials online in Europe, *Journal of Intellectual Property Law & Practice* [2015]

⁹ Agence Francaise de Presse, «L’indépendance de la presse est dans les mains des députés européens», 2018, <https://www.afp.com/fr/au-fil-de-lafp/lindependance-de-la-presse-est-dans-les-mains-des-deputes-europeens> [Translation added]

¹⁰ Pew Research Center, *Journalism and Media, Digital News Fact Sheet* [2019]

advertising revenue related to online news benefited especially two giant tech companies: Facebook (40%) and Google (12%)¹¹. Therefore, press publishers cannot recover their investments.

News aggregators offer a free service to a consumer who will provide valuable data about its online activity. These data will be collected, analyzed, and feed algorithms that target and anticipate the consumer expectations regarding news topics and advertising preferences. The more data ingested, the more accurate and performant algorithms are. Data feed algorithms enhance personalized services, while advertising revenues would finance the online services and websites. Nevertheless, some news aggregators are free advertising, such as Google News, which collects a sizeable amount of consumer data used for other services that the giant tech company offers. For some commentators, press publishers and news aggregators have a two-way exchange value relationship¹². News aggregators displace news content traffic and benefit from advertising revenues but, they give visibility and permit the consumer to discover new media brands¹³.

Moreover, the multiple sources compilation is more attractive for users than multiples news websites. According to the European Commission's Impact Assessment, 57% of European consumers read news on feed aggregators' websites, and 47% do not click on hyperlinks to consult the original content on the newspaper website¹⁴. Furthermore, opaque algorithms set the redistribution of news from press publishers' websites on news aggregators' websites. This process does not ensure the visibility of news content for press publishers. Moreover, the market position of some news aggregators such as Facebook and Google allows them to act as gatekeepers preventing a real mutual profitable and rewarding relationship¹⁵. Hence, their trade partners do not enjoy a favorable bargaining position that would allow them to set licensing terms. These news aggregators set up their policy of news content display and control the distribution.

Regarding the copyright area, press publishers face difficulty licensing their content and enforcing their rights as uncertainties surrounding the authorization operations, and news aggregators take advantage of those uncertainties. As noted by the Australian Competition and Consumer Commission, when conceded by a court, copyright-infringing content removals do not benefit the press publishers. Civil damages for copyright infringement turn to be extremely low and, the costs of proceedings are high¹⁶. Therefore, copyright remedies do not contribute to improving their power of

¹¹ *Ibid* (9)

¹² Roos, Mela, and Shachar, The Effect of Links and Excerpts on Internet News Consumption, Journal of Marketing Research [2020]

¹³ *Ibid* (12)

¹⁴ EU Commission, Impact Assessment on the modernization of EU copyright rules, Bruxelles, SWD(2016)

¹⁵ Stigler, Protecting Journalism in the Age of Digital Platforms [2019]

¹⁶ Australian Competition and Consumer Commission, Digital platforms inquiry: final report [2019]

bargaining. In this regard, the European Commission reacted to address these obstacles and strengthen the media sector by creating neighboring rights for press publishers under the proposal for a Directive on copyright in the Digital Single Market¹⁷. This instrument should protect press publishers' content for their digital uses and improve their bargaining position. However, as we explore later in this thesis, the new neighboring rights were criticized regarding their need and desirability.

In contrast, competition law offers broader solutions through remedies to cope with this matter and actively resolve market structural problems that harm the weakest parties' interests. Under competition law, dominant digital companies can be condemned for exploitative and exclusionary abuses. Therefore, a range of competition law remedies can be studied to improve the bargaining power of press publishers, rebalance the forces and improve the quality of the service or product on a determinate market in the interest of the consumer welfare and broadly, for the benefit of the society as a whole. Remedies can intervene in different fields, such as creating obligations (e.g., the duty to share data or allocate a remuneration for the use of original content). Remedies can be implemented considering the relevant market characteristics and target goals that go beyond the single damage to a person for a broader impact on society and the balance of its stakeholders' interests.

1.2 Research question and methodological approach

This thesis's central question is: ***How can competition law assist copyright law and set efficient remedies to improve the press publishers' trade position?***

This thesis follows a library-based research approach to answer the main research question. European academic legal literature related to competition law and copyright law is used at the core of this research work. Broader academic literature related to Economic and Sociology arts is consulted. In addition, the case-law of the European Courts (i.e., the cases law of the European Court of Justice and the General Court) and the decisions of the European Commission, its reports, and its guidelines would take a relevant part of this thesis. Finally, the inputs incurred on the topic by the National Competition Authorities across European Union and relevant non-governmental organizations such as the OECD are consulted and analyzed. Further material is consulted, such as Competition Law and Copyright Law blogs and newspaper articles.

¹⁷ EU Proposal for a Directive on Copyright in the Digital Single Market, COM(2016)

1.3 Thesis outline

Even though this thesis relies on competition law, it would be helpful to set up the copyright aspects to understand the reasons why copyright law and remedies are not sufficient to strengthen press publishers and rebalance their relationship with news aggregators. Therefore, state of the art within copyright law must be presented in Chapter 2. Despite difficulties to overstep, competition law would be entitled to give a proper response. Indeed, although critics can be made to their rulings, National Competition Authorities have recently reacted and shown their determination to address the matter. Thereby, Chapter 2 is devoted to exploring the current limitations and inefficiencies of traditional tools and approaches provided by copyright law in addressing challenges related to news and digital platforms and the potential implications of Competition rules. This part concerns the national and European Union developments and impacts to understand to what extent competition law can provide solutions.

Chapter 3 develops abuses of dominance taking place in this context. This part analyses exploitative and exclusionary abuses committed by news aggregators.

Chapter 4 discusses remedies provided by competition law that could be contemplated to address and prevent the abuses of dominance committed by news aggregators—moreover, those aiming to strengthen the position of press publishers.

Chapter 5 contains the conclusion.

1.4. Literature review

In a broader perspective, this thesis joints the debate regarding the regulations of digital platforms and the imposition of efficient remedies. It focuses on one particular context of news aggregation. However, the discussion regarding competition law remedies to bring solutions for copyright enforcement is limited. There is a gap in the literature review about competition law remedies designed to protect press publishers. Copyright law remains the area predicted for the analysis and relies on hyperlinks or snippets utilization by news aggregators. Competition law aspects rely on the analysis of duty to inter in fair negotiation imposition (that we will evoke in this thesis) since this initiative is taken on the ground of abuse of dominance. Also, news aggregators bring accusations of anti-competitive conduct that would have committed press publishers to claim remuneration collectively from news aggregators. This last point will not be addressed in this thesis. Colangelo analyzed in 2020 the different attempts in enforcing copyright through antitrust. His analysis sticks to the French initiative to impose a duty to enter in fair negotiation and the Australian mandatory bargaining code justified through competition law.

CHAPTER 2 - SHORTCOMINGS OF COPYRIGHT LAW AND REMEDIES

Before exploring how competition law remedies can help press publishers and the online media market, it is necessary to ask the limitations of copyright remedies adopted in news aggregation contexts.

In theory, copyright law appears to be the adequate realm of law to cope with the matter. Cases rely upon snippets and headlines. However, the Member States within European Union have solutions for a specific matter of copyright law, and the European Union lacks harmonization. Despite the initiatives to classify and ensure the protection of rights holders in the digital market included by introducing neighboring rights in several domestic legal systems and at the European level, copyright rules have appeared inefficient to address the free-riding conducts related to news aggregation online.

Therefore, in exploring this question, this chapter shows the difficulty for press publishers to get a copyright infringement statement. Instead of improving the press publishers' position on the sector, when they are conceded, copyright remedies injured them. Indeed, given the particular features of the sector, copyright remedies leave them with the only choice to step out of the online media economy and do not allow them to prosper and evolve in this ecosystem. Copyright remedies address a specific matter, context, and parties but not a more significant market failure that requests a broader intervention to rebalance the forces in action on this specific sector (i.e., news aggregators and press publishers) and redistribute resources.

2.1. Does copyright law suit to news aggregation context?

Digitalization has broadened acts of copying¹⁸. Hyperlinking and snippets can infringe copyright law¹⁹. In news aggregation contexts, courts establish the exploitative abuse of material protected by copyright law as committed by the news aggregators²⁰ and discuss the potential applicability of exceptions and limitations or fair dealing. Uncertainties through the adoption of definitions and faint exceptions have emerged. The recognition and enforcement of copyright infringement are not easy for content creators. Thus, the current copyright framework does not suit to news aggregation context to protect press publishers.

¹⁸ EU Commission, Green Paper Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, COM[1988]

¹⁹ Colangelo and Torti, Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform, *International Journal of Law and Information Technology* [2019]

²⁰ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L167/10 [2001] Articles 2-4

2.1.1. The problematic recognition of the liability of news aggregators under copyright law

The classification of technological processes is not easy for European institutions, and difficulties have emerged for press publishers to reach the enforcement of their rights.

An *acquis communautaire* has been elaborated since adopting the Software Directive I (1991)²¹ and the Data Directive²². In 2001, the InfoSoc Directive²³ provided a broad definition of the right of reproduction “*in any manner or form*”, which covered the digitalization of work and included the notion of “*indirect*” reproductions, also covering copies that were not original. Moreover, Article 5(1) of the InfoSoc Directive related to the definitions of exception of transient reproduction created uncertainties. In this regard, scholars claimed the lack of functional and economic impact on right holders’ interests²⁴. Exceptions are valid when they target temporary reproductions, must be transient with a limited duration or incidental, made in connection to another principal use without any dependent meaning, and bound to the technological process of it is part²⁵. The InfoSoc Directive excluded the exception when the reproduction has the sole objective of transmitting the content by intermediaries unless the right holder authorizes the use²⁶. In addition, intermediaries must “*not modify the content transmitted or interfere with the lawful use of technology*”²⁷. Article 5(2)(b) of the InfoSoc Directive introduced the notion of “fair compensation” and covers all reproductions made by a natural person for non-commercial purposes. Indeed, the definition is limited to private activities and excludes other uses with a commercial purpose. The Member States does not have any discretion about determining the gratuitous or onerous nature of the fair compensation. However, they have discretion regarding the management, distribution, and establishment of fair compensation.

The jurisprudence of the European Court of Justice shows embarrassment to classify acts that the InfoSoc Directive must cover. Its jurisprudence related to communication to the public hampers press publishers from asserting their rights. This situation increases the uncertainties regarding the recognition of the liability of news aggregators.

²¹ Council Directive 91/250/EEC on the legal protection of computer programs, OJ L122/42 [1991]

²² Directive 96/9/EC of the European Parliament and the Council on the legal protection of databases OJ L77/20 [1996]

²³ *Ibid* (20)

²⁴ Legal Advisory Board, Reply to the 1995 Green Paper on Copyright and Related Rights in the Information Society, Brussels [1996]

²⁵ Recital 33 of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society OJ L167/10 [2021]

²⁶ *Ibid* (25)

²⁷ *Ibid* (25)

For instance, regarding extracts, in its decision *Infopaq*²⁸, the European Court of Justice stated that fragmentations of eleven words constituted partial reproductions protected by copyrights if they were original enough to embody the author's intellectual creations. Therefore, their reproduction required the consent of the rightsholders²⁹. Member States define what reflects or not the author's own intellectual creations³⁰.

Regarding acts of hyperlinking, in *Svensson*³¹, the European Court of Justice stated that the hyperlink referring to freely available content online did not constitute “*an act of communication to the public*” and, therefore, does not infringe copyright law³². In the *BestWater International*³³, the Court reiterated its position, concluding to the absence of copyright infringement where links were created to refer to a protected work freely available. The act cannot be defined as “*a communication to the public*” when the content does not reach a “*new public*”³⁴. However, in *GS Media*³⁵, the Court held that a hyperlink could be only defined as a communication to the public, after determining if the unlicensed person who provided it pursued or not a financial gain and if this person ignores, and could reasonably have ignored, the unlicensed nature of the content.

These cases illustrate the comfortable advantage that news aggregators benefit from in the exercise of their services. Copyright laws do not constitute a right of opposition but a prior authorization to obtain before the intended use and with certainty. In defense of news aggregators, there are obstacles and difficulties to carry out each press publisher's authorization that they need to exploit their content³⁶. It could be very costly and inefficient.

From an economic perspective, news aggregation contributes mainly to traffic, and press publishers feel pressure. Therefore, their consent to exploiting their content does not appear express and certain as required by the copyright rules. Moreover, instead of seeking authorization, news aggregators use opt-out systems that allow press publishers to withdraw their implicit authorization to reproduce their content. For instance, in *Copiepresse*³⁷, Google claimed that the press publishers

²⁸ C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465

²⁹ *Ibid* (19)

³⁰ *Ibid* (28)

³¹ C-466/12, *Svensson v Retriever Sverige AB*, EU:C:2014:76

³² *Ibid* (31) [20]

³³ C-348/13, *BestWater International GmbH v. Michael Mebes and Stefan Potsch*, EU:C:2014:2315

³⁴ *Ibid* (29)

³⁵ C-160/15, *GS Media BV v. Sanoma Media Netherlands Bv and Others*, EU:C:2016:644

³⁶ Katz, Ariel. "The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem." *Berkeley Technology Law Journal* 27, no. 3 (2012): 1285-346

³⁷ *Copiepresse SCRL et al v Google Inc Tribunal de Premiere Instance de Bruxelles*, 2007; confirmed by Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999

implicitly consented to extracting and indexing its contents by not using the opt out parameter³⁸. However, the argument was rejected, and the Belgian Courts recognized the violation of moral rights and authorship.

However, the European legislator and Court have never addressed how the interests of news aggregators and those of press publishers must be balanced. Besides, technological processes remained ignored. For instance, the linking technique was not relevant in the analysis of the Court in *GS Media*.

2.1.2. Counterproductive copyright remedies

Copyright law offers a range of remedies. Some are civil (e.g., injunctions, damages, payment of any profits that the infringer received to the rights holder, destruction of infringing copies); others are criminal (e.g., fines, delivery of infringing copies to the rights holder).

In general, remedies under copyright law, especially the injunction to remove the content exploited unlawfully, injure press publishers. Indeed, they harm content creators since, deprived of visibility online, they cannot compete in the same conditions as their rivals and do not have another choice to step out of this new ecosystem. Removal remedy under copyright law benefits news aggregators. The projection of the removal consequences forces press publishers to provide content free of charge. Otherway, they must step out of the game. Copyright rules do not allow them to adapt their business model to the new paradigm in the digital area and hampers their potential growth.

Furthermore, the solution lacks to find a balance between those stakeholders in the online media market. The implementation and the number of penalties do not appear efficient enough to prevent big tech companies from carrying out this conduct and respecting copyright rules. Civil damages are significantly low to redress the extended damage and do not bring a concrete solution for the future at the level of the media sector.

Besides, litigation came to an end several times through agreements reached between news aggregators and press publishers. In general, they are not public, and copyright law remained unenforced. For instance, in *Copiepresse*, the Belgian newspaper publishers association requested the First Instance Tribunal and the Court of Appeal to recognize Google guilty of infringing copyright of news publishers through its Google News application and its utilization of its Google Web cache. Copiepresse requested the Courts to order Google to remove from Google News and the Google Web

³⁸ Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999 [46]-[51]

cache all its contents under penalty per day of delay³⁹. Copiepresse claimed that Google violated the moral rights and integrity of the authors and infringed the rights of reproduction and communication to the public in copying and modifying headlines, the content of extracts, and snippets from original content through Google News without obtaining the press publishers' consent⁴⁰. The argument by which Google argued that Google News did not operate news distribution since its work was based on content indexations not covered by copyrights did not prosper. The Court stated that the extracts reproduced by Google News contained the "essential information" that permitted the reader to understand the original content without visiting the publisher's website. Finally, the removal of the content from Google News and the Google Web cache was ordered. Even though the decision was challenged before the Supreme Court ("*Cour de Cassation*"), the parties settled a temporary licensing agreement that ended the litigation. According to this agreement, Google could use the Google Web page to reproduce the press publishers. However, the company was not allowed to communicate contents publicly and share them with internet users.

The solution can be found following the agreement between parties. However, this thesis argues that press publishers enjoy a weak bargaining power in front of news aggregators. Therefore, negotiations can be more profitable to news aggregators instead of press publishers.

2.2. Is the creation of ancillary rights for mandatory remuneration efficient?

The objective of introducing neighboring rights within legal frameworks is to improve the cooperation between parties, hence the bargaining power of press publishers, ensure a certain level of revenues and compensate the difficulty for press publishers in licensing their creation. However, opinions and economic theories diverge. News publishers supported the introduction of those neighboring rights accusing news aggregators of free-riding content that they produced. The European Commission supported this position recognizing the weak position of publishers deprived of financial reward and advertising revenues and the risk of a negative effect on the democratic society, the European cultural diversity, the quality of information, and the media pluralism⁴¹.

The first legislative interventions on neighboring rights remain the German and Spanish ones that expanded the intellectual rights to prevent free-riding. These initiatives aimed to ensure

³⁹ Laurent, Copiepresse SCRL & Alii v Google Inc In Its Decision Of 5 May 2011, The Brussels Court Of Appeal Confirms The Prohibitory Injunction Order Banning Google News And Google's "In Cache" Function, Computer Law & Security Review [2011]

⁴⁰ *Ibid* (38) [38]

⁴¹ *Ibid* (14)

compensation from news aggregators to publishers. However, some commentators and scholars questioned the lawfulness of these initiatives⁴².

2.2.1. Failure of ancillary rights to compensate for the difficulty in licensing content

In 2016, the European Commission intervened on rights to ensure a level of certainty for press publishers and an adequate power of negotiation with news aggregators. These ancillary rights would recognize the relevance of the investments provided by publishers and their role in creating qualitative journalism⁴³. The DSM Directive⁴⁴ came into force on June 6th, 2019, and the Member States should proceed to its transposition into their domestic law before June 7th, 2021. Article 15 covers reproduction as available to the public when digital uses are concerned for two years from the first publication⁴⁵. Safe harbors, as provided by the InfoSoc Directive, would still be applicable. However, Recital 33 defining the concept of press publications informs that the Directive “*does not extend to acts of hyperlinking*”⁴⁶. In other words, acts of hyperlinking not being defined as communication to the public, Article 15 does not cover them. Moreover, despite the right granted to press publishers for compensation for their work by news aggregators, the DSM does not cover “*the use of individual words or very short extracts of press publications*”⁴⁷. However, the DSM does not provide the meaning of “*very short excerpts*”.

The DSM Directive is not the first attempt at the creation of ancillary rights. Indeed, the German Parliament⁴⁸ granted in 2013 publishers the right to charge news aggregators to reproduce their content, headlines, links, and excerpts⁴⁹ an exclusive right to make available their content publicly for commercial use online⁵⁰. Also, in 2014, the Spanish authorities engaged a reform for intellectual property law imposing to news aggregators the payment of a mandatory, inalienable

⁴² Rosati, Neighbouring rights for publishers: are national and (possible) EU initiatives lawful? [2016]

⁴³ *Ibid* (41)

⁴⁴ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, (2019) OJ L 130/92

⁴⁵ *Ibid* (44)

⁴⁶ Recital 33 of the proposal for a Directive on Copyright in the Digital Single Market, COM(2016) [emphasis added]

⁴⁷ *Ibid* (44)

⁴⁸ Amendment to the *Urheberrechtsgesetz* - German Copyright Act - Leistungsschutzrecht für Pressverleger Sections 87f to 87h of the German Copyright Act [2013]

⁴⁹ Doh-Shin, Economics of News Aggregators, TSE Working Paper [2018]

⁵⁰ Scalzini, Is there free-riding? A comparative analysis of the problem of protecting publishing materials online in Europe, *Journal of Intellectual Property Law & Practice* [2015]

equitable contribution to the press publishers for the publication of links and excerpts⁵¹. In contrast to the German ancillary rights, press publishers could not waive these Spanish ancillary rights⁵².

However, the impact expected did not happen, the matter remains thorny, and the publishers' revenues did not increase. In reaction to this reform, Google switched off the Spanish Google News edition in December 2014⁵³. Google did not reserve the same fate to the German Google News edition as the reform did not cover brief excerpts, rendering, in theory, the link fee negotiable between press publishers and news aggregators. Nevertheless, Google refused to pay for licensing and reject any negotiation to settle on a fair compensation with publishers. Press publishers had to choose between providing for free their content or watching their content removed or significantly reduced from the news aggregator websites. They faced the loss in revenues incurred by the deviation of traffic.

Besides, competition aspects were problematic since these ancillary rights could impede innovation and restrain the development of new business models. Neighboring rights could affect the entry of news aggregators into the market in a discriminatory way and benefit merely the consolidated incumbents⁵⁴. Therefore, the reform would harm consumer welfare in terms of technological innovation, variety of bidders, and competitive pressure within the market of news aggregators⁵⁵. Furthermore, press publishers would be discouraged from finding solutions to recover their investments by developing a fresh business model⁵⁶. Finally, these reforms would reduce the visibility of small press players⁵⁷. This initiative would limit content creation, the incentive to innovate, and limit access to information and media pluralism.

2.2.2. Main economic and legal arguments against the introduction of ancillary rights

The introduction of European press publication rights has caused many inches to flow. Scholars questioned its economic and legal justifications⁵⁸ and its adverse effects⁵⁹. For some of them,

⁵¹ Xalabarder, The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish government: its compliance with international and EU law, Academic resources, Domestic legislation, limitations and exceptions [2014]

⁵² Article 32(2) of the Ley de Propiedad Intelectual 21/2014

⁵³ *Ibid* (49)

⁵⁴ Comision Nacional de los Mercados y la Competencia (CNMC), Pro/Cnmc/0002/14

⁵⁵ *Ibid* (54)

⁵⁶ *Ibid* (54)

⁵⁷ *Ibid* (54)

⁵⁸ *Ibid* (19)

⁵⁹ Hilty, Koklu, and Moscon, Public consultation on the role of publishers in the copyright value chain [2016]

these interventions are outdated⁶⁰. The causal relationship of the neighboring rights for press publishers and the increase of their revenues remain unestablished. The European reform of copyright is merely based on the evidence of the newspaper crisis, which is not relevant. Moreover, the German and Spanish experiences resulted in inefficient revenues and damage for press publishers and their economic interests. The press publishers' loss of income does not rely on news aggregators' platforms. Commentators argued that digital development changed the press industry removing printing press and traditional distribution channels. According to them, this situation encourages press publishers to develop fresh business models⁶¹.

Hence, the bargaining power of press publishers would not improve. Moreover, these ancillary rights overlap with other rights provided for their publications. Indeed, as shown above, European Copyright protected an extensive range of creative contents included snippets as provided by the *Infopaq*⁶² decision. In legal aspects, the DSM Directive does not set clear definitions and criteria. Thus, the reform leaves the national legislator to adopt its approach generating risk for divergences and fragmentations between the Member States.

Moreover, the scope of the reform appears overbroad. The originality is not required anymore, and the ancillary rights would cover commercial and non-commercial uses⁶³. Hence, neighboring rights are not extended to hyperlinks, and the copyright framework remains unclear to assess whether they constitute public communication⁶⁴.

The creation of ancillary rights seems to be a good solution, but considerable discretion is left to the news aggregators in practice. They can shut down their service quickly and exert pressure on authorities if they disagree with the new rules. It reflects the power that they have. Ancillary rights are not drastic enough to rebalance the forces and protect press publishers.

2.3. Conclusion

Copyright law suffers a lack of efficiency to cope with scraping online by news aggregators and could not address remedies. Divergences between domestic Courts persist where the matter must be addressed following a global perspective. The European institutions lack harmonization.

⁶⁰ Senftleben, Kerk, Buiten, and Heine, *New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era* [2017]

⁶¹ *Ibid* (60)

⁶² *Ibid* (28)

⁶³ Pihlajarinne and Vesala, *Proposed right of press publishers: a workable solution?* *Journal of Intellectual Property Law & Practice* [2018]

⁶⁴ Case C-466/12, *Nils Svensson and others v. Retriever Sverige AB*, EU:C:2014:76; Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV and others*, EU:C:2016:644.

Therefore, press publishers do not succeed in licensing their content for their reproduction through mandatory fees, remuneration, or compensation. When conceded, the removal of unlawful content is counterproductive for them. Their bargaining position remains weak. Ultimately, their revenues have no chance to increase.

However, the solution can be found out of the scope of the copyright and ad hoc rules addressed to specific players. Depending on the context, competition law would be capable of covering conducts that copyright law does not. Competition law remains apart and independent from the copyright and does not require a copyright infringement to apply. Competition law gives some tools for press publishers to oppose the unauthorized use of their production by third-party. Article 102 of TFEU addresses unilateral conduct banning abuse of dominant position.

However, the traditional conceptual framework is challenged by the digital economy. Designed for well-defined final products, it is now insufficient to capture all the layers of economic power significant in the digital ecosystem. Scholars called for the adoption of the multidimensional concept of economic power to scrutinize unilateral conduct⁶⁵. Indeed, new business models emerged, digital platforms rely on multi-sided platforms and zero-price markets. Concerns are now expressed regarding the unbalanced power of negotiation and the rise of gatekeepers.

Therefore, some issues regarding the market definition and dominance in digital markets could emerge, but this thesis focuses on the potential anticompetitive infringements that news aggregators can cause. In theory, using unlicensed content without right holders' consent by a news aggregator enjoying a dominant position on a relevant market may constitute an abuse of the dominant position and may infringe EU Competition law. However, such a situation has not yet reached the European Court. Following the concept of abuse defined by the European Court's decision *Hoffmann-La Roche*⁶⁶, unauthorized content publications should harm competition and affect consumer welfare.

According to news aggregators, their services improve press publishers' content visibility and allow more traffic. They redirect the user to the press publisher website. Hence, they personalize the service. They make the experience more convenient using the consumers' preferences. Following this reasoning, news aggregators do not harm competition, press publishers' interests, or consumer welfare. Nevertheless, suppose it is grounded that news aggregators' services permit more audience that benefits press publishers. In that case, the latter do not have any more control over the distribution of their content. Indeed, news aggregators encourage press publishers to allow free access to their content. For illustration, Google used a so-called First-Click-Free policy from 2009 to 2017. This

⁶⁵ See CERRE, Making Economic Regulation of Platforms fit for the Digital Age – Part 3 Threshold for Intervention [2020]

⁶⁶ Case 85/76, EU:C:1979:36, *Hoffmann-La Roche v. Commission* [91]

required press publishers to offer free content on a daily basis before users come across a pay wall⁶⁷. This practice helps to create a culture of free access in the mind of the user. Therefore, press publishers were deprived of protecting and monetizing their content through a « *paywall* » and faced difficulties imposing newly paid content. Besides, they claim the reduction of traffic on their websites⁶⁸ and opportunities to benefit from advertising revenues.

The European Commission investigated scraping content online by search engines⁶⁹. It did not shed light on the use of unauthorized content by news aggregators online without the right holders' consent. However, in *Google Shopping*, the European Commission considered that the downgrading of competitors' products in search results constituted an abuse that should require a proper justification⁷⁰. Nonetheless, as the following chapters analyze, national competition authorities across the European Union have been more active and intervened in the field.

In summary, Article 102 of the TFEU would apply to news aggregators that enjoy a dominant position in a relevant market. In addition, to establish abuse, the news aggregator should harm competition. Following the case law, a qualification of abuse can be avoided if news aggregators allow press publishers to control the use of their publications and do not impose unequal licensing conditions to press publishers. In contrast, they do not penalize those who do not consent to the use of their content for their services online. However, the National Competition Authorities seems to be determined to allocate remedies that protect press publishers' creative efforts prohibiting discriminatory ranking, provoking negotiations for remuneration, and ensuring the continuous activity of digital platforms while preventing anti-competitive conduct.

Against the power of news aggregators, press publishers are hampered by relying on copyright rules to protect their work and preserve their ability to create. The situation bespeaks market failures related to the press publishers' ability to keep control and get compensation for the use of their content. Therefore, it would be necessary to identify the relation between news aggregators and press publishers and outline the exclusionary and exploitative abuses that the former may be charged for.

⁶⁷ See Australian Competition and Consumer Commission, Digital platforms inquiry: final report [2019] pp. 233-235 for an analysis of Google's First Click Free policy

⁶⁸ Athey, M. Mobius & J. Pal, The Impact of Aggregators on Internet News Consumption, [2017]

⁶⁹ EU Commission, Press release, Antitrust : Commission fines Google €1.49 billion for abusive practices in online advertising [2019]

⁷⁰ EU Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service, IP/17/1784 [2017].

CHAPTER 3 - COMPETITION LAW INFRINGEMENTS

By considering the relationship between press publishers and news aggregators, this chapter analyzes the abuse of dominance adopted by news aggregators.

At the first glimpse, the relation between news aggregators and press publishers has a complementary nature and seems profitable for both of them. However, this apparent way-exchange relationship is tricky. Indeed, the power imbalance between them banned the complementation nature of their relation⁷¹. News aggregators provide traffic through their referral services, but they free-ride on the press publishers' content. Besides, news aggregators and press publishers compete in the market of advertising.

Depending on their relationship, some practices and conducts adopted by news aggregators constitute exploitative or exclusionary abuses. Establishing these infringements can permit press publishers to access traffic and monetize their content through their website or advertising opportunities. As we analyze in this chapter, recognizing these violations can prevent news aggregators from adopting strategies and practices that harm press publishers, such as discrimination, imposition of formats, or self-preferencing.

3.1. What is the relationship between news aggregators and press publishers?

3.1.1. Interdependence nature of their relationships hampered by an unbalanced power

News aggregators offer visibility through their referral services which remain free of charge for press publishers. In theory, news aggregators contribute to improving the level of the audience for press publishers' content. Thereby, press publishers benefit from opportunities to monetize their content through advertising and subscriptions.

However, news content is a kind of *raw material*, an *input* for digital platforms⁷². They attract the audience for free through those contents and resell this traffic to advertisers⁷³. They set up publication policies to arrange the publication following a self-pre-determinate format on their platform through algorithms.

⁷¹ Rebillard and Smyrnaio, Les infomediaires, au cœur de la filière de l'information en ligne : les cas de Google, Wikio et Paperblog, Réseaux 2010/2-3 [2010]

⁷² Geradin, Complements and/or Substitutes? The Competitive Dynamics Between News Publishers and Digital Platforms and What It Means for Competition Policy [2019]

⁷³ *Ibid* (72)

Press publishers' content, and the value created by their efforts and investments, are entirely captured free of charge by news aggregators that monetize them through advertising or collection of data. Data are a valuable resource to feed and boost the algorithms that keep users in a personalized ecosystem that proposes tailored content and advertising.

Moreover, the news aggregators do not share the value generated by the traffic with press publishers⁷⁴. Press publishers face an obstacle to monetize their creative effort through their website. Indeed, according to the European Commission's Impact Assessment, while 57% of EU consumers use news aggregators' websites, 47% do not click on hyperlinks provided by the referral service and do not consult the original content on the press publisher website⁷⁵.

In addition, the competition may also be distorted by the process of traffic allocation and content ranking that news aggregators operate through their programs and algorithms. Press publishers do not know the elements that determine the displaying of their news⁷⁶. Moreover, the distribution is questionable since large media outlets are displayed more systematically instead of the small ones⁷⁷.

Likewise, news aggregators set up policies of format and standardization from which they benefit⁷⁸, causing the devaluation of authenticity and authority and generating editorial dilution⁷⁹. Worst, the press publisher that embraces these policies may be forced to lower its production quality, remaining increasingly deprived of traffic and interest.

Finally, the press publishers' power of resilience is neutralized.

3.1.2. Rivalry nature of their relationship

Press publishers and news aggregators provide online space to advertisers who pay for this access. The more time the reader spends on a website, the more the content provider grabs advertising revenues, collects data, and enhances customer loyalty giving a chance to a potential subscription for those providing a pay-wall⁸⁰.

By collecting all sorts of data (e.g., behavioral, gender, age, geographical, demographical data), algorithms define, categorize and target groups of persons to offer personalized advertisings.

⁷⁴ *Ibid* (72)

⁷⁵ *Ibid* (14)

⁷⁶ *Ibid* (71)

⁷⁷ Dellarocas, Sutanto, Calin and Palme, Attention allocation in information-rich environments: the case of the news aggregators, Management Science [2015]

⁷⁸ As already evoked part 2.3 of this thesis, the so-called First-Click-Free policy used by Google

⁷⁹ *Ibid* (72)

⁸⁰ Wu, Blind Spot: The Attention Economy and the Law [2017]

Therefore, the placement of advertising does not rely any longer on the decision of a particular brand to approach a particular customer that will read a specific type of news, but an algorithm. While these tools are exploited mainly by digital platforms, the ability of press publishers to collect data through the development of such algorithms remains limited. According to Pidgeon, news aggregators unfairly absorbed a significant part of the revenue injected by advertisers to access the press publishers displaying⁸¹.

In addition, the advertising intermediation is the ground of the competition and the dependence between news aggregators and press publishers. Google competes for revenue generated by advertising and simultaneously owns the advertising applications and servers that organize advertising revenues distribution to content producers⁸². Its presence at each stage of the chain has been possible by a series of acquisitions such as DoubleClick⁸³. Therefore, press publishers are dependent on their rival applications that allow them to get rewards through advertising revenues⁸⁴. Thus, it is difficult to imagine press publishers stepping away from Google advertising servers without losing a certain level of monetization switching to advertising application competitors.

3.2. What abuses of dominance can be established?

Competition law can address anti-competitive offenses that distort competition in a relevant market and ultimately harm consumer's welfare through Article 102 of the TFEU. According to the decision of the European Court of Justice *Hoffmann-La Roche*⁸⁵, the abuse is related to the conduct of a dominant undertaking and the impact of its conduct on the competition within a determined market. The EU Commission occasionally interpreted Article 102 broadly to ban abusive conducts that did not fall within those addressed by the provision⁸⁶. The case of *Google Shopping*⁸⁷ is a good illustration.

By combining the product and the geographic markets⁸⁸, this definition of the relevant market will establish the market share of the companies involved and, therefore, assess the dominance of one

⁸¹ Pidgeon, Where did the money go? Guardian buys its own ad inventory, Mediatel Newslane [2016]

⁸² *Ibid* (16)

⁸³ *Ibid* (16)

⁸⁴ *Ibid* (16)

⁸⁵ *Ibid* (66) para. 91

⁸⁶ Bergkamp, The European Commission's Google Shopping Decision: Could Bias Have Anything to Do with It?, Maastricht Journal of European and Comparative Law [2019]

⁸⁷ Case AT. 39740 Google Shopping v. European Commission [2017]

⁸⁸ EU Commission, Notice on the definition of relevant market for the purpose of Community Competition law (97/C 372/03) [1997]

of those⁸⁹. The European Commission defined the relevant product market considering the interchangeability or the substitutability of products or services⁹⁰. The European Commission establishes the relevant geographic market considering “*the area in which the undertakings concerned are involved in the supply and demand of products or services*”⁹¹.

Having a glimpse of what has been stated or recommended, the relevant market must coincide with news referral services⁹² rather than the acquisition and distribution of news. In this regard, the French Competition Authority estimated that Google had abused its dominant position in the market of general search engines that provide referrals⁹³. However, the relevant market may be different depending on the form of the abuse perpetrated. Exploitative abuses will concern the referrals services market. The relevant market wherein engaged exclusionary abuses is not easy to determine. Therefore, we will address this question in part devoted to exclusionary abuses committed by news aggregators.

In the *United Brands Company and United Brands Continental BV* case⁹⁴, the European Court of Justice stated that a company enjoyed a dominant position when it has the power to behave independently from the other economic actors and overall market forces, to reduce its level of innovation, to charge prices above the competitive level. Dominance is not illegal. Instead, the abuse of a dominant position is prohibited under EU law. Typically, it is common to consider the existence of a dominant position where a firm enjoys a significant market share (40% and more), more prominent than its major rivals. Other factors can be considered to establish dominance, such as the existence of entry barriers. By doing so, the French Competition Authority estimated that Google was likely to enjoy a dominant position on the market of generalist search engines that provide referrals⁹⁵. Indeed, the authority established barriers to the entrance of competitors and a significant part of market shares. In contrast, the part of market share of its rivals remains at a lower level⁹⁶. Also, the Australian Competition and Consumer Commission, considering that Facebook and Google operated

⁸⁹ EU Commission, Glossary of terms used in EU Competition policy Antitrust and control of concentrations [2002]

⁹⁰ *Ibid* (88)

⁹¹ *Ibid* (88)

⁹² *Ibid* (16)

⁹³ Autorité de la concurrence, Décision n° 20-MC-01 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse

⁹⁴ Case 27/ 76, *United Brands company and United Brands Continental v Commission* [1978]

⁹⁵ *Ibid* (93)

⁹⁶ *Ibid* (93)

more than 50% of the news traffic, estimated that both giant tech companies enjoyed a significant market power in the market of news referral services⁹⁷.

However, some European domestic regimes provide rules regarding the prohibition of the abuse of economic dependence. This is the case of Belgium that introduced in 2019 the notion of “*abuse of economic dependence*” in its Code de Droit économique (Livre VI). Among its objectives, the provision prohibits abusive clauses and unfair deceptive or aggressive market practices in business-to-business relationships. This is also the case of France that prohibits the abuse of economic dependence through Article L. 420-2 of the Code de Commerce. The abuse of economic dependence concerns firms that enjoy a significant market share on a relevant market, abusing its power over those that depend on it as a supplier. This abuse must be likely to affect the functioning of the structure of the competition. The Belgian Code de Droit économique and the French Code of Commerce list conduct constitutes abuses of economic dependence, such as refusal to sell, tied selling, and discriminatory practices. The concept of abuse of economic dependence allows National Competition Authorities to scrutinize digital platforms that have a significant market share and power on a relevant market without being dominant. However, the domestic rules require that the abuse affects the functioning of the structure of the competition. Therefore, a minor offender could adopt the abusive conduct without being charged since it does not affect the competition.

In summary, press publishers’ concerns as constitutive of a dominant position abuse may be the followings: (1) the appropriation of their content by news aggregators; (2) the opacity of the algorithms in charge of the listing and ranking of news; (3) the editorial dilution incurred by the format imposed by news aggregators and harming the journalism quality and the image of the brand; (4) the appropriation of consumer data by news aggregators that do not aim to share with press publishers; (5) the implementation of policies decided by news aggregators and that harm the press publishers interests.

3.2.1. Exploitative abuses

Article 102 of the TFEU is relevant and addresses exploitative abuses that distort competition in a relevant market. The anti-competitive conduct considered is the one engaged by news aggregators when they free-ride press publishers production. The undertaking dominant power can abuse its dominant position by imposing unfair prices or unfair trading conditions on the other undertakings. However, the list set up by Article 102 of the TFEU is non-exhaustive. An exploitative abuse involves

⁹⁷ *Ibid* (16)

a dominant undertaking that adopts conduct that reduces the output or increases its products or services prices above the competitive practice, thereby exploiting the consumer⁹⁸. Indeed, Wish estimates that “*exploitation suggests the earning of monopoly profits at the expense of the customer*”⁹⁹. Exploitative abuses involved considerations related to fairness deals.

Excessive pricing

The case *United Brand* defines the excessive price as abusive “*if it has no reasonable relation to the economic value of the product*”¹⁰⁰. A two-step test is required to be done: (1) it must be determined whether or not is excessive the margin between the price and cost of the product or the service offered, (2) and, it must be determined whether the price is unfair in *itself* because of its excessive amount, or in comparison to similar products in the relevant market. In the case *AKKA/LAA*, the European Court of Justice held that significant and persistent rate differences indicated an excessive pricing abuse; no minimum threshold is imposed above which the price must be considered excessive¹⁰¹.

However, the digital economy came with new features and swept the traditional conceptions¹⁰². Indeed, digital platforms offer services for free, and consumers do not expect less¹⁰³. Nevertheless, referring to the Facebook case settled by the German Antitrust Authority in 2017 related to data economy, Geradin raised the query whether or not the zero pricing can be abusive where a dominant news aggregator benefits from press publishers' production without any compensation paid in return¹⁰⁴. According to him, an exploitative abuse could occur when one of the undertakings benefits further from and offers fewer to the others than they would have achieved in a competitive market¹⁰⁵. Indeed, besides the direct benefit extracted by news aggregators from advertising revenues and data collection, it should also be considered the significant indirect benefit that giant tech companies such as Facebook and Google get sharing snippets and likings extracts for their overall services. Without content produced by content creators, digital platforms no longer have any value.

⁹⁸ Whish and Bailey, Competition Law, 9th edition [2018]

⁹⁹ *Ibid* (98)

¹⁰⁰ Case 27/76, *United Brands v Commission*, EU:C:1978:22.

¹⁰¹ Case C-177/16, *Autortiesību un komunikēšanās konsultāciju aģentūra – Latvijas Autoru apvienība v. Konkurences padome*, EU:C:2017:689, para. 12 .

¹⁰² Bostoen, *Online platforms and pricing : EU Competition law as it should be?* [2018]

¹⁰³ *Ibid* (102)

¹⁰⁴ *Ibid* (72)

¹⁰⁵ *Ibid* (72)

In so far, the question remains open. In the context of news aggregators, excessive pricing practices would not be easy to raise before a jurisdiction in the case of matter¹⁰⁶.

Unfair trading conditions and discriminatory practices

The abuse consisting in imposing unfair trading conditions encompasses the ability of the dominant undertaking to set up contractual clauses at its convenience and aligned with its interests rather than the trade parties' interests. The dominant firm abuses its dominant position in doing so.

The question raised here is whether or not the terms of the service established by the dominant news aggregators are likely to force press publishers to acquiesce to some conditions that conflict with their interests. Based on this conduct, the claim will have furthermore the chance to prosper for press publishers.

Indeed, news aggregators engage in free-riding and capture all the press publishers' content without their consent. They set up policies from which they benefit. News aggregators impose a zero-price policy. Recently, the French competition authority based on the abuse of economic dependence held that Google abused its dominant position¹⁰⁷. According to the French Authority, by imposing unfair trading conditions, Google engaged in discriminatory conduct by imposing a principle of zero remuneration policy without assessing their situation¹⁰⁸. All attempts to negotiate to find a price have been rejected by some of them, such as Google.

News aggregators provide the option solely to opt-out from their services for the press publishers that do not consent to all their terms¹⁰⁹. Through this conduct, big tech companies use their dominant position to strengthen their power. For instance, Google assumed that if press publishers object to their content's displaying on Google News, there is no trade-off, and the content would not simply appear. This may lead to anti-competitive foreclosure¹¹⁰. Indeed, referring to the European Commission¹¹¹, Bania states that opting out "*is not a sustainable business option for most websites*"¹¹². Consequently, press publishers cannot have access to the market and monetize their content.

¹⁰⁶ *Ibid* (72)

¹⁰⁷ *Ibid* (93)

¹⁰⁸ *Ibid* (93)

¹⁰⁹ As already evoked part 2.3 of this thesis, the so-called First-Click-Free policy used by Google

¹¹⁰ Bania, The role of Media Pluralism in the enforcement of EU Competition Law [2015]

¹¹¹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2 para. 25

¹¹² *Ibid* (110)

News aggregators impose their standardized format for publishing content to the press publishers, causing the devaluation of authenticity and authority of the press brand and an editorial dilution¹¹³. Furthermore, the press publisher forced to respect these policies has to choose between lowering the quality of its creations or stepping out of the system and, consequently, losing the opportunity to attract readers and monetize its content through advertising or subscriptions.

3.2.2. Exclusionary abuses

A dominant firm abuses its dominant power in adopting exclusionary conduct that eliminates its competitors in a determined market and improves its position in this market. In its Guidance on enforcement priorities under Article 102 of TFEU¹¹⁴, the EU Commission stated that it would prosecute “*anti-competitive foreclosure*” committed by a dominant undertaking where “*the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking*”¹¹⁵. Therefore, two conditions are required: (1) a rival firm that appears sufficiently “efficient” has been excluded from the relevant market or hampered by the possibility to develop its business; and (2) the anti-competitive conduct must harm the consumer welfare.

Given that news aggregators and press publishers compete for the audience to maintain or increase the level of revenues incurred by advertisings, the relevant market here must be the online advertising sector, even though there exist market sub-divisions in the online advertising sector¹¹⁶.

Refusal to supply data input from news aggregators

Refusal to supply would involve a dominant undertaking that refuses to grant access to facilities to third parties. This exclusionary abuse is limited since a dominant firm is not always obliged to access its competitors. In the case of *Commercial Solvents Corporation*¹¹⁷, the European Court of Justice provided criteria to establish an exclusionary abuse involving a refusal to supply: (1) a dominant position used within a raw material market to disturb the competition; (2) refusal to supply a party that aimed to compete in the relevant market and; (3) the refusal to supply has the effect of

¹¹³ *Ibid* (91)

¹¹⁴ *Ibid* (111)

¹¹⁵ *Ibid* (111)

¹¹⁶ See e.g., EU Commission, Google/DoubleClick, COMP/M.4731, par. 68. Definition of two different markets: the intermediation market in online advertising and the one of online advertising displaying services.

¹¹⁷ Joined cases 6 and 7-73 *Commercial Solvents Corporation v Commission of the European Communities*

eliminating competition. To mandate a dominant firm to share those resources may stimulate the competition. However, there is a risk that this obligation reduces the dominant firms' incentive to invest, improve and develop the technology¹¹⁸. In the case of *Microsoft*¹¹⁹, the European Commission balanced the dominant undertaking's interests in protecting its efforts, its benefits, and investments related to intellectual property rights and innovation and the demand of competitors to grant access to information. Indeed, Microsoft's interests could have been deprived of the demand of its competitors.

In matter, press publishers are forced to upload their content on the news aggregators' servers (e.g., Google's AMP¹²⁰). By doing so, press publishers remained hampered in accessing users' data related to their contents' interaction and especially their reader's preferences. These data that concern their own activity and traffic remain exclusively in the hand of the news aggregators, which are reluctant to share this valuable material. Therefore, press publishers cannot personalize their services on their websites, target advertisings, and adapt their strategy. Commentators argued that press publishers must adapt their business model to digitalization. However, they are not allowed to do so without those valuable data. Ultimately, they face the risk of remaining out or expelled from the market. Furthermore, news aggregators can access the performance of press publishers and use these data to increase their service.

In the case of Google, which is present across multiple markets, the access to the audience allows it to collect a vast amount of data and charge higher advertisings prices. Therefore, Google can extract value from advertisers that will pay for displaying to the audience, and simultaneously from press publishers that will accept to provide data that their activities generate for audience and visibility. Google extracts surplus from consumers that are not aware of how their data are used; their consent is not required. Therefore, the quality of the product and service can be reduced. Finally, the ability to compete with the others players in those markets is undermined. Google can foreclose the market to the actual or potential rivals.

“Self preferencing” and discriminatory practices

The case of *Google Shopping*¹²¹ gives an orientation here. Google displayed in priority its own comparison shopping service rather than its concurrent services. It turned out that the options of

¹¹⁸ Opinion of AG Jacobs in the case C-7/97 Bronner [1998]

¹¹⁹ Case T-201/04 Microsoft Corp v Commission of the European Communities [2007]

¹²⁰ New Media Alliance, How Google abuses its position as a market dominant platform to strong-arm news publishers and hurt journalism [2020]

¹²¹ *Ibid* (87)

the algorithms were featured in a way to benefit Google's comparison service to the detriment of its rivals. This conduct resulted in the traffic decrease of its rivals' services. These mechanisms act as snowballs: more traffic is allocated to a service, more algorithms are fed with data extracted from this traffic and allocation, and more traffic would be allocated to the same service. Therefore, the rivals can be expelled from the market and cannot compete anymore. Finally, Google had a competitive advantage, and the lack of diversity in the offer harmed consumer's welfare.

In the case of Google News, the service provided by Google is free of charge for press publishers and free of advertising. However, the collection of data is significant and serves other services offered by Google. Moreover, Google can display in priority its service of news aggregation instead of displaying its rivals and press publishers' websites derivating thereby the traffic of its rivals. In doing so, Google active its own advertising service and collection of data to feed its own algorithms. These resources are precious and contribute to the entire ecosystem of services provided by Google. Google is most likely the dominant firm across the advertising tech value chain. Concerns are raised about its activities because it uses its leading advertising server to foster its advertising intermediation business.

Besides, a dominant news aggregator would commit an exclusionary abuse if its algorithm operates a ranking following its own interests rather than operate a better positional ranking of the content of press publishers' websites. On the one hand, the dominant firm could prioritize its content; on the other hand, it could prioritize press publishers' content who generate the most financial or data collection interests for the news aggregators. By doing so, the news aggregator can maximize its possibility of monetization through advertising to the detriment of press publishers. Also, this practice incurs discriminatory conduct since smaller publishers will merely remain apart and lose all of their opportunities to monetize their content.

However, to apply Article 102 TFEU here, it must be proven that the user is affected directly, independently because the conduct would harm competitors placed at a competitive disadvantage¹²². Therefore, a news aggregator would give itself an advantage over its rivals and foreclose the market by excluding rivals through its algorithms. Harming competition between news aggregators and press publishers, and among press publishers themselves, those practices constitute exclusionary abuses. These practices discourage the press publishers from creating original content, harm media pluralism, journalism quality, access to information, and, by extension, harm consumers' choice and welfare.

¹²² EU Commission *Deutsche Post AG - Interception of cross-border mail*, COMP/C-1/36.915 [2002] OJ L 331/40, para. 133

3.3. Conclusion

This chapter has detailed the relationship between news aggregators and press publishers and has established the antitrust abuses committed by news aggregators.

Forces have been unbalanced. News aggregators engage in free-riding of press publishers' content. Their practices harm the reputation and the integrity of content creators' brands and prevent press publishers from monetizing their content through advertising and subscription.

Conducts and practices adopted by large digital platforms constitute exploitative and exclusionary abuses. Self-preferencing, unfair conditions of trade, discrimination hamper press publishers from evaluating in this market. Furthermore, the refusal to access data does not permit them to adapt their business model. Press publishers are at the risk of foreclosure.

Concerns are raised regarding strategies that big tech companies adopt to concentrate the resources and harm rivals and press publishers. The more these practices perpetuate, the more harmful it will be for press publishers facing the increasing risk of foreclosure from the market. The more the digital platforms will acquire a more significant advantage over them and their rivals. Therefore, the market power of dominant firms such as Google allows them to adopt any conduct on the market; they do not fear their rivals.

The infringements have been addressed; remedies can help rebalance forces on the market and the relationship between news aggregators and press publishers. Competition law remedies will address the market failures. Ultimately, they will permit to increase the revenues of press publishers, protect their creative activities, compete efficiently on the market, and enhance consumers' welfare.

CHAPTER 4 - COMPETITION LAW REMEDIES PROPOSAL

This part will be devoted mainly to remedies and interim measures that would appear efficient in the context of news aggregation.

Digital markets are complex to discipline, sweeping the traditional way to think¹²³. While they achieve relevant economies of scale and easy tip to the products/services diversification, costs of production and distribution of digital goods and services are low. In addition, they benefit from network effects. Their structure does not allow an efficient rival to enter and lead the competition with the giant ones. There are risks of efficiency loss and elimination of the incentive to innovate for dominant firms and rivals¹²⁴. Within digital markets, antitrust fails in removing durable monopoly powers that have been positioned due to the adoption of unlawful conduct. Remedies failed in restoring the competition conditions that would have existed before the infringement. Digital markets oblige to consider the production model of a product rather than the selling process and question the authorities' ability to intervene in large multinationals' business model¹²⁵.

Competition law remedies have a deterrent role, aim to solve ongoing infringements and prevent future or recidivist violations¹²⁶. Beyond the deterrent nature of antitrust remedies, they also have a restorative nature¹²⁷. Indeed, implementing remedies leads the authorities to seek the proper way to restore the competition equilibrium that would have prevailed without the antitrust infringement or ongoing before the infringement¹²⁸. Restorative remedies require firms involved to act to re-create the competition conditions that prevailed before the commission of the infringement. In addition, antitrust enforcement deals with the consequences incurred by an infringement, compensating victims through the enactment of remedies.

Behavioral remedies consist of imposing specific conduct on the companies involved (action or refraining). They are decided upon a traditional mirror approach: mirroring the abuse¹²⁹. Their implementation can take a long time, which presents a risk, especially when required in fast-moving industries and fast-changing conditions. They require monitoring. They are expected to form a “*commitment package*” to complement each other, minimize risks of dilution of their effect and

¹²³ Ibáñez Colomo, What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed [2020]

¹²⁴ Gal and Petit, Radical Restorative Remedies for Digital Markets, Berkeley Technology Law Journal, Vol. 37, No. 1 [2021]

¹²⁵ *Ibid* (123)

¹²⁶ Wils, The relationship between public antitrust enforcement and private actions for damages, World Competition, Vol. 32, No. 1 [2009]

¹²⁷ *Ibid* (124)

¹²⁸ Sullivan, Antitrust Remedies in the U.S. and EU: Advancing a Standard of Proportionality, Antitrust Bulletin [2003]

¹²⁹ Hellstrom, Maier-Rigaud and Wensel Bulst, Remedies in European antitrust law, Antitrust Law Journal, Volume 76, No 1 [2009] pp. 43-63

distortion of competition, and achieve effectiveness. Structural remedies target the concerned market structure and seek to redress, maintain or boost the competition conditions. The structural remedies are radical and address issues that derive from the market structure¹³⁰. Behavioral remedies are more straightforward to enforce than structural remedies¹³¹.

This part is devoted to the possible remedies that will fit the abuses of dominance committed by news aggregators and, ultimately, to improve the position of press publishers.

4.1. Behavioural remedies proposal

Behavior remedies may bring the exploitative abuses committed by news aggregators to the end when they free-ride the content created by press publishers and impose unfair trading conditions and discriminatory practices.

4.1.1. Duty to remunerate

By creating a duty for news aggregators to enter in fair negotiation, press publishers would be awarded a remuneration for exploiting their creation. Hence, their bargaining power can be improved. However, this remedy must be tightly supervised at the risk of being useless.

The last intervention of the French Competition Authority related to the duty for news aggregators to enter in fair negotiation and remunerate press publishers have some merits. The French Competition Authority issued interim measures requiring Google “*within three months to conduct negotiations in good faith with publishers and new agencies on the remuneration for the re-use of their protected contents*”¹³². These measures of emergency were justified by the need to address the failure in the press industry. By doing it, the French Competition Authority aimed to empower press publishers in negotiating a remuneration with news aggregators, here Google, to re-use their content and grant them control over the displaying of this content. The French Competition Authority remarked that the national press sector economy decreased in 2020 compared to the previous year's rates and that Google captured the press publishers' advertising revenues.

To impose a duty to enter in fair negotiation with press publishers is an admirable attempt at the first glimpse. However, looking more closely, it is inefficient to restore the competition conditions as they would have existed before the commission of the infringement. Moreover, the French Competition Authority did not impose a further behavioral remedy that would have guaranteed

¹³⁰ Wang, Structural remedies in EU antitrust and merger control, World competition, Vol 34, Issue 4 [2011] pp. 571-596

¹³¹ *Ibid* (131)

¹³² *Ibid* (93)

efficiency. The French Competition Authority had the merit to address the systematic refusal of Google to enter into negotiation and, finally, to force Google to discuss with press publishers. However, the process has no frame for a relevant end. The French Competition Authority did not define what a “fair” negotiation should embody or what would have been the next step if the negotiation would have failed. Furthermore, the high-tech company was finally in a position of choice. Initially, Google accepted the idea to remunerate press publishers. Then, it went back on its statement and decided to wait until the definitive decision of a Court to endorse the interim measures. Finally, the French Competition Authority imposed €500 million of fines for non-compliance to the order to enter into a fair negotiation¹³³. Here again, the adoption of a fine shows the limit of the mechanism. Google preferred to pay this amount instead of applying the interim measure. Being always more lucrative for the giant tech, Google did not want to execute the French Competition Authority decision. The company did not want to see this decision exported abroad to other countries in Europe and worldwide and be subjected to a duty to remunerate press agencies on competition law liability where the *Bundeskartellamt*¹³⁴ took the opposite way, as we explored earlier in this thesis. Under these conditions, the voluntary bargaining does not prosper, and the French Competition Authority could have imposed the licensing of the contents used by Google. By doing it, it could have assisted the enforcement of copyright law through competition law.

The Australian Competition and Consumer Commission (ACCC) imposed a duty to enter in fair negotiation through a regulatory mandate. The ACCC recommended adopting a Mandatory News Media Bargaining Code¹³⁵ for the recall since the voluntary bargaining did not succeed. On February 25th, 2021, the Australian Parliament adopted the Mandatory News Media Bargaining Code¹³⁶, requiring big giant tech companies to pay for the press publishers' content use and imposing the obligation to negotiate in good faith. Of course, primarily subjected to the inquiry, Google and Facebook stemmed against adopting a Mandatory News Media Bargaining Code. Google has argued that its « *platforms are not the cause of the inherent difficulties with monetizing journalism or any market failure [...] the Code should not require search engines to pay for crawling, indexing and displaying links and extracts of websites, or require publishers to pay us for these services* »¹³⁷. On

¹³³ Lomas, Google fined \$592M in France for breaching antitrust order to negotiate copyright fees for news snippets, July 13, 2021, <https://techcrunch.com/2021/07/13/google-fined-592m-in-france-for-breaching-antitrust-order-to-negotiate-news-copyright-fees/>

¹³⁴ The *Bundeskartellamt*, B6-126/14 [2015], Decision according to Section 32c German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB)

¹³⁵ Press release, Australian Competition and Consumer Commission (ACCC), Holistic, dynamic reforms needed to address dominance of digital platform, [2019]

¹³⁶ See on ACCC's website, News media bargaining code, February 25th 2021, Final legislation, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/final-legislation>

¹³⁷ Google, Mandatory news media bargaining code: Response to the ACCC's concepts paper [2020]

February 17th, 2021, Facebook shut down its Facebook Actuality Australian edition, restricting users from sharing and exploring news links on the platform¹³⁸.

However, contrary to the French initiative, the Mandatory News Media Bargaining Code provides a phase of mediation and arbitration to find a settlement between big giant companies and press publishers if their mandatory negotiations do not prosper after a certain period. Therefore, the Australian initiative is exciting and goes further than the French initiative because it includes all stakeholders in researching a solution.

It is interesting to note that Dmitry Gerasimenko, the founder of SEO tool Ahrefs, announced the launch of Ahrefs search engine to compete with Google¹³⁹. He also announced a division of incomes at large scales. Indeed, he promises that 90% of the revenues generated would be allocated to content providers. The entrance of this new search engine would maybe change the game and force Google to meet someone halfway.

The sole duty to enter in “fair” negotiation is too weak. The giant tech companies’ attitude shows that it is not enough to rebalance the power with press publishers, remove their conduct, and discourage adopting anti-competitive practices and redistributing their resources. A duty to allocate a fair remuneration is a further step under the condition that the authority that imposes it defines what a fair remuneration means and the next step to follow in case of failure in the negotiation. Nevertheless, still, the restoration of competition is not foreseen in the case of allocation of remuneration.

Also, interventions on other grounds can be aggregated to complete this duty to negotiate and improve the bargaining power of press publishers. For instance, having access to datasets would empower them as rivals would improve their services.

4.1.2. Order to remove formats and standardization

The practice consisting in imposing content formats and standardizations must infer behavioral remedies that address it. Press publishers that refused them have the only alternative to opt-out from the digital platforms; and, when they decide to remain on them, a doubt surrounds the quality of their consent to those conditions. Besides, the image of the brand can be harmed and denatured because of the digital platform interference. In consequence, these unfair trade conditions conflict with their interests.

¹³⁸ Matney, Facebook restricts users in Australia from sharing or viewing news links, Techcrunch, February 17th 2021,

¹³⁹ Cordon, With almost \$100m in ARR without taking VC money, Ahrefs is now challenging Google, June 23rd 2021, <https://www.techinasia.com/ahrefs-reaching-100m-revenue-vc-money-challenging-google>

Competition Authorities must merely order the removal of these conditions, not modify the content and/or impose a determinate format for their rubrics as a behavioral remedy. In this regard, some of the National Competition Authorities advanced a bit on this field, considering that Google could abuse its position if it imposes disproportionate consequences to press publishers refusing that Google News uses their content for any reason. In 2010, the Italian competition authority accepted commitments presented by Google¹⁴⁰. Press publishers would be entitled to opt-out of Google news services for single articles instead of the platform.

Moreover, it would have been interesting to include an obligation to discuss the conditions of exploitation and content displaying within the duty to remunerate. By doing it, the negotiation power of press publishers would have been reinforced in front of news aggregators.

4.1.3. Order to provide access to dataset and algorithms

To grant access to datasets and algorithms and share information would empower press publishers' trade position, permit them to catch up on their competitive disadvantage, and lift the opacity.

This kind of remedy could fix the exclusionary abuses committed by news aggregators. Datasets feed and improve algorithms. The possibility to impose a mandatory duty for news aggregators to share a whole or part of algorithms with press publishers when they were used to satisfy anti-competitive conduct or unlawfully gathered, used and analyzed, could be envisaged.

News aggregators gathered data generated by press publishers' content performance and refused to give them access. As a result, news aggregators accumulate a substantial competitive advantage in perfecting their algorithms, improving their services¹⁴¹, and charging higher advertising prices. By not accessing these data, press publishers are at risk of being excluded from the market or facing a discouraging entrance barrier. News aggregators took a considerable advance in the performance of their service to the detriment of press publishers.

A duty to share its data could be imposed on the tech company guilty of abuse of its dominance when it uses it this way and that the exploitation of dataset is the source of its advantage. There are different utilizations possible of duplicate data, and they are replicable and divisible. The main problem of data utilization is related to their interoperability, portability, and cost difficulties. Rivals that get these data must take a certain period devoted to the organization and classification of them. They must invest in performing technical systems to achieve and integrate this amount of data into

¹⁴⁰ Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), Antitrust Authority Accepts Google Commitments and Implores Parliament to Update Copyright Laws, Press Release A420 – AS787 [2010]

¹⁴¹ *Ibid* (124)

their structure. The monopolist would be therefore able to benefit from this obstacle. In addition, some legislations aim to protect personal data and prohibit sharing even when the competition justifies this sharing. In that case, combining data sharing and data-based algorithmic learning sharing is conceivable to remain in the law frame and restore competition in the relevant market.

Press publishers urgently need that news aggregators to share their data relating to their performance and their readers. Suppose the news aggregators also get the data concerning the performance of other press publishers' rivals. All press publishers must also be entitled to receive these data to be positioned at an equal competitive advantage in the relevant market. Their use would be the different point to improve their performance and elevate the performance of the entire relevant market.

For further, data sharing could be complemented with the mandatory sharing of data-based algorithmic learning (algorithms) to restore the competition by allowing press publishers to catch up in immediacy¹⁴². This order could fix the exclusionary abuse and exploitative abuse in lifting all the parties at the same level of technological advancement. Therefore, press publishers will benefit from big learning that would have been done in regular access to these data. Also, without all data generated by press publishers' contents, algorithms would have been less performance. Therefore, they participate in the algorithms feeding and development. Algorithm sharing is superior to sharing data. Each party benefits from the advancements of technology equally.

Moreover, this remedy does not require for antitrust authorities comprehensive monitoring. However, questions must be addressed regarding the intellectual property of this technology. Indeed, companies own their property, and these are their know-how. Therefore, the disclosure duty could be discouraging companies from engaging in innovation and development. They could just wait for a rival to invest, innovates, and be forced to share with them.

4.1.4. Order to cease self-preferencing practices by displaying the websites of press publishers and other rivals

The European Commission adopted this approach in the *Google Shopping* case¹⁴³. The European Commission imposed on Google not to repeat any equivalent act or act “*having the same or equivalent object or effect*”¹⁴⁴. Google should ensure that it “*treats competing shopping services no less favorably than its own comparison shopping service within its general results pages*”¹⁴⁵. The

¹⁴² *Ibid* (124)

¹⁴³ *Ibid* (87)

¹⁴⁴ *Ibid* (87) Article 3

¹⁴⁵ *Ibid* (87) Recitals 698-699

European Commission imposes to Google to adopt an equal treatment within general search results pages. Google must adopt mechanisms in order to satisfy the decision of the European Court. It separated in two the shopping business unit and removed the demotion algorithms applied to rivals. It engaged not to modify the format, the design, and the position of shopping units.

In the case of Google, the company can derivate the traffic of its rivals and press publishers by displaying in priority its service of news aggregation instead of displaying its rivals and press publishers' websites. This conduct permits it to cumulate a large amount of data and improve its advertising revenues. Therefore, the front page of the search engine service should display the website of its news aggregators rivals and the website of the press publishers. This action could fix the self-preferencing abuse.

4.1.5. Order to remove litigious algorithms

News aggregators can rank the display of the content that they offer following their own interests. On the one hand, they distort competition among press publishers, favoring the one that generates more value (traffic, data, or financial value) for the digital platform. Thereby, they engage in discriminatory practices. On the other hand, they engage in self-preferencing when they create the content they displayed in priority.

To remove litigious algorithms that rank contents can fix exclusionary abuse. All press publishers' content must be treated equally.

4.2. Structural remedies proposal

4.2.1. Breakups of big tech companies

Traditionally, European Union institutions are reluctant to adopt structural remedies in antitrust contexts. However, the debate is increasingly ongoing to address the anticompetitive conducts adopted by big tech companies that can diversify their products and services in the digital markets. For instance, on adopting the DMA Directive, Netherlands stood in favor of strict sanctions, including breakups of digital platforms. In the United States, authorities are urged to apply stringent and drastic regulations and breakups to big tech companies. For instance, to restore the competition, the Federal Trade Commission seeks to divesture or reconstruct businesses such as Instagram and WhatsApp and hamper Facebook from making further acquisitions exceeding \$10 million without

notification¹⁴⁶. Authorities are considering worldwide to impose to digital platform the divestiture of asset, business units, and intellectual property law where other firms and users' economic dependency occur. This position has extensive support within the scholar ambient, such as Wu, who supports the breakup of Facebook¹⁴⁷.

News aggregators are not all of them a sub-service of a diversified digital platform. Such structural remedy would merely concern the big tech companies such as Apple, Facebook, or Google. For instance, Google occupies the more effective advertising and referral market share.

Google is present across multiple markets, including the advertising market, through its Google Ads. By addressing the monopolist power, breaking it up would separate Google News and Google Ads from Google. Google can adopt exploitative and exclusionary conduct because it forms an ecosystem concentrating data, algorithms, and power that serve its services. To break up the company would kill any incentive to engage in discrimination because there would no longer be vertical integration and concentration of these resources and services/products. Users would be less engaged in loyalty conduct and would be forced to explore rivals' services and products. Press publishers could therefore grab more opportunities to monetize their content and catch up with the competition. However, if this structural remedy is interesting to address the power of digital platforms, in our case, it is a bit limited.

4.2.2. To recognize big tech companies as public utilities in order to ensure access to the market for all stakeholders

Some primary observations must be addressed. Digital platforms such as Google or Facebook have built their competitive rank by several strategies that raised anti-competitive concerns. Thereby, they acquired potential competitors (e.g., Facebook acquiring Instagram and WhatsApp) and diversified their products/services, elaborating an ecosystem wherein they complete each other. They engaged in critical partnerships with other companies to maximize their benefit¹⁴⁸ and influenced policymakers. Not only dealing with products and services, digital platforms' activities interfere in the democratic life by spreading information (fake or reliable) and provide a space for trades. For all of these reasons, digital platforms became essential for communities, users, and businesses¹⁴⁹. Therefore, the idea according to which digital platforms would be of public utility immerses the

¹⁴⁶ Case 1:20-cv-03590-JEB, January 13th 2021, FTC Facebook complaint, section X Prayer For Relief, <https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf>

¹⁴⁷ Thompson, Tim Wu explains why he thinks Facebook should be broken up, WIRED [2019]

¹⁴⁸ See e.g., Confidential agreement between Google and Facebook in 2018 operating division among the market for advertisings and applications. [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20\(Redacted\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf)

¹⁴⁹ Bagnoli, Digital Platforms as Public Utilities. IIC 51, 903–905 [2020]

debate. Even Facebook termed itself a “utility”. Indeed, it could be inferred that digital platforms may be seen as infrastructures of a good public which consumers, users, businesses, and communities depend on. Within the digital environment, digital platforms are controlled by those who own them and enjoy a discretion to restrict the access or exclude from this utility any kind under their policies. To regulate the sector would ensure the consumer and business welfare to ensure access to the market and fair conduct led by digital platforms. The essential facilities doctrine would be here the solution to apply. In June 2021, Ohio Attorney General Dave Yost filed a lawsuit seeking that the State Court rules that *“Google’s provision of internet search is properly classified as a common carrier and/or public utility under Ohio common law [...] Google uses its dominance of internet search to steer Ohioans to Google’s own products--that’s discriminatory and anti-competitive [...] When you own the railroad or the electric company or the cellphone tower, you have to treat everyone the same and give everybody access”*¹⁵⁰. This act would refrain Google from favoring its services over rivals that depend on it to attain consumers and users. Such regulation would permit to eliminate entrance barriers, discrimination practices, notably toward downstream rivals using the digital platforms network, self-preferencing, unlawful mergers, and acquisitions. The solution is radical but appears efficient.

Therefore, this remedy would end the exploitative and exclusionary abuses engaged by big tech companies in the online media market. Press publishers would benefit from this regulation and access to the network with more neutrality without fear of being expelled whether they do not consent to terms and conditions or fear related to the mode of ranking, the deprivation of dataset. They would monetize their content easily.

4.2.3. Order temporary shutdowns of news aggregators services

This remedy would oblige the users to explore rival websites. For instance, Google News is temporarily shut down, and the reader is forced to explore alternatives and visit the press publishers' websites or other news aggregators platforms. Advertising revenues would be generated benefiting press publishers, plus, the reader would be geared to the proposition of subscription. It must be considered the question of the shutdown duration.

It does not exist any studies related to the effects of shutdowns over the competition. However, in the past, China practiced shutdowns to support domestic search engine firms, shutting down Google temporarily. The expected outcomes succeeded for Chinese companies: the Chinese rival of

¹⁵⁰ State of Ohio ex rel. Dave yost, Ohio Attorney General v. Google llc c/o Corporation Service co., Case No. 21 CV H, June 8th 2021. [https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-\(Time-Stamped\).aspx](https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-(Time-Stamped).aspx)

Google, Baidu, entered into the market and its market share steadily increased¹⁵¹ to catch up the Google's competitive advantage.

4.2.4. To order the subsidiarization of press publishers

It is challenging to consider subsidization as a remedy, but still, it would be interesting to evoke them in this chapter. This tool must have a high impact on the market structure. It can complement other remedies or, for instance, instead of other behavioral remedies (e.g., instead of the duty to remunerate).

Subsidization aims to strengthen or allow entry into the relevant digital market of a rival. It would be justified by social welfare and would restore the competition. In this perspective, subsidization would remove any exclusionary effect of abusive monopolist's conduct, permitting to eliminate the entrance barriers and bring back competition on the relevant market. The People's Republic of China vigorously practices subsidization to support its domestic digital companies, allowing them to enter the market and prosper successfully¹⁵². By doing so, the Chinese digital companies gained a competitive advantage. The subsidization of firms on a relevant market should concern a market in which a short-term self-correction cannot occur and must be justified by significant welfare and benefit. Also, the result expected cannot be achieved by other fewer interventionist remedies.

In the case of matter, the market would not self-correct quickly. A subsidiarization can be justified through a public and democratic interest for the society to provide the right to access information, quality of journalism, freedom of expression, and media pluralism.

However, in the press sector, subsidization is already common in several countries. For instance, the French press is subjected to inefficient complex mechanisms of subsidization for decades that do not target innovation and do not ensure the exit of crisis in the press sector¹⁵³.

4.3. Conclusion

Behavioral and structural remedies that would appear efficient to strengthen the press publishers' position and rebalance the forces in the context of news aggregation were analyzed within this part.

¹⁵¹ Thompson, Google's China Problem, N.Y. Times [2006]

¹⁵² Institute of International Finance, A new kind of conglomerate: bigtech in China, November 2018

¹⁵³ Lardeau, Market structure and innovation policies in France, Innovation policies in the European news media industry, [2017]

Behavior remedies can end exploitative abuses when news aggregators free-ride the content created by press publishers and impose unfair trading conditions and discriminatory practices.

Creating a duty to remunerate is exciting but not sufficient if it is not enough framed by the authorities that impose it. Indeed, as a remedy, National Competition Authorities should define what “fair” negotiation embodies, what would happen next if the fair negotiation does not succeed. Besides, this remedy lacks restoring the competition conditions as they would have been if the infringement had not occurred. However, the Australian Authority went further than the French Authority in this initiative. A duty to allocate a fair remuneration is attractive. However, the Competition Authority must define the term “fair” remuneration and frame the process in case of negotiation failure.

The exploitative abuse consisting of imposing unfair trade conditions such as the respect of formats and standardizations for contents can be addressed to remove those policies. If they disagree, press publishers are forced to opt-out of the platform. To empower the press publishers, it must be included in the duty to remunerate, negotiating the conditions of exploitation and content displaying.

To grant access to datasets and algorithms and share information would empower press publishers' trade position, permit them to catch up on their competitive disadvantage, and lift the opacity.

To fix the exclusionary abuses is relevant to provide access to datasets and algorithms. These remedies could rebalance the considerable advance enjoyed by news aggregators for the performance of their service to the detriment of press publishers. However, obstacles persist. Indeed, the exploitation of datasets is exposed to the problem of costs, interoperability, and portability. Press publishers as rivals could face difficulties to organize them, also lacking a technological system of exploitation. Besides, to restore the competition by allowing press publishers to catch up with their disadvantages, the order of data sharing could be complemented with the mandatory sharing of data-based algorithmic learning (algorithms). The exclusionary and exploitative abuse would be fixed in lifting all the parties at the same level of technological advancement. This remedy is restorative and does not require deep monitoring. Each party would enjoy equally the advancements of technology. However, questions are pending. The intellectual property of this technology and the manner to keep stimulating innovation and development should be addressed.

To address the exclusionary abuse related to self-preferencing, a remedy in ceasing this practice would be relevant. For Google, in particular, which also exploits a search engine, the company should display the websites of press publishers and other rivals.

These exclusionary abuses could be addressed by the order to remove litigious algorithms that rank contents unfairly.

These two last remedies are not restorative enough, but they can be part of the behavioral remedies package I developed earlier.

Structural remedies were proposed in this part.

Among them, the break up of big tech companies is drastic. It would split the market into different parts and stimulate competition within those very concentrated markets. This action would be decisive, and the debate is currently open at the top of the European and United States institutions. This remedy should be seen as a massive intervention, a set of divestitures that concern Google, Facebook, and other big tech companies. In the case of Google, the only breakup of Google News would not be relevant enough. However, the divestiture of Google Ads would have exciting consequences since Google would not be present at all stages of the chain, and press publishers would have more opportunities to monetize without fearing the deprivation of advertising revenues. In the same vein, some institutions propose recognizing big tech companies as public utilities regarding the place they embody between citizens, consumers, businesses, and policymakers. This recognition would permit regulation of the digital market from the state that would provide access to this space to all businesses. Press publishers would not be foreclosed or struggling to enter the market. These remedies would ultimately bring the exploitative and exclusionary abuses engaged by big tech companies on the online media market.

The remedy concerning the order to temporarily shut down news aggregators' service would generate opportunities for rivals and press publishers to monetize through advertising and redistribution. This remedy requires monitoring, and the shutdown duration must be determined. A political positioning is required here.

Finally, we evoke the subsidization tool even though it is challenging to term its remedies. This intervention could impact the structure of the market and implement competition. Since the news aggregation market is not prone to self-correct, a public interest such as media pluralism could justify it. Nevertheless, experiences in several countries show that their efficiency also depends on each context.

CHAPTER 5 - CONCLUSION

The beginning of this thesis described the step-by-step utilization of the news aggregators' service from the external user point of view. By doing it, I aimed to show further the complex process and conflict of interests hiding behind the simple act of reading news online. Indeed, the consumer is unaware of the consequences of consulting news aggregators' websites instead of press publishers' ones and of clicking or not on links provided by a news aggregator. The users do not know how this online media sector is monetized since news aggregators offer free service access. It has a cost, especially for press publishers that invest in content creation and for the entire press sector and democratic society. I aimed to show that news aggregators in free-riding the press publishers' contents accumulate value in several forms that empower them and ensure a durable business model. This advantage allows them to adopt anti-competitive conduct. However, most cases involving news aggregators' practices are brought into the field of copyright law, relying upon the utilization of hyperlinks and snippets. It makes sense as far as press publishers face high barriers in licensing their content and enforcing their copyrights. However, copyright law lacks to achieve what is expected: protect press publishers' creation and investment. Furthermore, when they are conceded, copyright remedies do not fit with the digital media economy. Indeed, civil damages for copyright infringement are low, and the removal of unlawful content does not benefit press publishers. Hence, being deprived of visibility weakens their business model and harms the reputation of their brand. Copyright remedies do not offer durable alternatives to ensure their bargaining power for news aggregators and establish a real collaboration. In contrast, competition law through remedies can bring some solutions to strengthen their position and ultimately preserve their contribution and get awarded for it. Therefore, this thesis addressed the following question: research question was: « *how can competition law assist copyright law and set efficient remedies to improve the press publishers' trade position?* ».

The recognition of news aggregators' liability under copyright law is not easy for press publishers. European Union legal system lacks harmonization, definitions of concepts and exceptions raised uncertainties, and the fragmentation of solutions among national systems is significant. Moreover, the European Court of Justice struggles to classify acts that the InfoSoc Directive must cover. Its jurisprudence results in raising obstacles for press publishers to assert their rights. The current legal framework and judicial interventions benefit news aggregators primarily. Press publishers do not have any other choice to accept the unauthorized displaying of their work or step out of the system. Therefore, the quality of their consent as required by copyright rules is questionable. Also, press publishers are dependant on this ecosystem to survive. Remaining out of it,

they can not compete on the market properly under the same conditions of competition as their rivals. Several times, copyright law is applied when news aggregators were at an advantage in litigation.

Nevertheless, as we see in *Copiepresse* when the law states against them, often, an opaque agreement brings the litigation to an end, and copyright law does not apply. Press publishers prefer to negotiate with news aggregators instead of obtaining an order to remove the content. However, their bargaining position is weak and can still play against them. In order to strengthen the press publishers' bargaining position and generate revenues for their creation, copyright rules were twisted to create ancillary rights at the European and domestic levels. Spain and Germany first made this choice. Then the European Commission also announced the creation of neighboring rights in 2016 by the DSM Directive. However, critics have been expressed. Indeed, the past experiences have shown their inefficiency in improving the level of revenues et bargaining position of press publishers. Hence, they impede innovation and restrain the development of new business models. Finally, those dispositions overlap with dispositions that already exist (i.e., InfoSoc Directive) and do not clarify an aspect of the existing copyright framework that remain opaque. Ancillary rights are not drastic enough to rebalance the forces and protect press publishers. They still offer considerable discretion for news aggregators. Nevertheless, competition law gives some tools for press publishers to oppose the unauthorized use of their production by news aggregators that enjoy a dominant position in the relevant market, such as Google and Facebook.

Before establishing the anti-competitive abuses committed by news aggregators, the complex relationship with press publishers was analyzed. Depending on its aspects, different practices would be defined as exploitative abuse while others will have an exclusionary nature. Two predominant aspects were developed. First, the interdependence nature is unbalanced by the dominant power exploited by news aggregators. News aggregators provide traffic, and press publishers provide content. However, the position of news aggregators is advantageous. They capture for free press publishers' content, free-ride on their investments, attract the audience and resell this traffic to advertisers. They design their service in their only interest through restrictive publication policies. By doing it, they maximize their revenues and value through advertising or the collection of data that perfect their algorithms. Besides, they organize through their algorithms the ranking of press publishers' content. Press publishers do not control the distribution of their creation anymore and remain with a concise power of resilience. Second, news aggregators and press publishers are rivals. The more the audience they generate through their website, the more advertising revenues they generate, the more data they collect.

After exposing the aspects of their relationship, I led down the press publishers' concerns: (1) the appropriation of their content by news aggregators; (2) the opacity of the algorithms in charge of the listing and ranking of news; (3) the editorial dilution incurred by the format imposed by news aggregators and harming the journalism quality and the image of the brand; (4) the appropriation of consumer data by news aggregators that do not aim to share with press publishers; (5) the implementation of policies decided by news aggregators and that harm the press publishers interests.

The infringements concern dominant firms on the market of news referrals for exploitative abuses and advertising for exclusionary abuses. Google and Facebook are primarily concerned.

The dominant firm commits exploitative abuses in imposing unfair trade conditions and discriminatory practices. It set up contractual clauses, including a zero price policy and format/standardization. Given the sector's reality, press publishers are forced to accept them even if they conflict with their interests. News aggregators refuse to negotiate over these conditions such as Google. If they refuse these conditions, press publishers must opt out of the ecosystem.

The dominant firm commits exclusionary abuses in refusing to grant access to data to press publishers, included those that concern their activity and interaction with their readers. By doing it, news aggregators hamper press publishers from improving their services and adapt their business model. They cannot compete under the same conditions as their rivals and risk foreclosing on the market. Worst, news aggregators improve their own services and get a more significant competitive advantage with these datasets. Google, present across multiple markets, can extract value from advertisers, press publishers providing data, and consumers through the collection of their data. Google can foreclose the market to the actual or potential rivals.

News aggregators also commit exclusionary abuse in self-preferencing and the adoption of discriminatory practices. Google can display in priority its service of news aggregation instead of displaying its rivals and press publishers' websites. Thereby, it derives the traffic of its rivals, activating its own service of advertising and collection of data to feed its own algorithms. Besides, news aggregators can organize their algorithms to organize a ranking of content that suits more its interests or that displays in priority its content when it is also the creator of content. By giving itself an advantage over its rivals, the news aggregator forecloses the market by excluding rivals through its algorithms. This practice lowers the quality of the service and the diversity, ultimately harming consumer's welfare.

The imposition of a duty to enter in negotiation was discussed to fix the exploitative conduct of capturing content without a counterpart. However, the proposition of a duty to allocate a fair

remuneration remained a further alternative to consider. However, the Competition Authorities must define what “fair” remuneration means and the procedure to follow for the parties in case of negotiation failure. However, the restorative aspect of the remedy is not fulfilled solely with this initiative.

To address the exploitative abuse of imposing unfair trade conditions related to the respect of formats and standardizations for contents, an order to remove those policies was proposed. This imposition gives only the choice to the press publisher to opt out of the platform, which is detrimental for their business. Besides, a duty to negotiate those conditions can supplement the negotiation about the remuneration.

To grant access to datasets and algorithms and share information would empower the trade position of press publishers and permit them to catch up on their competitive disadvantage lifting the opacity.

The exclusionary abuses related to the exploitation of datasets and algorithms could be fixed with access to datasets and algorithms. These remedies are restorative, do not require monitoring, and would rebalance the advance enjoyed by news aggregators to the detriment of press publishers. However, the problem of costs, interoperability, and portability must be addressed. Press publishers and rivals could struggle to organize and efficiently exploit them, lacking a technological system that would allow it. In addition, press publishers would be able to catch up with their disadvantages through the order of mandatory sharing data-based algorithmic learning (algorithms). The exclusionary and exploitative abuse would be banned in lifting all the parties at the same level of technological advancement. However, the intellectual property of this technology and the risk of desensitizing innovation and development are problems that must be addressed.

To address the exclusionary abuse related to self-preferencing, an order to cease it can be efficient enough. In the case of Google, it could be ordered the company to display the websites of press publishers and other rivals through its search engine service.

The exclusionary abuses in the ranking of contents could be addressed by removing litigious algorithms. This remedy should require monitoring.

These two last remedies are not restorative enough, but they can be part of the behavioral remedies package I developed earlier.

Structural remedies were proposed in this part.

The breakup of big tech companies would fragment markets, stimulating competition. This action would be drastic and decisive. Still, the European and United States institutions opened the debate. However, a set of divestitures should be engaged in the digital area to impact and should

therefore concern all the big tech companies. For Google, the mere breakup of Google News would have a tiny impact. However, Google being present at all stages of the chain, the divestiture of Google Ads should be impacting. Press publishers would easily monetize their content without barriers or decide to opt out of the service without fearing deprivation of advertising revenues.

Furthermore, the recognition of big tech companies as public utilities has been evoked. Considering the place that digital platforms embody between citizens, consumers, businesses, and policymakers, the debate related to the public good is legitimate. Press publishers would not be at risk of foreclosing or struggling to enter into the market. This remedy would end the exploitative and exclusionary abuses engaged by big tech companies on the online media market. It is not a restorative remedy and requires a political stand from authorities.

To generate opportunities for monetization through advertising and redistribution, the remedy of the temporary shutdown of news aggregators' service is interesting. This remedy requires monitoring and duration determination and would organize the balance and distribution of advertising revenues. Again, a political positioning is required to do so.

Finally, subsidization was proposed even though it is challenging to consider their remedies. The market structure can be impacted by them and permit the entrance or avoid the foreclosure of rivals on the market. This action would be restorative and bring back competition in the relevant market. This action is contemplated in the news aggregation context since the market would not self-correct, and intervention should be justified through public interest and consideration such as media pluralism. However, experiences in several countries show that their efficiency also depends on each context.

BIBLIOGRAPHY

ARTICLES

- Alexiadis and de Streel, Designing an EU intervention standard for digital platforms, EUI Working Paper [2020]
- Athey, M. Mobius & J. Pal, The Impact of Aggregators on Internet News Consumption, [2017]
- Anderson, *Rebuilding the News: Metropolitan Journalism in the Digital Age*. Philadelphia, PA: Temple University Press [2013]
- Bagnoli, Digital Platforms as Public Utilities. IIC 51, 903–905 [2020]
- Bania, The role of Media Pluralism in the enforcement of EU Competition Law [2015]
- Bergkamp, The European Commission's Google Shopping Decision: Could Bias Have Anything to Do with It?, *Maastricht Journal of European and Comparative Law* [2019]
- Bostoen, Online platforms and pricing : EU Competition law as it should be? [2018]
- Calzada and Gil, What do News Aggregators Do?, *Marketing Science* [2020]
- Cerre, Making Economic Regulation of Platforms fit for the Digital Age – Part 3 Threshold for Intervention [2020]
- Coddington, Gathering evidence of evidence: News aggregation as an epistemological practice, *Journalism* [2020]
- Colangelo and Torti, Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform, *International Journal of Law and Information Technology* [2019]
- Dellarocas, Sutanto, Calin and Palme, Attention allocation in information-rich environments: the case of the news aggregators, *Management Science* [2015]
- Doh-Shin, Economics of News Aggregators, TSE Working Paper [2018]
- Ergas et al., Impact of news aggregators on public interest journalism in Australia [2018]
- Gal and Petit, Radical Restorative Remedies for Digital Markets, *Berkeley Technology Law Journal*, Vol. 37, No. 1 [2021]
- Galbraith, A squatter on the Fourth Estate: Google News, *Journal of Library Administration* [2008]
- Garett, *Too Big to Jail: How Prosecutors Compromise with Corporations*, Harvard University Press, [2014]
- Geradin, Complements and/or Substitutes? The Competitive Dynamics Between News Publishers and Digital Platforms and What It Means for Competition Policy [2019]
- Geradin and Katsifis, An EU Competition law Analysis of Online Display Advertising in the Programmatic Age, [2018]
- Ibáñez Colomo, What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed [2020]
- Isbell, The rise of the news aggregator: Legal implications and best practices [2010]
- Hanff, News aggregators. In C. H. Sterling *Encyclopedia of journalism* (pp. 951-952). SAGE Publications, Inc. [2009]
- Hellstrom, Maier-Rigaud and Wensel Bulst, Remedies in European antitrust law, *Antitrust Law Journal*, Volume 76, No 1 [2009]
- HI, SC and Zheng, Parasite or partner: Coverage of Google News in an era of news aggregation. *Journalism & Mass Communication Quarterly* [2016]
- Hilty, Koklu, and Moscon, Public consultation on the role of publishers in the copyright value chain [2016]
- Joseph and Cusworth, *Meltwater: Liability For internet Browsing* [2014]
- Katz, Ariel. "The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem." *Berkeley Technology Law Journal*
- Lardeau, Market structure and innovation policies in France, *Innovation policies in the European news media industry* [2017]

Laurent, Copiepresse SCRL & Alii v Google Inc In Its Decision Of 5 May 2011, The Brussels Court Of Appeal Confirms The Prohibitory Injunction Order Banning Google News And Google's "In Cache" Function, Computer Law & Security Review [2011]

Loertscher and Maier-Rigaud, On the consistency of the European Commission's remedies practice, presentation given at the 14th Annual Conference of the GCLC in Brussels on 31 January–1 February 2019

Maier-Rigaud, Behavioural versus Structural Remedies in EU Competition Law, European Competition Law Annual [2013]

Monti, Attention Intermediaries: Regulatory Options and their Institutional Implications [2020]

Pidgeon, Where did the money go? Guardian buys its own ad inventory, Mediatel Newslite [2016]

Pihlajarinne and Vesala, Proposed right of press publishers: a workable solution? Journal of Intellectual Property Law & Practice [2018]

Rebillard and Smyrniotis, Les infomédiaires, au cœur de la filière de l'information en ligne : les cas de Google, Wikio et Paperblog, Réseaux 2010/2-3 [2010]

Roos, Mela, and Shachar, The Effect of Links and Excerpts on Internet News Consumption, Journal of Marketing Research [2020]

Roos, Carl Mela, and Shachar, The Effect of Links and Excerpts on Internet News Consumption, Journal of Marketing Research [2020]

Rosati, Neighboring rights for publishers: are national and (possible) EU initiatives lawful? [2016]

Scalzini, Is there free-riding? A comparative analysis of the problem of protecting publishing materials online in Europe, Journal of Intellectual Property Law and Practice [2015]

Senftleben, Kerk, Buiten, and Heine, New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era [2017]

Sganga, Chapter 6 The right of reproduction [2021]

Stigler, Protecting Journalism in the Age of Digital Platforms [2019]

Sullivan, Antitrust Remedies in the U.S. and EU: Advancing a Standard of Proportionality, Antitrust Bulletin [2003]

Xalabarder, The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish government: its compliance with international and EU law, Academic resources, Domestic legislation, limitations and exceptions [2014]

Wang, Structural remedies in EU antitrust and merger control, World competition, Vol 34, Issue 4 [2011]

Whish and Bailey, Competition Law, 9th edition [2018]

Wils, The relationship between public antitrust enforcement and private actions for damages, World Competition, Vol. 32, No. 1 [2009]

Wu, Blind Spot: The Attention Economy and the Law [2017]

OFFICIAL DOCUMENTS

EU Commission, Green Paper Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, COM[1988]

EU Commission, Impact Assessment on the modernization of EU copyright rules, Bruxelles, SWD(2016)

EU Proposal for a Directive on Copyright in the Digital Single Market, COM(2016)

WIPO Copyright Treaty [1997] and WIPO Performances and Phonograms Treaty [1997]

Berne Convention for the Protection of Literary and Artistic Works [1886]

Council Directive 91/250/EEC on the legal protection of computer programs, OJ L122/42 [1991]

Directive 96/9/EC of the European Parliament and the Council on the legal protection of databases OJ L77/20 [1996]

Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society OJ L167/10 [2001]

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, (2019) OJ L 130/92

Recital 33 of the proposal for a Directive on Copyright in the Digital Single Market, COM(2016)

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2

EU Commission, Staff Working Document Impact Assessment Accompanying the Proposal for a Regulation of the EU Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD/2018/138

EU Commission, Glossary of terms used in EU Competition policy Antitrust and control of concentrations [2002]

Legal Advisory Board, Reply to the 1995 Green Paper on Copyright and Related Rights in the Information Society, Brussels [1996]

EU Commission, Notice on the definition of relevant market for the purpose of Community Competition law (97/C 372/03) [1997]

EU Commission's Communication, Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal C 45 [2009]

OECD, News in the Internet Age New trends in News Publishing [2010]

Australian Competition and Consumer Commission, Digital platforms inquiry: final report [2019]

Pew Research Center, Journalism and Media, Digital News Fact Sheet [2019]

New Media Alliance, How Google abuses its position as a market dominant platform to strong-arm news publishers and hurt journalism [2020]

Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty, JO 013, 21/02/1962

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, OJ L 1, 4.1.2003

ACCC's website, News media bargaining code, February 25th 2021, Final legislation, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/final-legislation>

Google, Mandatory news media bargaining code: Response to the ACCC's concepts paper [2020]

Institute of International Finance, A new kind of conglomerate: bigtech in China, November 2018

PRESS RELEASE

Greenslade, Economist predicts the death of newspapers, The Guardian, 25 Aug. 2006, <https://www.theguardian.com/media/greenslade/2006/aug/25/economistpredictstheatho>

Agence Française de Presse, «L'indépendance de la presse est dans les mains des députés européens», 2018, <https://www.afp.com/fr/au-fil-de-lafp/lindependance-de-la-presse-est-dans-les-mains-des-deputes-europeens>

EU Commission, Press release, Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising [2019]

EU Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service, IP/17/1784 [2017].

EU Commission, Press release, Europe fit for the digital age : Commission proposes new rules for digital platforms [2020]

Whitley, The era of free news for Facebook and Google may soon be over. Bloomberg, July 2020

Press release, Australian Competition and Consumer Commission (ACCC), Holistic, dynamic reforms needed to address the dominance of digital platform, [2019]

Matney, Facebook restricts users in Australia from sharing or viewing news links, Techcrunch, February 17th 2021,

Lomas, Google fined \$592M in France for breaching antitrust order to negotiate copyright fees for news snippets, July 13, 2021

Thompson, Google's China Problem, N.Y. Times [2006]

Thompson, Tim Wu explains why he thinks Facebook should be broken up, WIRED [2019]

Cordon, With almost \$100m in ARR without taking VC money, Ahrefs is now challenging Google, June 23rd 2021, <https://www.techinasia.com/ahrefs-reaching-100m-revenue-vc-money-challenging-google>

CASES

Copiepresse SCRL et al v Google Inc Tribunal de Premiere Instance de Bruxelles, 2007

Court of appeal of Brussels, Google Inc. v. Copiepresse, R. No. 2011/2999

C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] EU:C:2009:465

C-466/12, Svensson v Retriever Sverige AB, EU:C:2014:76

C-348/13, BestWater International GmbH v. Michael Mebes and Stefan Potsch, EU:C:2014:2315

C-160/15, GS Media BV v. Sanoma Media Netherlands Bv and Others, EU:C:2016:644

Comision Nacional de los Mercados y la Competencia (CNMC), Pro/Cnmc/0002/14

Case 27/ 76, United Brands company and United Brands Continental v Commission [1978]

Case 85/76, EU:C:1979:36, Hoffmann-La Roche v. Commission

Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), Antitrust Authority Accepts Google Commitments and Implores Parliament to Update Copyright Laws, Press Release A420 – AS787 [2010]

The Bundeskartellamt, B6-126/14 [2015], Decision according to Section 32c German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB)

Case AT. 39740 Google Shopping v. European Commission [2017]

EU Commission, Google/DoubleClick, COMP/M.4731

EU Commission Deutsche Post AG - Interception of cross-border mail, COMP/C-1/36.915 [2002] OJ L 331/40

Case T-201/04 Microsoft Corp v Commission of the European Communities [2007]

Autorite de la concurrence, Décision n° 20-MC-01 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse

Joined cases 6 and 7-73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities [1974]

Opinion of AG Jacobs in the case C-7/97 Bronner [1998]

Case 1:20-cv-03590-JEB, January 13th 2021, FTC Facebook complaint, section X Prayer For Relief, <https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf>

State of Ohio ex rel. Dave yost, Ohio Attorney General v. Google llc c/o Corporation Service co., Case No. 21 CV H, June 8th 2021. [https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-\(Time-Stamped\).aspx](https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-(Time-Stamped).aspx)